THE MARITIME LAW ASSOCIATION OF THE UNITED STATES
SPRING MEETING

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* cargo, reportedly worth about US$500 million, is carried in 18,300 containers.

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 (MLC) 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. The flag state, Panama, is a party to the MLC, but Egypt is not.

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, much 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]. SCA rules provide for automatic waiver of the right to limit liability and indemnification of SCA. KEY ISSUE: is the waiver effective in the UK?

5. The reported claim by the SCA of USD 916 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 principal 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. All vessels in the Canal must comply with the Colregs; maximum speed in that part of the Canal is 8.4 knots. The vessel was reportedly sailing at 13.5 knots at the time of the grounding.

   2. 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).

   3. SCA rules make the vessel responsible for pilot error.

   4. P&I insurance typically protects the vessel owner against a pilot's negligence.

   5. 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**. The UK is party to both the 1976 Limitation of Liability for Maritime Claims Convention and the 1996 Protocol. The Owners of Ever Given have invoked this convention, which is implemented in UK law by the Merchant Shipping Act 1995, as amended. Jurisdiction is apparently proper under English law.

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 1976 Limitation Convention, the Suez Canal Authority may be legally obliged to respect the English High Court Limitation concursus and must file its claims against the vessel in the Limitation proceeding.*

3. The 1996 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 115 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 salved; 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.

4. **Secondary litigation.** The delay of the Ever Given has disrupted supply chains world-wide. Cargo will be delivered late or not at all. Business entities that are expecting this cargo will be disappointed. There will be secondary litigation between sellers of cargo and buyers who will receive cargo late or not at all. The outcome of such litigation will vary with each contract involved and, in particular, the *force majeure* clause in each contract.

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 appliable 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.

Maritime Law Association of the United States, Spring Meeting

Outline

SOME INTERNATIONAL ASPECTS OF ENFORCEMENT OF MARITIME LIENS IN THE UNITED STATES

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I. The enforcement of maritime liens in the United States is not constrained by international conventions on maritime liens and on the arrest of ships.[1]

II. United States law on maritime liens [CIMLA and court opinions] is very favorable to suppliers of vessels:

- U.S. law recognizes that the supply of "necessaries" to a vessel on the order of the owner or a person authorized by the owner creates a maritime lien.
- U.S. law accepts a large class of products and services as "necessaries."
- U.S. law is designed to protect suppliers to vessels.
- A 1971 amendment deleted the duty of reasonable inquiry on the part of a supplier to ascertain whether a charterer is constrained by a "no lien" clause.
- As a practical matter, a "no lien" clause will not protect the shipowner unless supplier is explicitly told beforehand in writing.

III. As a result, a **foreign supplier** of fuel to a ship in a **foreign port** with respect to a **foreign-flagged vessel** will commonly insert a choice of U.S. law provision in the supply contract.

IV. What happens in such a case when a foreign-based charterer orders bunkers from a foreign supplier in a foreign port?

V. The result is that when/if the vessel comes into a U.S. port the vessel may be seized *in rem* under Admiralty Rule C to assert and execute a maritime lien against the vessel. Although the shipowner is not liable *in personam*, the ship may not be protected against a maritime lien even if there is a "no lien" clause in the charter party.

[1] Arrest conventions were concluded in 1952 and 1999; maritime lien conventions date from 1926 and 1993.

VI. **U.S. courts will recognize the choice of law clause and apply U.S. lien law**. Courts reject the argument that this is extraterritorial application of U.S. law and the transaction involved had nothing to do with the United States. *World Fuel Services Singapore Pte. v. Bulk Juliana M/V,* 822 F.3d 766 (5th Cir. 2016); *Triton Marine Fuels, Ltd. v. M/V Pacific Chukotka*, 575 F.3d 409 (4th Cir. 2009); *Trans-Tec Asia v. M/V Harmony Container,* 518 F.3d 1120 (9th Cir. 2008). These cases distinguish *Rainbow Line v. M/V Tequila* 480 F.2d 1024, 1026 (2d Cir. 1973) [choice of U.S. law not effective because "rights of third parties cannot be affected"]. The Supreme Court has denied cert in these cases.

VII. Consider the following facts, taken but simplified from *ING Bank NV v. M/V Charana Naree*, 446 F.Supp.3d 163 (W.D.La. 2020): The vessel, M/V Charana Naree, is owned by PLV, a foreign company. The time charterer, Copenship (Danish company) orders bunkers from O.W. Bunker (Danish company). O.W. Bunker terms and conditions include a provision choosing U.S. law. O.W. Bunker arranges for bunkers for the vessel to be supplied in Gibraltar by Vemaoil. The invoice for bunkers is sent by O.W. Bunker to Copenship; the invoice is not paid. O.W. Bunkers declares bankruptcy and assigns its rights and interest and any maritime lien to ING BANK. When the vessel enters port in Louisiana, ING Bank files suit against the vessel *in rem* under Rule C.

Issues presented:

1. Will the choice of U.S. law provision be enforced? Clearly yes (see above).

2. If there is a "no lien" clause in the charter party, will this prevent the imposition of a maritime lien on the vessel when bunkers are ordered by the time charterer? Clearly no (see above).

3. As between Vemaoil, the physical supplier of bunkers in Gibraltar, and O.W. Bunker, the general contractor, who has the maritime lien?

4. *Answer:* the maritime lien for necessaries accrues to O.W. Bunker, not the physical supplier of bunkers. To obtain a maritime lien, a supplier must (1) furnish a "necessary" (2) to a vessel (3) on the order of the owner/agent. The physical supplier of bunkers satisfies (1) and (2) of these prongs, but not (3). Vemaoil, the physical supplier, furnished bunkers to the vessel on the order of O.W. Bunker, who was not an "agent" or authorized by the owner. On the other hand, O.W. Bunker meet all three criteria and thus has the lien.[2] *Valero Mktg. and Supply Co. v. M/V Almi Sun*, 893 F.3d 290 (5th Cir. 2018); *ING Bank NV v. M/V Temara* 892 F.3d 511 (2d Cir. 2018); *Bunker Holdings Ltd. v. Yang Ming Liber*

[2] There are two exception whereby the physical supplier has the lien: (1) where the facts show that the general contractor is the agent of the owner; and (2) where the fact show that a preexisting significant relationship existed between the physical supplier and the owner.

Corp. 906 F.3d 843 (9th Cir. 2018); *Barcliff LLC v. M/V Deep Blue*, 876 F.3d 1063 (11th Cir. 2017).

5. Is the assignment of the debt and lien from O.W. Bunker to ING Bank valid? Yes, maritime liens are subject to assignment.

6. *Full disclosure of my interest in these cases.* In 2015-16 I was attorney/expert representing and working on behalf of ING Bank, who was fighting for its lien to be recognized in all the above cases. Fortunately for my client, my legal opinion prevailed in the courts.