



A sea change: the French Government rethinks its oil pollution legislation post-ERIKA

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The ERIKA in France gave rise to numerous questions regarding the interaction between the international oil pollution liability conventions as incorporated into French law and other French legislation.

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Introduction The lengthy judicial proceedings arising out of the sinking and massive oil spill from the tanker ERIKA off the coast of Brittany in December 1999, have been the subject of comment in our earlier publication, Gard News. 1 The *ERIKA* proceedings in the French courts gave rise to numerous questions regarding the interaction between the international oil pollution liability conventions as incorporated into French law and other French legislation which claimants argued should apply. This article focusses on legislation passed by France since the *ERIKA* judgements in order to clarify the legal position, as seen against some of the decisions handed down by the French courts in that case.

The French Supreme Court decision On 25 September 2012, the French Supreme Court found all four defendants criminally liable for the pollution damage caused by the *ERIKA* oilspill: TOTAL SA as *de facto* charterer, the classification society RINA, the manager of Tevere Shipping as owner and the manager of Panship as technical manager. The Court held that none of them could benefit from the ‘channelling provision’ of Article III of the Convention on Civil Liability for Oil Pollution Damage (CLC 92) which imposes strict liability on the registered owner *only* by stating that “... *no claim for compensation for pollution damage under this Convention or otherwise (emphasis added) may be brought against...*” numerous parties including “*any charterer.....manager or operator of the ship*”.

The *ERIKA* case raised significant environmental issues, which were debated at length by the French media and public opinion and it is unlikely that the (strong) views expressed went unnoticed by the courts.

The legal debate centred on whether or not the French Courts possessed jurisdiction to try the case and which law should be applied, triggering discussions relating to the compatibility between French domestic law and the international conventions on liability for oil pollution.

Jurisdiction issues France is party to the CLC 92. However, other legislation was considered to be relevant as well:

- (i) the Montego Bay Convention of 1982 establishing the definitions of ‘territorial waters’ and ‘Exclusive Economic Zones’ (EEZs) of contracting States;
- (ii) the MARPOL Conventions of 1973 and 1978 which apply to matters involving general water pollution and allowing domestic law to provide definition for the infractions pursued;
- (iii) various domestic laws, including Article 8 of the Law of 5 July 1983 criminalising “*damage to*” – and not “*damage in*” – territorial waters and Article L.113-12 of the French Penal Code establishing that French law applies to infractions committed outside of territorial waters as long as international conventions permit.

The Court found that it had to contend with four different international conventions for a single event and applied an interpretation of these conventions whereby French Courts would have jurisdiction to rule on criminal liability for oil pollution damage to French territorial waters if the damage was considered ‘severe’ – a test not immediately apparent from the wording of any of the conventions. Applying the test of ‘damage to’ rather than ‘damage occurring in’ served arguably to give French Courts jurisdiction in more maritime pollution cases.

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Which is the applicable law? The CLC 92 applies to damage caused in territorial waters of a Contracting State by oil pollution from tankers. 2 Nevertheless, the first instance Courts in France decided to apply the Convention on the Limitation of Liability for Maritime Claims (LLMC) of 1976 which provides for limitation of liability for various categories of maritime claims, but not claims for damage caused by pollution of oil carried as cargo. 3 In fact, Article 3 (b) of the LLMC explicitly excludes “Claims for oil pollution damage within the meaning of ...” the CLC. This error was rectified by the Paris Court of Appeal, which rightly held that issues of liability and limitation for oil pollution damage should be governed by CLC 92 as incorporated in French law.

In view of the complexity and protracted proceedings related to the above mentioned issues the French government has sought to develop legislation aimed to clarify the legal position in relation to both criminal and civil oil pollution liability.

Legislation seeking to clarify position Two important pieces of legislation: Ordinance n°2012-1218 dated 2 November 2012 on maritime criminal proceedings and subsequent Law n°2013-431 dated 28 May 2013 regarding infrastructure and transportation services have been introduced, both of which have consequences for shipowners and insurers.

Firstly, it should be noted that the legislation does not change the effect of the French Supreme Court decision in *ERIKA* as concerns what may give the French Courts rights to retain jurisdiction to hear criminal liability cases for ship-source oil pollution events. Hence, the French Courts may still retain “criminal case jurisdiction” whenever the pollution damage to the French coast is considered ‘severe’ – even if the alleged criminal conduct that gave rise to the pollution damage occurred outside French territory.

Secondly, the reference to the Code of the Environment was repealed. It was clarified that CLC 92 shall govern civil liability concerning oil pollution damage from ships carrying oil in bulk as cargo. As a result, such events in France are now, by law, treated according to the CLC 92 and no confusion should arise in future with the general liability regime provided under the LLMC 76.

Thirdly, criminal jurisdiction was removed from the ordinary commercial courts to a specialist court (the *Tribunaux maritimes*) in order to provide swift and expert proceedings in such matters.

The legislation also applies criminal sanctions to the failure of owners of ships flying the French flag or any ships entering or leaving French ports not in possession of valid insurance certificates. Such failure may cause a temporary or permanent prohibition of navigation in French territorial waters, as well as criminal fines and, in extreme cases, prison sentences. The purpose is to discourage uninsured vessels from entering French waters.

Criminal fines imposed on the master, officers or crew member(s) may be brought against the shipowner where found to be responsible for the damage, i.e. due to lack of maintenance, dangerous orders or a failure to communicate properly with authorities or other ships.

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The legislation also included provisions to restructure the existing body of ship

inspectors and grant them extended powers to investigate, pursue infractions and impose substantially increased criminal penalties for lack of compliance with the orders given by French Authorities.

Conclusion The judgement handed down in the *ERIKA* continues to prevail in the legislation passed to clarify responsibility and sanctions available in relation to ship-source oil pollution, even though it is now clear that CLC 92 governs civil liability for damage caused by such pollution from tankers.

Far-reaching criminal sanctions determined by French domestic law still places emphasis on post-event punishment in the belief that it shall work as a deterrent of irresponsible conduct. France is also considering enactment of rights of compensation for *environmental loss* in the French Civil Code, which would enable public authorities to claim compensation for damages to the environment itself even in the absence of material damage to infrastructure or impaired exploitation of natural resources.

All in all, France is among the countries seeking to toughen its criminal and civil remedies in respect of ship-source oil pollution, adding to the trend of criminalising seafarers, shipowners and other parties who may be blamed for such pollution.

1 Gard News 210.

2 Article 2 (1) (a) CLC 92.3 Article

3 LLMC 76.

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