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Please quote our reference in all communications with us

Case: Ministry of the Sea / Consultation on IALA liability

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MINISTRY FOR INFRASTRUCTURE,
TRANSPORT, HOUSING AND THE SEA

Mr Jacques Manchard

Head of Department, Lighthouses and
Navigation Aids

Fax: 01.44.49.86.80

26 October 2006

Fax

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Dear Sir,

You have enquired about the risks incurred under French law by the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) and its officials as a result of its activities, and especially the proceedings and recommendations it publishes.

According to our information, the IALA is a non-governmental organisation tasked with improving the quality of lighthouses, buoys and other aids to navigation at sea.

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Member d'une association agréée, le règlement des honoraires par chèque est accepté

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Article 2 of the IALA Constitution, approved on 23 May 2006, states that the aim of the association is to:

"foster the safe, economic and efficient movement of vessels, through improvement and harmonisation of aids to navigation worldwide and other appropriate means, for the benefit of the maritime community and the protection of the environment".

The IALA's members are lighthouse authorities, scientific institutes, equipment manufacturers and consultants.

There are 200 members, including 80 national authorities, of which France's *Bureau des Phares et Balises*, and some sixty industrial companies.

Among the aims assigned to the IALA under Article 3 of the Constitution are the publication of recommendations, standards and guidelines on marine aids to navigation.

Against this background, you wished to find out which liability rules applied to the IALA and its members under French law.

In particular, you envisage a situation in which a maritime accident might be attributable to the faulty operation of a navigation aid system based on principles laid down by the IALA

The following opinion outlines the principles under which the IALA, its members and staff could be held liable under French law (1).

Obviously, these liability rules are intended to apply first and foremost to accidents occurring in French territorial waters.

For that reason, section (2) of this paper briefly addresses the eventuality of a maritime accident outside French territorial waters.

1-
PRINCIPLES UNDER WHICH IALA, ITS MEMBERS AND STAFF COULD BE HELD LIABLE
UNDER FRENCH LAW

11-
Legal risks incurred by the IALA in respect of its proceedings and
recommendations

In the event of a maritime disaster that might be attributed to IALA recommendations, the victim could seek to hold the IALA liable for quasi delict under the law of tort.

Ordinary courts in France sometimes rule that the provision of information constitutes quasi delict if it causes harm to third parties (112-).

In this case, for the IALA to be held liable, the victim would have to prove that loss or damage exists, that the IALA is at fault and that there is a causal link between the fault and the loss or damage(113-).

First, however, it is necessary to briefly review the rules of civil liability (111-).

111-
Civil liability rules in French law

Under Article 1382 of the Civil Code:

| *"Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it."*

In addition, Article 1383 of the Civil Code states that:

| *"Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence".*

In consequence:

⇒ the only act that incurs the personal liability of its perpetrators is a wrongful act.

⇒ a wrongful act can be wilful (article 1382 of the Civil Code: delict) but it can also be unintentional (article 1383 of the Civil Code: quasi delict).

112-

Negligent supply of information, data or recommendations

In light of Arts 1382 and 1383 of the Civil Code, the Court of Cassation laid down the following a principle:

| "[...] A person who has agreed to provide information is obliged to inform himself in order to inform [others] with full knowledge of the facts;" (Cass. 2nd civ., 19 October 1994, appeal no. 92-21543; Bull. Civ. II, no. 200; D. 1995. 499 note Gavard-Gilles)

In case law, therefore, the fact of giving inaccurate information constitutes a wrongful act for which the perpetrator can be held liable (Cass., 2nd Civ., 19 June 1996: appeal no.94-12777; Bull. Civ. II, no. 161; Defrénois 1996.1373 obs. Delebecque; Gaz. Pal. 15 February 1997, Somm. obs. D. Mazeaud- RTD Civ. 1997.144 obs. Jourdain – Cass. 2nd Civ., 2 April 1996: Bull. Civ. II, no. 87).

Likewise, the fact of giving advice heedlessly and incompetently without taking the appropriate precautions constitutes a wrongful act.

