

IALA – RISKS AS AN ASSOCIATION UNDER FRENCH LAW

Dear Sir

You have asked me about the risks which are run, in French law, by the International Association of Lighthouse Authorities and its officers, in the context of its activities, in particular because of the documents and recommendations which are made public.

On the basis of the information with which we have been instructed, the International Association of Lighthouse Authorities (IALA) is a non-governmental organisation of which the objective is to improve the quality of maritime markers.

Article 2 of its constitution, approved on the twenty-third of May 2006, states that the IALA:

“seeks to ensure that the movement of boats is safe, economical and efficient, by the improvement and the harmonisation of navigational aids throughout the world, to the benefit of the maritime community and the protection of the environment.”

The IALA brings together organisations involved with maritime signals, scientific institutions, manufacturers and consultants.

It is made up of 200 members, including 80 national service providers, including the French Office of Lighthouses and Markers, as well as sixty-odd industrial groups.

The publication of recommendations, standards and directives with relation to maritime signals is one of the tasks conferred by article 3 of the constitution of the IALA.

In this context, you therefore wish to know more about the framework for determining responsibility under French law which applies to the IALA and its members.

In particular, you envisage the hypothetical situation where an accident at sea is caused by deficiencies in a system of signals the principles of which were set down by the IALA.

You will find below a presentation of the principles in French law which would be used in determining whether the IALA and its members and personnel were liable (1).

This framework for determining liability obviously applies above all to damages occurring in French territorial waters.

We will then briefly consider the circumstances in which an accident occurred at sea outside of France's territorial waters (2).

1-

ON THE PRINCIPLES OF THE RESPONSIBILITY OF THE IALA, ITS MEMBERS AND PERSONNEL UNDER FRENCH LAW.

11-

On the subject of the legal risks run by the IALA as a results of its work and recommendations

In the event of a maritime catastrophe, the origins of which were linked to the IALA's recommendations, a person suffering loss or damage may seek to prove that the IALA was liable for the damages.

Indeed the provision of information is sometimes considered by the French courts as a tortious or other form of wrongful act when it causes loss or damage to a third party (112-).

The onus would then be on the person suffering the loss or damage to prove the existence of the loss or damage, of any fault on the part of the IALA, and of a causal link between the fault and the damage, in order for the IALA's to be held responsible (113-).

However it is first necessary to briefly consider the rules of civil responsibility (111-).

111-

On the rules of civil responsibility in French Law

Article 1382 of the French Civil Law Code (**Code**) provides:

“Any action of a person which causes loss or damage to another person, obliges the person causing the damage to make good that loss or damage.”

Article 1383 of the Code further provides:

“All persons are responsible for the damage they have caused, not only through their actions, but also by their negligence or their recklessness.”

This implies that:

- On the one hand, an act which leads to personal responsibility of a person is not any and all acts, but rather **acts involving fault**.
- On the other hand that 'fault' not only refers to voluntary faults (article 1383 of the Code: civil wrongs) but also **involuntary faults** (article 1383 of the Code: quasi-civil wrongs).

112-***On the provision of faulty advice, information or recommendations***

The *Cour de Cassation*¹, in its application of articles 1382 and 1383 of the Code, came to the following decision:

“It is understood that a person who has accepted to give advice is in turn obliged to properly inform himself in order to be able to properly inform others;” (Cass. 2^{ème} civ., 19 octobre 1994, pourvoi n°92-21543: Bull. civ. II, n°200: D. 1995. 499 note Gavard-Gilles)

Furthermore, jurisprudence considers that **the act of giving inexact information** constitutes a fault for which its author is responsible (Cass., 2^{ème} civ., 19 juin 1996 : pourvoi n°94-12777 ; Bull. civ. II, n°161 ; Defrénois1996.1373 obs. Selebecque ; Gaz. Pal. 15 février 1997, Somm. Obs. D. Mazeaud- RTD Civ. 1997144 obs. Joudain – Cass. 2^{ème} civ., 2 avril 1996 : Bull. civ. II, n°87).

Furthermore, **giving advice lightly and with incompetence, without taking the necessary precautions in light of the circumstances**, constitutes a fault.

