

**THE MARITIME LAW ASSOCIATION OF THE UNITED STATES
SPRING MEETING**

Marine Financing Committee

OUTLINE

THE GOOD SHIP *EVER GIVEN* AND THE LAW: A PRELIMINARY ASSESSMENT

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- I. The container ship *Ever Given* on Tuesday, March 23, 2021, traveling north, bound for Rotterdam, sailed into the placid waters of the Suez Canal. Reportedly, high winds and a dust storm hit the area. In the event, the *Ever Given* ran aground, blocking the Canal. On Monday, March 29, 2021, a fleet of tugboats, dredges, and salvage crews, with the help of a high tide, managed to free the vessel. The *Ever Given* proceeded north to Great Bitter Lake, where it is detained by Egyptian authorities, who are demanding US\$ 916 million in compensation damages for lost revenue and other expenses. The *Ever Given* was launched in 2018 as one of the largest container ships in the world, 217,612 tons and 399.94 meters in length. The *Ever Given* was fully laden with cargo, reportedly worth about US\$500 million.

- II. The true facts of what happened are under investigation. From public reports the parties involved are as follows:
 - A. The owners of the *Ever Given* are Luster Maritime SA (Panama) and Higaki Sangyo Kaisha, both are subsidiaries of Shoei Kisen Kaisha, which is a sub of Imbari Shipbuilding of Japan (collectively "*Owners*"). The *Ever Given* is registered in Panama.
 - B. The *Ever Given* was under time charter to Evergreen Marine Corp. ("*Evergreen*") of Taiwan.
 - C. The technical manager of the ship who hired the master and crew is Bernhard Schulte Ship Management ("*BSM*").
 - D. Reportedly at the time of the incident, two Egyptian compulsory pilots were aboard the vessel.
 - E. The salvors who freed the vessel are reportedly Smit Salvage (Boskalis, NL); Nippon Salvage; and various Egyptian entities (collectively "*salvors*").

- F. Despite the 6-day blockage of the Canal, no cargo was lost, no pollution occurred, the 25-person crew is safe, and the vessel was only slightly damaged.
- G. **Crewmembers.** Reportedly there are 25 Indian nationals who are seafarers aboard the vessel. There are no reported injuries to crewmembers. The UK and all 27 EU States have ratified the International Labour Organization's (ILO) Maritime Labour Convention 2006, as amended. This Convention assures that the crew will continue to be paid and their health and welfare will be safeguarded. ILO Seafarer regulation 2.5 guarantees the crew to be repatriated to their home country at no cost.
- H. The Hull and Machinery (H&M) insurer of the vessel is Mitsui Sumitomo Corp. The Hull insurer must pay if there is damage to the vessel. The P&I insurer is UK P&I Club. Cargo is insured by hundreds of different insurers.

III. Legal Proceedings and Issues:

A. Suez Canal Authority (SCA) compensation.

1. The *Ever Given* is not free to resume its voyage; at this writing the vessel is detained by the Suez Canal Authority, which is claiming damages, most of which appear to be *specious*.
2. As reported on 14 April 2021, an Egyptian Court in Ismailia in a ruling under Egyptian law has authorized the SCA to make a "precautionary seizure" of the vessel until the shipowners pay the outstanding debts allegedly owed the SCA. The vessel has appealed this ruling under Egyptian law. Reportedly the hearing of the appeal is May 4.
3. Osama Rabie, chair of the SCA stated to the Wall Street Journal that "the vessel will remain here until investigations are complete and compensation is paid."
4. **Impounding the *Ever Given* (including cargo and the crew) until compensation is paid appears to be inconsistent with the 1976 Limitation Convention. Egypt is a party to the 1976 Limitation Convention but not the 1996 Protocol. SCA may have the right to require that the vessel post bond for *security*, but the SCA is required to pursue its claim in the London Limitation proceeding. The SCA is also required to release the crew. [see above].**
5. The reported claim by the SCA of USD 900 million seems excessive, since, reportedly, USD 300 million of the SCA claim is based on "loss of reputation,"

and considering that the SCA made up the ship tolls lost to a great extent after the Canal was reopened.

6. Damages due the SCA would appear to be the following:

- the SCA has a right to charge the vessel/charterers for any damage to the Canal.
- As a pure economic loss claimant for lost revenue, the SCA is less remote than other such claimants.
- the SCA and/or Egyptian persons may, if *appropriate under the facts*, share in the salvage award; a salvage award is outside the scope of the Limitation Convention. Reportedly, however, the LOF salvage contractors were Smit and Nippon.

