Erika

Information as presented at the April 2024 session of the 1992 Fund Executive Committee

Date of incident	12-12-1999
Place of incident	Brittany, France
Quantity of Spill	19 800
Area Affected	West coast of France
Flag State of Ship	Malta
Gross Tonnage	19 666
P&I Insurer	Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual)
CLC Limit	€12 843 484
STOPIA/TOPIA applicable	No
CLC + Fund limit	€184 763 149
Compensation Paid	€129.7 million (€12.8 million by the Club and €116.9 million by the Fund)
Year last featured in Annual/Incident Report	2013

Incident

On 12 December 1999, the Maltese-registered tanker *Erika* (19 666 GT) broke in two in the Bay of Biscay, some 60 nautical miles off the coast of Brittany, France. All members of the crew were rescued by the French maritime rescue services.

The tanker was carrying a cargo of 31 000 tonnes of heavy fuel oil of which some 19 800 tonnes were spilled at the time of the incident. The bow section sank in approximately 100 metres of water. The stern section sank to a depth of 130 metres approximately ten nautical miles from the bow section. Some 6 400 tonnes of cargo remained in the bow section and a further 4 800 tonnes in the stern section.

Impact

Some 400 kilometres of shoreline were affected by oil.

Response operations

Although the removal of the bulk of the oil from shorelines was completed quite rapidly, considerable secondary cleaning was still required in many areas in 2000. Operations to remove residual contamination began in spring 2001. By the summer tourist season of 2001, almost all of the secondary cleaning had been completed, apart from a small number of difficult sites in Loire Atlantique and the islands of Morbihan. Clean-up efforts continued at these sites in the autumn and most were completed by November 2001.

More than 250 000 tonnes of oily waste were collected from shorelines and temporarily stockpiled. Total SA, the French oil company, engaged a contractor to deal with the disposal of the recovered waste and the operation was completed in December 2003. The cost of the waste disposal is believed to have been some €46 million.

The French Government decided that the oil should be removed from the two sections of the wreck. The oil removal operations, which were funded by Total SA, were carried out by an international consortium during the period June to September 2000. No significant quantities of oil escaped during the operations.

Applicability of the Conventions

At the time of the incident France was Party to the 1992 Civil Liability Convention (1992 CLC) and 1992 Fund Convention. In accordance with the 1992 CLC, the *Erika* was insured for oil pollution liability with the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual). At the request of the shipowner, the Commercial Court in Nantes issued an order on 14 March 2000 opening limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's liability insurer, Steamship Mutual.

In 2002, the limitation fund was transferred from the Commercial Court in Nantes to the Commercial Court in Rennes. In 2006, the limitation fund was again transferred, this time to the Commercial Court in Saint-Brieuc.

The maximum amount available for compensation under the 1992 CLC and the 1992 Fund Convention for the *Erika* incident is 135 million SDR, equal to FFr1 211 966 811 or €184 763 149.

The level of payments by the 1992 Fund was initially limited to 50% of the amount of the loss or damage actually suffered by the respective claimants. The 1992 Fund Executive Committee decided in January 2001 to increase the level of payments from 50% to 60%, and in June 2001, to 80%. In April 2003, the level of payments was increased to 100%.

Claims for compensation

Undertakings by Total SA and the French Government

Total SA undertook not to pursue claims against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer, relating to its costs arising from operations in respect of the wreck, the clean up of shorelines, the disposal of oily waste and from a publicity campaign to restore the image of the Atlantic coast, if and to the extent that, the presentation of such claims would result in the total amount of all claims exceeding the maximum compensation available for this incident under the 1992 Conventions, ie 135 million SDR.

The French Government also undertook not to pursue claims for compensation against the 1992 Fund or the

limitation fund established by the shipowner or his insurer, if and to the extent that the presentation of such claims would result in the maximum amount available under the 1992 Conventions being exceeded. However, the French Government's claims would rank before any claims by Total SA if funds were available after all other claims had been paid in full.

General claims

In excess of 7 000 claims for compensation were submitted for a total of €388.9 million. Payments of compensation were made for a total of €129.7 million, out of which Steamship Mutual, the shipowner's insurer, paid €12.8 million and the 1992 Fund paid €116.9 million.[1]

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[1] For details of the assessment and payment of the claim by the French State in respect of costs incurred in the clean-up response, reference is made to the IOPC Funds Annual Report 2008 (pages 79 and 80).