So, for example, the Cour de Cassation held that to give free advice about horse-riding which provoked a violent reaction from the animal constituted a fault. (Cass. 2^{ème} civ., 21 mai 1997: Resp. cix. Et assur. 1997, comm. 25).

The result is that, in the event, for example, of an accident at sea which was caused by a deficiency in a system of signals, the principles of which were set down by the IALA, one cannot discount the possibility that a victim might attempt to prove IALA’s responsibility on the basis of article 1383 of the Code.

113-***On the engagement of the civil responsibility of the IALA by a victim***

To obtain reparation for a loss or damage suffered, the victim must prove the existence of the following three elements:

- Loss or damage;
- Fault;
- A causal link between the fault and the damage.

That said, in some circumstances the Association would not be held liable despite the presence of these three elements.

1131-**On the existence of loss or damage for which damages may be recovered**

¹ = the Australian High Court

Whatever its nature, the loss or damage claimed by the victim entitles him to recover damages only if it is **direct, certain and legitimate**.

First, “Indirect” damages are those which are too far removed in the chain of events for them to realistically be associated with the fault.

That said ‘consequential damages,’ which are suffered not by the immediate or principle victim of the wrong, but rather by a person who is a victim of the repercussions of the loss suffered by the principle victim, is compensated.

Second, only real loss or damage can lead to reparations, not hypothetical damages resulting from more or less subjective conjecture about the future: damages which are merely possible cannot be taken into account. However, unforeseeable loss or damage does create an entitlement to recover damages.

Third, the victim can only seek damages if these damages do not present an illicit or immoral character.

In the event of a maritime catastrophe linked to the IALA’s recommendations, the loss or damage suffered by the victim of this catastrophe should *a priori* present these three characteristics.

1132-

On fault caused by imprudence or negligence

Holding IALA responsible implies that the IALA has committed **a fault by imprudence or negligence** in giving the particular recommendations.

According to Professor BENABENT, a civil wrong is:

“A failure to conform to the attitude that one can expect between citizens who are normally conscious and respectful of the equilibrium required by life in a society.” (Alain BENABENT, Droit Civil Les obligations, éd. Montchrétien, 9th ed., n°540).

The judge, when called upon to rule on the existence of a fault, attempts to determine what, in the same circumstances, he would have done, or a “*reasonable man*” would have done, in as much as that can be determined. (François TERRE, Philippe SIMLER, Yves LEQUETTE, Les Obligations, Précis Dalloz, 9th ed., p 728).

That said, it must be noted that the judge takes into equal account the defining characteristics of the concerned party.

So, for example, a judge will be more demanding towards a professional than towards a layman or a non-profit organisation.

A study on the responsibility of people engaged in the provision of commercial or financial information states that:

“A careful examination of past decisions [...] reveals that the judge treats with greater or lesser degrees of severity the different providers of information, taking

into account the function carried out by each of them as well as the means at their disposal. Therefore, whilst French law in principle knows only one non-contractual code of responsibility for people engaged in the provision of commercial information, based on article 1382 of the [Code], it adapts this code to the nature of the provider in question.” (“The responsibility of professional providers of commercial and financial information” La Gazette du Palais- 1994 1st semester).

It is equally interesting to note that in a relatively recent decision, the Cour de Cassation confirmed the rejection of civil responsibility of a non-profit public good organisation which had been given a role as a certifier as a result of its public works and communications (Cass. 2^{ème} civ, 30 novembre 2000, pourvoi n°98-16839).

1131-

On the link of causality

The victim who is seeking damages must prove not only the fault of the defendant, but also the existence of a causal link between the fault and the loss.

An analysis of the applicable doctrines shows two relevant issues:

-**The theory of the equivalence of conditions**, which places at the same level all the circumstances which came together to produce the loss;

-**The theory of adequate causality**, which on the contrary tends to highlight among the different factors leading to the loss the one which is the “effective cause” which is the say the one which was likely to have produced such damages under normal circumstances.

Jurisprudence prefers to apply **the theory of adequate causality and attempts to link the damages to the prior action which, under normal circumstances, and following the natural chain of events, was likely to cause it, unlike the other prior actions, which only lead to the damages because of extraordinary circumstances.**

In the event of a maritime catastrophe, the existence of a **direct causal link** between the loss and the IALA’s recommendations would appear difficult to show and could prove an obstacle to any attempt to hold the organisation, or, *a fortiori*, its members and personnel responsible.