B. **Ascribing Fault.** Whether fault (negligence) of any party caused the grounding has yet to be determined. Presumably this will be determined by the investigation.

1. At the time of the grounding, there were reportedly two Egyptian compulsory pilots on board the vessel. A pilot is theoretically liable for failure to exercise due care; but it is normally not practical to sue a pilot, and maritime law ascribes the negligence of a pilot to the ship. *The China*, 74 U.S. 53 (1868).
2. P&I insurance typically protects the vessel owner against a pilot's negligence.
3. If a crew member or the master of the vessel is shown to be negligent, this would be ascribed to the vessel.

C. **Limitation of Liability.** Both the UK and Egypt are parties to the 1976 Limitation of Liability for Maritime Claims Convention, updated by a 1996 Protocol. The Owners of *Ever Given* have invoked this convention, which is implemented in UK law by the Merchant Shipping Act 1995.

1. On 1 April the Owners of *Ever Given* filed for limitation of liability in the London High Court. Reportedly this lawsuit was filed against the time charterer, Evergreen Marine, and "all other persons claiming or being entitled to damages."
2. *Since Article 13(1) of the 1976 Limitation Convention concursus is specified to have world-wide effect, and since Egypt is a party to the Limitation Convention, the Suez Canal Authority is legally obliged to respect the English*

High Court Limitation concursus and must file its claims against the vessel in the Limitation proceeding.

3. The 1976/96 Limitation Convention limits liability and requires the ship to constitute a limitation fund based upon the tonnage of the vessel. In the case of *Ever Given*, the limitation amount is SDR 81 million (about USD 114 million).
 4. Claims for delay in carriage of goods by sea are specifically covered by limitation. [Art. 2(b)].
 5. An insurer of liability for claims subject to limitation is entitled to limitation to the same extent as the insured. [Art. 1(6)].
 6. Relevant claims excluded from limitation under the Convention [Art. 3(a)] are (1) salvage and (2) general average.
 7. Limitation is very difficult (virtually impossible) to “break” under the 1976 Convention. [Art. 4].
 8. Under the Convention, filing for limitation is not an admission of liability.
- D. **Salvage.** In the case of *Ever Given*, the ship and cargo were preserved quite promptly by a combination of salvors. The applicable law is the 1989 Salvage Convention.
1. Salvage is the voluntary preservation of property, including a vessel and cargo, that are in marine peril. Three necessary factors are present in this case: danger (marine peril); voluntariness; and success.
 2. Salvage was reportedly carried out according to Lloyd’s Open Form (LOF), which does not specify a contract amount for a salvage reward. Under LOF, the amount of salvage reward is determined by arbitration by applying some 10 factors specified in Article 13 of the Salvage Convention. Relevant factors include the value of the property salvaged; the skill and effort of the salvors; the equipment and personnel employed; the danger involved; and success.
 3. Salvage Convention Art. 14 provides for special compensation (SCOPIC) to a salvor as a reward for prevention or minimization of environmental damage.
 4. Applying these criteria, it is clear the salvors merit a **very large salvage award**. The benefit of salvage is to the shipowners and cargo owners. Salvage is usually a matter of insurance cover by the H&M insurer. In this case cargo insurers may cover salvage of cargo. SCOPIC is covered by the P&I insurer.

E. General Average. On April 1, the vessel owner declared general average. The obligation on the part of each cargo owner to pay general average comes from a bill of lading provision known as a “*New Jason Clause*.” This clause is triggered by any “accident” stemming from “any cause whatever” and covers “payment of any sacrifice, losses or expenses.” Thus, each cargo owner will be called upon to pay a pro-rata portion of the salvage award and other expenses of the accident. Payment is required to gain release of the cargo. General average payment may be covered by the applicable cargo insurance.

1. General average procedures are specified by the *York-Antwerp Rules 2016*, which will be enforced by UK courts. *Rule D* concerns rights to contribution in general average.
2. Cargo owners must pay even if their cargo is not damaged. General average adjusters will assess each shipment’s value and apply a formula that determines the financial contribution of each cargo owner. Cargo owners will need to supply a copy of their cargo invoice; a copy of the bill of lading; an Average Bond Form and an Average Guarantee Form.

F. Rights of Cargo shippers and cargo owners regarding cargo aboard *Ever Given*.

No cargo aboard the vessel was damaged, but perishable cargo may deteriorate, and all cargo has suffered delay in delivery. Do shippers have recourse against the carrier, Evergreen Marine, owners, or cargo insurers?