For example, the Court of Cassation has ruled that giving free advice on horse riding constitutes misconduct if it causes the horse to react violently (Cass. 2nd Civ., 21 May 1997: Civil liability and insurance. 1997, comm. 250).

In consequence, assuming for example that a maritime accident is caused by the faulty operation of a navigational aid system based on IALA-recommended principles, it is not impossible that the victim may seek to hold the IALA liable under Art. 1383 of the Civil Code.

113-

Civil liability action brought against the IALA by the victim

To obtain compensation for damage or loss, the victim must prove that three elements are present:

⇒ damage or loss

⇒ a wrongful act

⇒ a causal link between the wrongful act and the damage or loss

There are, however, some cases in which IALA would not be held liable even if the three elements were present.

1131-

Existence of damage or loss for which compensation is payable

Whatever the nature of the damage cited by the victim, no compensation may be awarded unless it has three characteristics, i.e. the damage must be **direct**, **certain** and **legitimate**.

First, consequential damage is too far removed from the chain of circumstances for it to be truly connected to the wrongful act.

That being said, compensation is payable in the case of reflex damage (*dommage par ricochet*), which affects not the main or immediate victim but a person who is harmed by the damage or loss suffered by the main victim.

Further, only real damage, not hypothetical damage resulting from random speculation about the future, can give rise to compensation. In other words, damage that is merely possible cannot be taken into consideration. However, unforeseeable damage does give rise to compensation.

Last, the victim cannot claim compensation in the event of damage or loss of a wrongful or immoral nature.

Assuming a maritime disaster related to IALA recommendations, the damage or loss suffered by the victim of such disaster must, in principle, evidence all three of these characteristics.

1132-
Reckless or negligent misconduct

For the IALA to incur liability, it would have to have committed a wrongful act through recklessness or negligence in issuing the recommendations in question.

According to Professor Alain Benabent, intentional tort (delict) is:

" A violation of the attitude that citizens are entitled to expect of each other if they are properly mindful of the balance needed to live in society." (Alain Benabent, Droit Civil Les obligations, Published by Montchrétien, 9th ed., no. 540)

When asked to assess whether misconduct has occurred, the courts will seek to determine what a "reasonable person" would have done, based on their perception of such a person (François Terre, Philippe Simler, Yves Lequette, *Les Obligations*, Précis Dalloz, 9th Ed, no. 728)

However, it should be pointed out that the courts may also take into consideration the parameters that characterise the interested party.

Accordingly, they will be more demanding with a professional than with a layman or a not-for-profit organisation.

A study of the liability of providers of commercial and financial information noted that:

*" A reasonably thorough study of legal precedent [...] shows that the courts deal more or less harshly with various information providers depending on each one's function and resources. France, for example, which in principle has only one system of non-contractual liability for information providers, based on Art. 1382 of the Civil Code, actually adapts that system to the type of provider." ("La responsabilité des professionnels du renseignement commercial ou financier", *La Gazette du Palais*-1994 1st sem.)*

Interestingly, the Court of Cassation recently upheld the dismissal of a tort liability suit against a state-approved not-for-profit organisation responsible for certification, brought on the grounds of the organisation's publications (Cass. 2nd Civ, 30 November 2000, appeal no.98-16839).

1133-
The causal link

A victim claiming compensation must prove not only that the defendant has committed a wrongful act but also that there is a causal link between the act and the damage or loss suffered by the victim.

Commentaries on legal decisions have brought forth two theories:

- **equivalence of conditions** (*equivalence des conditions*), whereby all the circumstances contributing to the damage or loss are treated as equivalent;

- **adequate causation** (*causalité adéquate*), which, on the contrary, seeks to determine the "efficient cause", i.e. the factor that should or could normally have led to such damage or loss.

Legal precedent prefers adequate causation theory by seeking to connect the damage or loss to the prior events which, under normal circumstances and according to the natural sequence of events, was of such nature as to have engendered the damage or loss, in contrast to other prior events, which caused it only because of exceptional circumstances.

