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Post Erika Issues for Charterers

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INTRODUCTION

- **"*post*-ERIKA issues for Charterers"**
  - ↗ Proceedings still pending
  - ↗ Already important lessons
- **Fundamental change in perceived legal risk**
  - ↗ Before: balance between environment and oil prices (CLC/IOPC system)
  - ↗ Now: CLC/IOPC system not watertight
- **Impact on loss prevention**

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INTRODUCTION - Perceived environment prior to ERIKA

- **Balance: IOPC/CLC system**
  - ↗ Channeling of liability on Owner
  - ↗ IOPC fund – financed by oil industry
- **Tailored loss prevention approach**
  - ↗ Owning v. chartering
  - ↗ Vetting procedures

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INTRODUCTION – *Post-ERIKA*

- **IOPC/CLC system not exclusive source of compensation**
  - ↗ Victims bring other proceedings
  - ↗ New liability as “producer” of a product turned to “waste”
  - ↗ Criticisms of vetting and market practices
- **New approach to loss prevention needed**
  - ↗ Vetting of ships found insufficient
  - ↗ Involvement of producer

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The facts of the case

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FACTS OF THE CASE
The "ERIKA"

- **Maltese registered tanker**
- **A long history:**
  - Vessel aged 23
  - 8 successive names
  - 3 successive flags
  - Several changes of ownership
  - Classed with 4 classification societies (latest change only 3 months prior to TOTAL's vetting report)
  - 4 successive shipmanagers

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FACTS OF THE CASE
The chartering

- **Vetting by TOTAL in 1998**
  - ↗ Not admissible for time-charter but could possibly be admissible in spot
  - ↗ Requested and received a certificate from RINA guaranteeing the good state of the structure
  - ↗ 3 other Majors had accepted “Erika” but 2 rejected her
- **Voyage charter with Total Transport Corp.**

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FACTS OF THE CASE
The loss

- **12 Dec. 1999 –**
  - "Erika" broke in 2 off the coast of Brittany whilst carrying 30,000 t of heavy fuel oil
- **19,800 t spilled**
- **400 km of coastline polluted**
- **Public emotion / Total publicly criticised**

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FACTS OF THE CASE
The loss

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The Proceedings

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Proceedings – IOPC fund (1)

- **Definition:**
- **1992 IOPC fund - € 184.7 m**
  - ↗ 93%: levies on the international oil industry
  - ↗ 7%: Letter of guarantee from P&I (owner's limitation fund under CLC)
- **Attractive option for claimants**
  - ↗ No court proceedings
  - ↗ Strict liability
  - ↗ However:
    - Strict rules of causation/recoverable damage
    - Pro rata sharing in case of insufficient (not the case here)

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Proceedings – IOPC fund (2)

- **Good results …**
  - ↗ All claims fulfilling criteria compensated
  - ↗ Efficient indemnification
- **… yet, did not prevent parallel proceedings**
  - ↗ Financial reasons (recoverable damage)
  - ↗ “Political” reasons
- **Subrogatory action**
  - ↗ Stayed pending criminal proceedings

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Court survey proceedings

- **Panel of 5 court surveyors**
- **Conclusions of the panel:**
  - Cause of sinking: advanced state of corrosion in metallic structures
  - Sinking inevitable considering the state of structures
  - No possible rescue measure
  - State of corrosion as on the day of sinking inconsistent with thickness measurements taken in 1998 and approved by RINA
- **Conclusions on responsibility:**
  - Exonerate Total: corrosion undetectable during vetting operations and/or during loading at Dunkirk
  - Impute liability to shipmanagers who designed and followed repair works in 1998 and to RINA who supervised the works – (both parties have disputed these conclusions)

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Criminal Court proceedings

- **12th Feb 2007: start of criminal trial in Paris**
- **Charges of pollution + endangerment of the life of others**
- **Civil claimants**
  - ↗ Multiple civil proceedings stayed pending criminal trial
  - ↗ Claims totalling approximately € 1 billion
  - ↗ Conditions of success:
    - Upholding of criminal conviction
    - Establish civil liability
- **Judgement of 16th January 2008**

