Towards the introduction of the notion of environmental loss in the French Civil Code?

The *Erika* oil spill case has recently taken an unexpected turn following the filing by the Advocate General before the French Supreme Court of an Opinion recommending the quashing, without referral, of the decision of the Paris Court of Appeal of 30 March 2010. At the same time, a bill aiming at introducing the notion of environmental loss in the French Civil Code was filed with the French Senate on 23 May 2012.

During the hearing of the French Supreme Court on 4 April 2012, the Advocate General expressed the view that French Courts do not have jurisdiction to rule on the consequences of the sinking of the Erika oil tanker, which occurred in an exclusive economic zone. On this sole basis, the Advocate General requested a quashing without referral of the Paris Court of Appeal's decision. He also expressed doubts about the grounds on which the Paris Court of Appeal had awarded compensation for environmental loss.

Only two months after this hearing, Bruno Retailleau, Senator, filed a bill for the notion of environmental loss to be included in the French Civil Code in an Article 1382-1 drafted as follows: "*A person whose actions cause damage to the environment shall remedy such damage. Damage to the environment shall first be remedied in kind*".

Legal developments in terms of environmental loss

It cannot be denied that the new environmental stakes have given rise to legal developments that aim at preventing and punishing damage to the environment. This has, for instance, shown itself in the 2004 Environmental Charter which has constitutional value, which notably enabled the Constitutional Council, in a decision of 8 April 2011, to consider that "*everyone is bound by an obligation to be vigilant with regards to damage to the environment that may be caused by one's activity*" (Decision no. 2011-116, in the scope of a request for a priority ruling on an issue of constitutionality, point 5).

Law no. 2008-757 of 1st August 2008 relating to environmental liability and to various adaptive provisions regarding European Law on the environment, which transposed European Directive no. 2004/35/EC of 21 April 2004 on environmental liability with regards to the prevention and remedying of environmental damage, also established the inclusion of a scheme governing environmental liability, which is now detailed in Articles L. 160-1 and following of the French Environmental Code. This scheme has also been strengthened by French case law in favour of the principle of compensating damages to the environment. In this respect, the Paris Court of Appeal acknowledged, in the scope of the *Erika* case, the existence of an "*environmental loss resulting from damage to non-marketable environmental assets, to be compensated by the payment of an amount equal to the loss*" (Paris Court of Appeal, 30 March 2010, Docket no. 08/02278).

How to remedy such loss?

There is, to date, a contradiction between the existing case law, which provides that the environmental loss is "*to be compensated by the payment of an amount equal to the loss*" and the recently filed bill, which provides that damage to the environment "*shall first be remedied in kind*".

As a consequence, should the bill be adopted unchanged, monetary compensation would only be an alternative remedy that could be awarded by the courts only if it is established that remedy in kind is not possible. It is, therefore, likely that the principle of giving priority to remedies in kind will lead the responsible person to submit to the courts' approval the appropriate compensation measures, which would, in this case, be subject to a debate in the presence of all the stakeholders.

This is, in any case, the approach recommended by the *Club des Juristes* (French legal think tank) in its report entitled "*How to better remedy damages to the environment*" (January 2012, p. 30, http://www.leclubdesjuristes.com/notre-expertise/a-la-une/rapport-sur-la-responsabilite-environnementale-la-question-de-droit-civil-du-xxieme-siecle). Yet, the consequences could be significant for any businesses found guilty: in addition to the costs of the initial proceedings, they would also incur the costs of this second debate held in the presence of all the parties and exclusively relating to the remedy measures. Such a debate might also draw the attention of the media and damage the businesses' reputation.

What next?

While the bill intends to meet the fundamental principles of French Law in terms of civil liability by giving priority to full compensation for the loss sustained, a repressive dimension still results from the current context regarding damages to the environment. Indeed, some, notably associations, require more repressive measures, like punitive damages, thus increasing the sanctions against businesses.

Lastly, the new French Minister of Justice, Christiane Taubira, confirmed, during her hearing before the Law Commission on 5 July 2012, that the notion of environmental loss would be introduced in French law. Furthermore, she also announced that the Government would rely on the existing bills to introduce, in French Law, class actions. The combination of these two legal developments could have disastrous consequences for businesses.

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