Criminal proceedings

On the basis of a report by an expert appointed by a magistrate in the Criminal Court of First Instance in Paris, criminal charges were brought in that Court against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society Registro Italiano Navale (RINA), one of RINA's managers, three companies of the Total Group (Total SA, and two subsidiaries, Total Transport Corporation (TTC), voyage charterer of the *Erika*, and Total Petroleum Services Ltd, the agent of TTC) and some of its senior staff. A number of claimants, including the French Government and several local authorities, joined the criminal proceedings as civil parties, claiming compensation totalling €400 million.

Judgment by the Criminal Court of First Instance in Paris

The Criminal Court of First Instance delivered its judgment in January 2008.

In its judgment, the Criminal Court of First Instance held the following four parties criminally liable for the offense of causing pollution: the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA.

The representative of the shipowner and the president of the management company were found guilty of lack of proper maintenance, leading to general corrosion of the ship; RINA was found guilty of imprudence in renewing the *Erika*'s classification certificate on the basis of an inspection that fell below the standards of the profession; and Total SA was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the *Erika*.

The representative of the shipowner and the president of the management company were sentenced to pay a fine of €75 000 each. RINA and Total SA were sentenced to pay a fine of €375 000 each.

Regarding civil liabilities, the judgment held the four condemned parties jointly and severally liable for the damage caused by the incident.

The judgment considered that Total SA could not avail itself of the benefit of the channelling provisions of Article III(4)(c) of the 1992 CLC since it was not the charterer of the *Erika*. The judgment considered that the charterer was one of Total SA's subsidiaries.

The judgment considered that the other three parties, RINA in particular, were not protected by the channelling provisions of the 1992 CLC either, since they did not fall into the category of persons performing services for the ship. The judgment concluded that French internal law should be applied to the four parties and that therefore the four parties had civil liability for the consequences of the incident.

The compensation awarded to the civil parties by the Criminal Court of First Instance was based on national law. The Court held that the 1992 Conventions regime did not deprive the civil parties of their right to obtain compensation for their damage in the Criminal Courts and, in the proceedings, awarded claimants compensation for economic losses, damage to the image of several regions and municipalities, moral damages and damages to the environment. The Court assessed the total damages at the amount of €192.8 million.

The Criminal Court of First Instance recognised the right to compensation for damage to the environment for a local authority with special powers for the protection, management and conservation of a territory. The judgment also recognised the right of an environmental protection association to claim compensation, not only for the moral damage caused to the collective interests which was its purpose to defend, but also for the damage to the environment which affected the collective interests which it had a statutory mission to safeguard.

The four parties held criminally liable and some 70 civil parties appealed against the judgment.

Following the judgment, Total made voluntary payments to the majority of the civil parties, including the French Government, for a total of €171.3 million.

Judgment by the Court of Appeal in Paris

The Court of Appeal in Paris rendered its judgment in March 2010.

In its decision, the Court of Appeal confirmed the judgment of the Criminal Court of First Instance who had held criminally liable for the offense of causing pollution: the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA. The Court of Appeal also confirmed the fines imposed.

Regarding civil liabilities, in its judgment, the Court of Appeal ruled that:

- The representative of the registered owner of the *Erika* was an 'agent of the owner', as defined by Article III.4(a) and that, although, as such, he was theoretically entitled to benefit from the channelling provisions of the 1992 CLC, he had acted recklessly and with knowledge that damage would probably result, which deprived him of protection in the circumstances. Thus, the Court of Appeal confirmed the judgment on his civil liability;
- The president of the management company (Panship) was the agent of a company who performs services for the ship (Article III.4(b)) and as such was not protected by the channelling provisions of the 1992 CLC;
- The classification society RINA, cannot be considered as a 'person who performs services for the ship', as per the definition of Article III.4(b) of the 1992 CLC. Indeed the Court ruled that, in issuing statutory and safety certificates, the classification society had acted as an agent of the Maltese State (the Flag State). The Court also held that the classification society would have been entitled to take advantage of the immunity of jurisdiction, as would the Maltese State, but that in the circumstances it was deemed to have renounced such immunity by not having invoked it at an earlier stage in the proceedings; and
- Total SA was '*de facto*' the charterer of the *Erika* and could therefore benefit from the channelling provision of Article III.4(c) of the 1992 CLC since the imprudence committed in its vetting of the *Erika* could not be considered as having been committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. The Court of Appeal thus held that Total SA could benefit from the channelling provisions in the 1992 CLC and therefore did not have civil liability. The Court of Appeal also decided that the voluntary payments made by Total SA to the civil parties, including to the French Government following the judgment of the Criminal Court of First Instance were final payments

which could not be recovered from the civil parties.