In the particular case of a hypothetical maritime disaster, it seems difficult to establish a **direct causal link** between the resulting damage or loss and the recommendations made by the IALA, and this could make it hard to render liable the IALA and, all the more so, its members and staff.

Moreover, you have told us that IALA recommendations are subsequently enforced by states or written into specific regulations.

134-
Exemption from liability of the IALA

In [French] tort law, there are three exemptions that apply to the Association.

First, the act of the victim results in shared liability if the victim was partially the cause of damage or loss, whether or not he is at fault (Cass. Ass. Plén., 9 May 1984, Epx. Derguini, BAF, no. 3; D. 1984.525, 4th esp., concl. Cabannes)

Second, an act of God (force majeure) can be grounds for total exemption of liability in tort if it is (i) external to the defendant, (ii) unpredictable, and (iii) irresistible.

In the event of a maritime disaster, the IALA could effectively raise this cause for exemption

Third, the act of a third party exempts the IALA from liability provided that the act is both irresistible and unpredictable and that the Association is not answerable for it.

12-

Legal risks incurred by IALA members

To analyse the legal risks incurred by the members and staff of the IALA (22), it is necessary to recall the rules applicable to the civil liability of an association with regard to third parties (21-).

Under Art. 1 of the Act of 1 July 1901:

| " [An] association is [an] agreement under which two or more people pool their knowledge or activities on a permanent basis with a purpose other than that of sharing profits."

121-

The civil liability of an association and its members with regard to third parties

An association is responsible for the harm it causes to persons who are not its members and are therefore considered as third parties (1211-).

However, if the members and officers of the association commit a wrongful act that is separate from their functions, they may be held personally liable (1212-).

1211-

Personal liability of an association

The personal act of an association covers all wrongful acts attributable to it, be they intentional, reckless or negligent, which lead to damage or loss and for which it can be held liable.

The wrongful act must be linked to the way in which the association is run and organised and must reflect a shortcoming.

In practice, the personal act of the association that led to the damage may be carried out by a natural person acting on behalf of the association.

Such persons may be the officers, staff, volunteers or members of the association.

However, **since these persons are acting on association's behalf, the association alone is held liable.**

The wrongful act can also result from a decision taken by one of **the association's collective bodies**.

In this case, the personal act of the association that led to the damage or loss is considered as collective misconduct that cannot be connected to any of the natural persons acting on behalf of the association.

Indeed, the origin of the wrongful act lies with the association's collective body (TGI Paris, 28 September 1989: RTD Com. 1990.62).

Accordingly, the association will be solely liable for damage or loss resulting from the acts of the association's bodies (cf. Dalloz Action 2000, *Associations*, no. 489 and 495), and, in this particular case, for any damage resulting from the recommendations approved by its general meeting.

212-

Personal civil liability of the association's members and officers with regard to third parties

In principle, the fact that the members of the association take part in its activities has no influence on civil liability.

A member of an association is required solely to make reparation for any harm caused to third parties by **his or her personal misconduct**.

The board members and chair of the association cannot be held personally liable if a third party suffers damage or loss **unless they have committed a wrongful act that can be separated from their functions** (Cass. Civ. 2nd, 19 February 1997: Rev. Sociétés 1997.816, RTD Civ. 1998.114 note P. Jourdain – CA Aix-en-Provence, 17 May 2005, appeal no. CT0023 published by the documentation and research department of the Court of Cassation e- Cass. Civ. 2nd, 10 March 1998, appeal no.86-16929).