This is especially so given that you state that the IALA’s recommendations are then put into place by States or by specific regulatory activities.

134-

On the cases where the Association would have a defence to an action

In matters of civil wrong, there are three circumstances in which the Association would have a defence to an action.

First, **the actions of the victim**, whether they involve fault or not, lead to shared liability if the victim was partly to blame for the loss (Cass. Ass. Plén., 9 mai 1984, Epx. Derguini, BAF, n°f3 ; D. 1984. 525, 4^{ème} esp., concl. CABANNES).

Second, **force majeure** can provide a complete defence, provided it meets the three requirements of being exterior, unforeseeable and unavoidable.

In the event of a maritime catastrophe, this defence could usefully be used by the IALA.

Third, **the actions of a third party** will provide a defence for the Association if these actions meet the requirements of being unavoidable and unforeseeable and the association is not responsible for them.

12-

On the subject of the judicial risks run by the members of the IALA

In order to examine the legal risks run by the members and personnel of the IALA (22-), we must recall the framework for determining the civil responsibility of an association in relation to a third party (21-).

In the words of article 1 of the law of the 1st of July 1901:

“An association is the means by which two or more people place in common, in a permanent fashion, their knowledge or their activities, in a goal other than to share the profits.”

121-

On the civil responsibility of an association and its members towards a third party

An association is liable for loss it causes to persons who are not members and who are therefore considered to be third parties (1211-).

However, if the members and officers of an association commit a wrong which is unrelated to their functions, they will be held personally liable (1212-).

1211-

On the responsibility of an association for the acts of persons

The responsibility of an association for acts of persons extends to all faults, whether they be intentional, the result of recklessness or negligence, to which the association can be linked, which causes loss or damage and for which the association can be held responsible.

Any wrongdoing must be linked to the functioning and the organisation of the association and must result from any deficiencies in these.

The personal acts of an association causing loss or damage could in fact be the actions of an individual **acting on behalf of the organisation.**

Such individuals might be directors, employees, volunteers or associates within the association.

Whichever they are, **when they are acting on the behalf of the organisation, only the organisation will be held responsible.**

The wrongdoing could equally result from a decision taken by **a collective function of the association.**

In this case, the action of the association which caused the damage is **a collective responsibility**, which cannot be linked to any of the individuals acting on the behalf of the organisation.

Indeed it is the collective activity of the association which is responsible for the wrongdoing (TGI Paris, 28 septembre 1989: RTD Com. 1990.62).

The association is therefore solely liable for loss or damage which arise as a consequence of actions of the associations collective functions (see: Dalloz Action 2000, "Associations," n°489 and 495) and therefore in particular for the possible consequences of decisions approved by the association's general assembly.

212-

On the civil responsibility of the members and officers of the association in relation to a third party

In principle, the participation of **the members of the association** in activities of the association has no impact on civil responsibility.

Indeed a member of an association is only liable for loss or damage caused to a third party by **his personal wrongdoing.**

The administrators and President of the association are personally liable for damages to a third party **only if they commit a wrong which is unrelated to their role within the association.** Cass. Civ. 2^{ème} 19 février 1997:Rev. Sociétés 1997.816, RTD Civ. 1998.114 note P. JOURDAIN – CA Aix-en-Provence, 17 May 2005, pourvoir n°CT0023 publié par le Service de documentation et d'études de la Cour de Cassation- Cass. Civ 2^{ème}, 10 mars 1998, pourvoi n°86-16929).

The second civil chamber of the Cour de Cassation clearly stated:

“Given that the company appeals against the decision of the Court of Appeal which rejected its claims against the officers of the associations when the administrators of an association are equally responsible for any faults the association is held to have committed (violation of article 1382 of the ‘Code Civil’);

But given that the administrators of an association are held personally liable only if they have committed a wrong which is separate from their performance of their duties;

And given that the decision held that no personal wrongdoing was proven in relation to the directors, who acted within the limits of the constitutions of the associations;

That from these observations the Court of Appeal rightly held that the directors of the association were not personally liable towards the company.”
(Cass. Civ. 2^{ème}, 7 octobre 2004, pourvoi n°02-14399)

Thus, an officer of an association will be held to have committed a fault which is separate from his functions when he intentionally commits a particularly serious fault which would otherwise be incompatible with the normal exercise of his duties (Cass. Com., 7 juillet 2004, pourvoi n°02-17729).