Regarding reputation, image, moral and environmental damage, in its judgment the Court of Appeal accepted not only material damages (clean up, restoration measures and property damage) and economic losses but also moral damage resulting from the pollution, including loss of enjoyment, damage to reputation and brand image and moral damage arising from damage to the natural heritage. The Court of Appeal's judgment confirmed the compensation rights for moral damage awarded by the Criminal Court of First Instance to a number of local authorities and has in addition accepted claims for moral damage from other civil parties.

The Court of Appeal accepted the right to compensation for pure environmental damage, ie damage to non-marketable environmental resources that constitute a legitimate collective interest. The Court of Appeal considered that it was sufficient that the pollution touched the territory of a local authority for these authorities to be able to claim for the direct or indirect damage caused to them by the pollution. The Court of Appeal awarded compensation for pure environmental damage to local authorities and environmental associations.

The amounts awarded by the Court of Appeal are summarised in the table below.

Damage awarded	Criminal Court of First Instance (million €)	Criminal Court of Appeal (million €)
Material damage	163.91	165.4
Moral damage (loss of enjoyment, damage to reputation and brand image, moral damage arising from damage to the natural heritage)	26.92	34.1
Pure environmental damage	1.32	4.3
Total	**192.15**	**203.8**

Taking into account the amounts paid in compensation by Total SA following the judgment of the Criminal Court of First Instance, the balance to be compensated by the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl) and the classification society (RINA) was €32.5 million.

Some 50 parties, including the representative of Tevere Shipping, Panship Management and Services, RINA and Total SA, appealed to the French Supreme Court (Court of Cassation).

Judgment by the Court of Cassation

On 25 September 2012 the Criminal Section of the Court of Cassation rendered its judgment. In a 320-page judgment, which is available to download in its original French language version under Related Documents above, the Court decided the following:

Jurisdiction

The Court of Cassation decided that French courts had jurisdiction to determine both criminal and civil liabilities arising from the *Erika* incident even though the sinking of the vessel had taken place in the Exclusive Economic Zone (EEZ) of France and not within its territory and/or territorial waters. In its judgment, the Court, based on a number of dispositions of the United Nations Convention on the Law of the Sea (10 December 1982, Montego Bay), justified France exercising its jurisdiction to impose sanctions on those responsible for an oil spill from a foreign-flagged vessel in the EEZ of France causing serious damage in its territorial sea and to its coastline.

With respect to the classification society RINA, the Court of Cassation did not address the question of whether the classification society would have been entitled to take advantage of the immunity of jurisdiction, as would the

Maltese State (the Flag State of the *Erika*), since RINA was deemed to have renounced such immunity by having taken part in the criminal proceedings.

The Court stated that, since the 1992 Fund had not taken part in the criminal proceedings, it would not be bound by any judgment or decision in the proceedings.

Criminal liabilities

The Court of Cassation confirmed the decision by the Criminal Court of First Instance and by the Court of Appeal which had held the following four parties criminally liable for the offense of causing pollution: the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA.

Civil liabilities

Regarding civil liabilities, the Court of Cassation decided that under Article IX.2 of the 1992 CLC, it was entitled to exercise jurisdiction in respect of actions for compensation. In its judgment the Court held that RINA and Total SA were covered by the channelling provisions of the 1992 CLC. They could not, however, rely on this protection since the damage resulted from their personal acts or omissions, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

In relation to RINA, the Court of Cassation decided that the Court of Appeal had been wrong in deciding that a classification society could not benefit from the channelling provisions contained in Article III.4 of the 1992 CLC. The Court decided, however, that the damage had resulted from RINA's recklessness and that therefore RINA could not rely on the protection awarded by the 1992 CLC.

In relation to Total SA, the Court of Cassation quashed the decision by the Court of Appeal and decided that, since the damage had resulted from Total SA's recklessness, it could not rely on the protection awarded by the 1992 CLC.

Material, moral and pure environmental damages

The Court of Cassation confirmed the decision by the Court of Appeal which had awarded the amounts set out in the table above.

Consideration by the 1992 Fund Executive Committee of the judgment by the Court of Cassation

At the April 2013 session of the 1992 Fund Executive Committee, the Director presented an analysis of the judgment by the Criminal Section of the Court of Cassation rendered in September 2012. Discussions focussed on three key issues: the jurisdiction of the criminal courts in France for a spill which had occurred in the EEZ, ie outside of French territorial waters; the Court of Cassation's decision that although all liable parties, including the classification society (RINA), could benefit from the channelling provisions contained in Article III.4 of the 1992 CLC, the four parties had acted recklessly and were therefore held liable under French law of tort for the damage caused; and the decision that compensation should be paid for pure environmental damage under French law. The 1992 Fund Executive Committee noted that this judgment was not binding on the 1992 Fund, which was not a party to the criminal proceedings.