The second civil chamber of the Court of Cassation has stated clearly that:

"[...] The company is complaining against a court decision to reject its claim against the officers of associations although, according to the statement of the grounds of appeal, the members of an association's board are jointly and severally liable with the association for the misconduct found against it (breach of Art. 1382 of the Civil Code);
However the board members of an association may not be held personally liable unless they have committed a wrongful act that is separable from their functions:
Furthermore, the court decision states that the board members, who acted in accordance with the association's charter, have not been shown to have committed specific personal misconduct:
The court of appeal has rightly inferred from these observations and recitals that the officers of the association were not personally liable to the company:" (Cass. Civ. 2nd, 7 October 2004, appeal no.02-14399)

The officer of an association commits a wrongful act separable from his functions if he is guilty of intentional and serious misconduct that is incompatible with the normal conduct of his duties (Cass. Com., 7 July 2004, appeal no.02-17729)

122-

Specific case of the liability of the President, the Secretary General and the members of the technical committees of the IALA

In light of the foregoing, in the event of a maritime disaster caused by the faulty operation of an IALA- defined navigational aid system, it would seem that a third party victim could bring an action for liability against the IALA only.

In this case, the cause of the damage or loss is the recommendations issued by the IALA.

Accordingly, the President of the association and its Secretary General, who presumably acted in accordance with their powers, cannot be held liable.

Similarly, in drawing up recommendations on navigational aids, the members of the technical committees have not committed personal misconduct but have acted on behalf of the association.

In consequence, they, too, should not be held responsible for the damage, which is considered as collective misconduct by the association.

2-

MARITIME ACCIDENT OCCURRING OUTSIDE FRENCH TERRITORIAL WATERS

A distinction must be made between a hypothetical maritime accident occurring in the territorial waters of a state other than France (31) and an accident occurring on the high seas (32).

31-

Accident in the territorial waters of a state other than France

In private international law, the traditional solution in doctrine and case law is to apply *lex loci delicti*, or the law of the place of tort.

This solution was enshrined in the *Lautour* and *Luccantoni* rulings of the Court of Cassation (Cass. 1st civ., 25 May 1948: Rev. Crit. 1949.89, note Battifol, J.D.I. 1949.38, D. 1948, note Lerebour-Pigeonnist, J.C.P. 1948.II.4542, note Vasseur, G.A. no. 19 – Cass. 1st civ., 1 June 1976: J.D.I., 1977.91, note Audit).

Article 5 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters also lays down this rule:

"A person domiciled in a Contracting State may, in another Contracting State, be sued::
[...]
3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;"

Similarly, Art. 46 of the France's new code of civil procedure upholds the competence if the court of the place of tort:

" The plaintiff may choose to bring proceedings not only in the courts of the place where the defendant resides but also:
[...]
- in matters of tort, in the court of the place where the harmful event occurred or of the place where the damage or loss was incurred;"

According to Professor Pierre Mayer, there are many arguments in favour of this connecting factor (Pierre Mayer, *Droit International Privé*, Published by Montchrétien, 9th edition, no. 678):

- it is the only neutral connecting factor, where there is no overriding reason for choosing the law of the victim rather than the law of the perpetrator, or vice versa;

- the consequences of tort, delict or quasi-delict concern the state upon whose territory such acts are committed;

- *lex loci delicti* and *lex fori* (the law of the [state](#) where the case is being litigated) frequently coincide, with the courts of the place of tort having jurisdiction.

Accordingly, in the event of a maritime accident involving the IALA and occurring in the territorial waters of a state other than France, the law of that state should, in principle, apply.

32-
Accident on the high seas

The law of the place of tort cannot be applied if the offence occurs on the high seas since no laws are applicable there.

According to Professor Mayer, where there is no objective connection, *lex fori* should apply:

" In the case of a collision on the high seas between two ships flying different flags, as with a collision between two aircraft that does not occur above the territory of a state, the governing law is lex fori, since there is no objective connection " (Pierre Mayer, op. cit., no. 684) (see also: Cass. Com., 9 March 1996: Rev. Crit. 1966.636, note Simon-Depitre et C. Legendre, D. 1966.577, note Jambu-Merlin, JCP 1967.II.14994, note: Juglart and Pontavice).

It would therefore seem that if an accident occurs on the high seas and the recommendations of the IALA are implicated, the law of the place of jurisdiction chosen by the victim would be the governing law.

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We hope we have replied to all your queries and we remain at your disposal should you require any further information.

Yours truly,

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