122-

On the particular responsibility of the President, the Secretary and the members of the technical committees of the IALA

Taking into account what has already been said, in the eventuality of a maritime catastrophe caused by a failure in a system of signals which was developed by the IALA, **it would seem that a claim by an injured third party could only be made against the IALA itself.**

This is because any loss or damage would be caused by the recommendations of the IALA itself.

No action can be taken against the Association’s President or Secretary, assuming they acted within the limits of their powers.

By the same token, the members of the technical committees of the Association which came up with the recommendations could not themselves be held to be at fault as they were acting **on the behalf of the Association.**

It flows from that that they cannot be held personally responsible for any loss or damage, as this would amount to **a collective wrongdoing** on the part of the Association.

2-

ON THE EVENTUALITY OF A MARITIME ACCIDENT OUTSIDE OF FRENCH TERRITORIAL WATERS

It is necessary to distinguish between accidents which might occur in the territorial waters of a state other than France (31) and those which might occur on the high seas (32).

31-

In the event of an accident occurring in the territorial waters of a state other than France

In private international law, the traditional solution, both in jurisprudence and in practice, has been to apply **the law of the location where the wrong was committed** or the “*lex loci delicti*”.

This approach was confirmed by the *Latour* and *Luccantoni* decisions of the Cour de Cassation (Cass. 1^{ère} civ., 25 mai 1948: Rev. Crit. 1949.89, note Battifol, J.D.I. 1949.38, D. 1949, note Lerebour-Pigeonnière, J.C.P. 1948.II.4542. note Vasseur, G.A. n°19 – Cass. 1^{ère} civ., 1^{er} juin 1976 L.J.D.I., 1977.91, note Audit).

Article 5 of the Brussels Convention of 27 September 1968, concerning the judicial competence and execution of decisions in civil and commercial matters, confirms this rule:

“A person domiciled in a Contracting State may be sued in another Contracting State:

[...]

3. in matters relating to tort, or quasi-tort, in the courts of the place where the wrong occurred;”

Similarly, article 46 of the ‘*New Code of Civil Procedure*’ confirms the jurisdiction of the tribunal of the location of the wrong.

“The applicant may choose to sue,, in addition to the jurisdiction of the defendant’s domicile:

[...]

-in matters relating to tort, in the jurisdiction where the wrong occurred or where the loss was suffered.”

According to Professor Pierre MAYER, the arguments in favour of this link are numerous (Pierre MAYER, *Droit international privé*, éd. Montchrétien, 9^{ème} édition, n°678):

- It is the only neutral solution, in the absence of any particular reason to chose the law of the victim over that of the defendant or vice versa;
- The consequences of torts, and quasi-torts are of interest to the State on whose territory they were committed;
- It is frequently the case that there is a coincidence between the law of the location of the wrong and the law of the tribunal, if the tribunal of the place of the wrong is able to hear the matter.

The result is that in the eventuality of a maritime accident involving the IALA which occurred in the territorial waters of a state other than France, the law of that state should, in principle, be applied.

32-

In the event of an accident on the high seas

When the wrong occurs on the high seas, it is impossible to determine the matter in accordance with the law of the location where it occurred, as there is no applicable law in this location.

According to Professor Pierre MAYER, when there is no objective link to any particular law, the local law of the place where the matter is brought, or *lex fori*, should be applied:

“In the event of the boarding of two ships which do not fly the same flag, like in the event of the collision of two planes which does not occur over the territory of any particular state, the law to be applied is the law of the place where the action is brought, as there is no other objective link to any legal system.” (Pierre Mayer, *ibid*, n°684) (See also: Cass. Com., 9 mars 1996: Rev Crit. 1966.636, note Simon-Depitre et C. Legendre, D. 1966.577, note Jambu-Merlin, JCP 1967/II/14994. note de Juglart et du Pontavice).

From that it would appear that **in the event of an accident on the high seas which resulted from the IALA’s recommendations, the legislation of the jurisdiction in which the applicant brings the matter would apply.**

We hope that this has answered your queries and we remain available to answer any further questions you may have.

Yours sincerely

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