1. Cargo will not be able to recover damages against the carrier(s). The applicable law is the Hague/Visby Rules. Art. IV, r. 2 provides that the carrier is not liable for loss or damage to cargo caused by (a) error of “navigation or the management of the ship.” Rule 2 also excuses damage or loss to cargo caused by “arrest or restraint of princes.”
2. On their website Evergreen states, “Evergreen is free of responsibility for delay.” This is correct. There is no provision in bills of lading or in the Rules allowing recovery for delay in delivery.
3. General average payments by shippers of cargo aboard *Ever Given* will likely (depending on the policy) be compensated by cargo insurers, but coverage for delay is excluded from “all-risk” cargo insurance by para. 4.5 of the Institute Clauses.

G. Pure Economic Losses. May the Suez Canal Authority as well as vessels and parties that incurred *economic losses* due to delays stemming from the closing of the Suez Canal for six days recover these losses as damages? The grounding of the *Ever Given* caused world-wide delays in international trade and disruptions in

supply chains. Some vessels were diverted to alternate routes to their destinations.

1. **Is recovery allowed for pure economic losses? Pure economic losses are economic losses without any associated physical damage.**
 2. In maritime law recovery for “pure” economic losses is either prohibited or severely restricted. In the United States there is no recovery of damages for pure economic losses where there is no personal injury or property loss or damage. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); see also *State of Louisiana v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985). There are several reasons for this rule: first, pure economic loss damages are potentially unlimited; second, it is difficult to establish criteria for their measurement; third, they are remote and unforeseeable.
 3. In some countries, recovery is allowed on a *case-by-case basis*, depending on the proximity between the negligent act and the loss. E.g., *Canada National Railway Co. v. Norsk Pacific Steamship Co.* (1992) 137 N.R. 241 (Supreme Court of Canada).
 4. The UK rule is that there is no recovery for pure economic losses that are secondary and relational. Such losses are too remote for recovery. *Hedley Byrne & Co. Ltd. v. Heller* [1964] AC 465 (HL); *Spartan Steel & Alloy Ltd. v. Martin & Co. Ltd.* [1973] QB 27 (Court of Appeal); *Landcatch Ltd. v. The International Oil Pollution Compensation Fund* [1999] 2 Lloyd’s Rep. 316 (“*Braer*”); *RJ Tilbury & Sons (Devon) Ltd. v. International Oil Pollution Compensation Fund* [2003] 1 Lloyd’s Rep. 327 (“*Sea Empress*”).
 5. To what extent do these rulings carry over to the closure of the Suez Canal for six days? Will the *Ever Given* case cause the UK courts to take a fresh look at the issue. I would say, probably *not*.
- H. Rights and Obligations of Charterer Evergreen Marine Corp.** The charter party provisions must be consulted to determine the relative obligations of the shipowner and the charterer, Evergreen. Most charter party forms contain provisions that a chartered vessel is “off-hire” in the event of a grounding and/or detention of the vessel by State authorities. It is likely that Evergreen does not have to pay hire under the circumstances.
- I. Owners and Charterers of Ships Adversely Affected by Blockage of the Canal.** Hundreds, perhaps thousands of ships were adversely affected by blockage of the Suez Canal. In most voyage and time charter party forms and contracts, blockage of the Canal would *not* be an “off-hire” event. Thus, the charterer

would have the obligation to pay hire during the blockage. But if the delay causes extra vessel expenses the owner would bear them. The owner would also bear the risk of cancellation for late arrival or delivery of the vessel under standard charter party forms.

- J. Regulatory actions.** The *Ever Given* accident may lead governments to conclude new regulatory action/international agreements are necessary to safeguard “chokepoints” for international trade.

SUMMARY

The grounding of the *Ever Given* caused great disruption of international shipping and international trade. The causes of the accident must be thoroughly investigated to settle liabilities and to prevent any future recurrence of such a casualty. The investigation will take months, and litigation stemming from the accident will likely take years.

Under applicable rules of maritime law, the financial loss of this accident will be borne mainly by (1) insurers, the H&M and P&I insurers, who will ultimately pay the salvage award, and (2) innocent cargo owners, who will pay general average. Cargo owners in turn will likely be reimbursed by cargo insurers.

The blockage of the Suez Canal for six days cost hundreds of billions of dollars in purely economic losses. These delays and disruptions amount to purely economic losses that may not be recoverable. If so, the economic losses of the *Ever Given* grounding will be borne by shipowners and charterers of vessels (and ultimately by consumers) world-wide. The legal issue of pure economic loss will be vigorously litigated in the UK and may ultimately produce a landmark decision by the UK Supreme Court.