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Criticisms of market practices by the Criminal Court

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Issues specifically concerning charterer

Position of Total

- Heavily relies on the conclusions of the commercial court survey
  - Source of loss: problem of corrosion
  - Undetectable at the time of vetting/loading
  - Responsibility of classification society
- Relies on international conventions:
  - MARPOL (criminal liability for pollution under 1983 law should be intentional and not merely reckless)
  - CLC: no liability of charterer

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Position of the Criminal Court (1)

- **Vetting carried out by Total SA (holding company) – i.e. not by the charterer directly**
  - ↗ Avoid CLC
- **The vetting service was "imprudent" - ignored:**
  - ↗ The history of the ship
  - ↗ Unacceptable risks taken for transport of heavy fuel
  - ↗ Specific risks on the "ERIKA" (ballast structure)
- **No loss "*but for*" approval by Vetting**

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Position of the Criminal Court (2): *factors of risk that Total ignored*

- **Total ignored other sources of information**
  - Age, change of names, flags, owners, etc. were clues of potential risk factors
  - Public access to that information
- **Criticism of general market practice:**
  - Product carried particularly polluting (“black product”)
  - Yet, industry generally uses voyage charters rather than time-charters
  - “fierce competition” on the spot market
  - impact on security of the ship
  - “black products” more damaging to structure of vessel
  - **Must analyse risks in view of magnitude of potential consequences**
- **separated ballasts:**
  - “well-known weakness” of tankers of the type and the age of the “Erika”

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Position of the Criminal Court (3): *factors of risk that Total ignored*

- **Abstract:**
  - *"If the risk taking inherent to maritime transport is, by nature, admissible, it ceases to be so and becomes imprudence, when, to the perils resulting from the conditions of navigation of an oil-tanker, whether it holds all the required certificates, one adds other perils, such as those related to its age, the discontinuity in its technical management and maintenance, the type of chartering usually chosen, and the nature of the product carried, which have been described as circumstances that were clearly identified, at the time of the acceptation for chartering of the "Erika" by the vetting service of [Total SA], as each having a real impact on security"* [our translation]
- **Vetting services of other companies "as guilty"**
- **Total SA found guilty of pollution**

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Position of the Criminal Court (4): *position on the civil claims*

- **TOTAL jointly liable:**
  - ↗ Aggregate amount of claims: € 190 m
  - ↗ First recognition of “environmental” damage under French law – strict conditions
- **Appeal against the judgement**
  - ↗ Total appealed on criminal side and tried to settle the civil claims
  - ↗ Many civil claimants refused and appealed except main civil claimant (French state)

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The ruling of the European Court of Justice:

A new source of liability

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Reasoning of the European Court of Justice (ECJ)

Interpretation of the EC "Waste" Directive

- "polluter pays" principle
  - costs of cleaning
- heavy fuel oil considered as "waste" once mixed with water and sediment

Who is liable? ("holder" / "producer" of waste)

- shipowner considered as "holder"
- seller of the cargo/charterer, considered as "previous holder"
- initial producer of the fuel could be considered as "producer" and be liable if also proven to have contributed to the risk.

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Reasoning of the ECJ (2)

- **Articulation with CLC:**
  - ↗ if IOPC/CLC system not sufficient, liability of "*initial producer*" if proved to have contributed to the risk and failed to take appropriate measures
- **Impact on the spirit of the IOPC/CLC system**

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Conclusion

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Issues ahead

- **Procedural issues**
  - ↗ Appeal of the criminal judgement
  - ↗ Sharing of the costs between the defendants
  - ↗ Subrogatory action of the IOPC fund
  - ↗ Insurance coverage of Total
- **New vetting/market practices**
- **Reform of the CLC/IOPC system?**