Civil proceedings

Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were commenced by 796 claimants. Out-of-court settlements were reached with a great number of these claimants and the courts rendered judgments in respect of the other claims.

The last legal action pending against the 1992 Fund, with a total amount claimed of €87 467, became stale for lack of prosecution during 2015, since under French law, legal actions become stale if there is no activity for ten years.

Global Settlement

At its July 2011 session the 1992 Fund Executive Committee authorised the Director to reach a global settlement between the 1992 Fund, Steamship Mutual (acting on its own behalf and also on behalf of the shipowner's interests), RINA and Total in respect of the *Erika* incident.

The main objective of the global settlement was to ensure that civil parties who had been awarded compensation by the judgment of the Criminal Court of Appeal in Paris received compensation as soon as possible.

In October 2011, the Secretariat was informed that 47 out of 58 civil parties (81%) who had been awarded compensation had either signed a protocol with RINA or agreed to be paid by RINA the amounts awarded by the Criminal Court of Appeal in Paris. These civil parties represent 99% of the total amounts awarded by the Court of Appeal.

Since the vast majority of civil parties who had been awarded compensation by the Criminal Court of Appeal in Paris had agreed to receive compensation, on 14 October 2011 the Director signed on behalf of the 1992 Fund a global settlement with Steamship Mutual, RINA and Total.

The global settlement was formalised in four agreements as detailed below.

General four party agreement

Under the general four party agreement, the 1992 Fund, Steamship Mutual, RINA and Total undertook to withdraw all proceedings against the other parties to the agreement and, in addition, waived any rights to bring any claim or action which they might have in relation to the *Erika* incident against any of the other parties to the agreement.

In accordance with the general agreement the parties withdrew their actions.

Settlement agreement between Steamship Mutual and the 1992 Fund

A bilateral agreement was signed between Steamship Mutual and the 1992 Fund whereby:

- Steamship Mutual undertook to pay to the 1992 Fund a lump sum of €2.5 million as a contribution to the agreement;
- the 1992 Fund undertook to waive and renounce all claims against Steamship Mutual and discontinue all pending actions against Steamship Mutual;
- Steamship Mutual undertook to waive and renounce all claims against the 1992 Fund; and
- the 1992 Fund undertook to meet any judgments against Steamship Mutual and/or the 1992 Fund and agreed to indemnify Steamship Mutual if the judgments were enforced against Steamship Mutual.

In accordance with that agreement, Steamship Mutual paid the 1992 Fund a lump sum of €2.5 million.

Settlement agreement between RINA and the 1992 Fund

A bilateral agreement was signed between RINA and the 1992 Fund whereby:

- RINA undertook to pay to those civil parties who agree to settlement, the amounts awarded by the decision of the Criminal Court of Appeal in Paris;
- the 1992 Fund undertook to waive and renounce all claims against RINA. The 1992 Fund also undertook to discontinue all pending actions against RINA; and

- RINA also undertook to waive and renounce all claims against the 1992 Fund.

In accordance with that agreement, RINA paid the amounts awarded by the decision of the Criminal Court of Appeal in Paris to all civil parties who agreed to settlement.

Settlement agreement between Total and the 1992 Fund

A bilateral agreement was signed between Total and the 1992 Fund whereby:

- Total undertook to waive and renounce all claims against the 1992 Fund and discontinue all pending actions against the Fund; and
- the 1992 Fund undertook to waive and renounce all claims against Total and discontinue all pending actions against Total.

The global settlement has been fully executed. Under the global settlement the 1992 Fund will continue to handle the pending legal actions brought against it and will pay in accordance with judgments. As stated in the civil proceedings section above, as at October 2014 only one action remained pending against the 1992 Fund with a total amount claimed of €87 467.

Refund to contributors

As a result of the global settlement and after providing for claims in court, there remained a significant surplus on the *Erika* Major Claims Fund. On 1 March 2012 the 1992 Fund reimbursed £25 million of that surplus to the contributors of the Major Claims Fund and in October 2013, the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, decided to close the *Erika* Major Claims Fund. The remaining £26.2 million surplus was returned to contributors on 1 March 2014.

Closure of the case in respect of the 1992 Fund

In October 2015 the Director reported to the 1992 Fund Executive Committee that the *Erika* incident was closed.