Claim & Coverage Overview

The Aftermath of the Grounding of m/v EVER GIVEN in Suez Canal

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Default Legal Position

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Since the recent publication of our Claim & Coverage Overview of the M/V *EVER GIVEN,* many questions have arisen regarding the default legal positions, particularly for the vessels for which transit was delayed as a result of the recent blockage of the Suez Canal.

With thanks to Preston Turnbull LLP, we have sought to address a few of the most common questions posed by our clients. The following answers are grounded in English law and, where applicable, based on an unamended NYPE 1946 charterparty and GENCON bill of lading form for the following frequently asked questions:

1. Q: Was a ship awaiting transit as a result of this incident considered to be off-hire?

   A: No

Clause 15 of NYPE46 form reads as follows:

> *That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.*

While the off-hire events of "grounding" or "detention by average accidents to ship", for example, may initially appear to apply in this scenario, they are not actually applicable to a third party ship being held up by the grounding of the *EVER GIVEN* (the *EVER GIVEN* itself, however, if it was on time charter, was very likely to have been off-hire during incident). This is because such events must be intrinsic to that ship and its condition / efficiency to carry out the service then required of it. A ship simply delayed as a result of an incident involving another ship is not in itself deemed to be inefficient, and thus would not be deemed to be off-hire for the period of delay.

Similarly, it might also be tempting for a charterer to apply the catch all of "any other cause preventing the full working of the vessel", however this fails for the same reason: "any other cause" must, like off-hire events, relate to an inefficiency in or about the subject ship itself, not that of a third party.

Even if, for argument's sake, any of the off-hire events were applicable in these circumstances, the vessel would still not be determined to be off-hire because its full working would not thereby be prevented. For example, in the *Laconian Confidence,* the judge established that "A vessel is not off hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency of water, blocking her path". The same precedent would apply for a third-party vessel delayed by the grounding of the *EVER GIVEN*.

As such, a vessel delayed by this incident would remain on-hire throughout the delay.

2. Q: If I chose to re-route from the Suez Canal around the Cape of Good Hope, does that constitute a deviation under the contract of carriage as evidenced by the bill of lading / charterparty (as applicable)?

   A: Potentially

Time Charter: Under the NYPE form, the only reasons for deviating are for the purposes of saving life or property as per clause 16; otherwise, a deliberate unilateral choice to proceed via a longer route may constitute a breach of the clause 8 obligation to proceed with utmost despatch. As an owner, the best course of action would be to seek the charterers' orders. Given that the vessel shouldn't be off-hire, owners would be entitled to wait out the delay and be paid hire throughout. Alternatively, , should the charterer instead orders the vessel to proceed in transiting around the Cape of Good Hope, any question of deviation is therefore eliminated.

Voyage Charter: Clause 3 of The Gencon form gives owners the right to deviate for the purposes of saving life or property. Otherwise, there is an obligation to proceed without unnecessary deviation in accordance with the usual and customary route. Given that transiting the Cape of Good Hope would not be considered the 'customary route' for many of the vessels attempting to transit the Suez, an owner under a voyage charter, this could be considered a deviation and contractual carriers are encouraged to seek confirmation of the coverage position from P.L. Ferrari / Lockton and their P&I Club.

Note that delay itself can amount to a contractual deviation if that delay is considered to be unreasonably excessive. What would determine an 'excessive' is the test of frustration; is the delay at the canal so severe that it was so different from the circumstances envisaged at the time the contract was agreed and it is now incapable of being performed?

Ultimately, an owner under a voyage charter would be well advised to seek instructions from their charterer, particularly because owners would not necessarily be entitled to any more freight regardless of how long the voyage takes, unless there were an express provision for same in the charter contract.

Bill of Lading: Assuming the Congenbill form, either the Hague or Hague-Visby Rules, there will be an express right to deviate under Article IV r4 for the purposes of saving life or property. As with time and voyage charters above, neither scenario is applicable here and the same suggestion above applies.

3. Q: Will an owner be liable for missing a laycan under a time charter or a voyage charter?

   A: Charterers would have no right to claim damages from owners due to the missed laycan but would have the right to cancel the charter.

Time Charter: The relevant clause of the NYPE 46 is clause 14, as follows:

> *That if required by Charterers, time not to commence before _____ and should vessel not have given written notice of readiness on or before _____ but not later than 4 p.m. Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.*

Therefore, so long as owners have exercised reasonable diligence to deliver the ship within the relevant period of time, and the dates in the cancelling clause have been given honestly and reasonably, then absent any express 'eta' provision the sole remedy of a charterer would be cancellation.

Voyage Charter: The relevant clause is 9(a) of the Gencon form:

> *Should the Vessel not be ready to load (whether in berth or not) on the cancelling date indicated in Box 21, the Charterers shall have the option of cancelling this Charter Party.*

Therefore the position should be largely the same as that of a Time Charter provided that:

(i) any promises given by the owner to charterers concerning "expected ready to load" dates and so forth have been reasonably and honestly given; and

(ii) the vessel has commenced the approach voyage by a date within which it is reasonably certain that the vessel will arrive at the load port specified within the laycan.

If a Clause Paramount has been incorporated into the voyage charter then, absent any contrary provisions in the charter contract, owners should be excused from liability for delay on the approach voyage caused by events falling within Article IV, rules 1 or 2 of the Hague Rules.

In both cases, it is expected that the starting position would be that the charterers would have a right to cancel the charter, but no prima facie right to claim damages.

4. Q: Will the contractual carrier be liable for delayed delivery as a result of the incident?

A: Likely not

This will depend on the terms of the bill of lading pursuant to which the cargo is carried, but generally, assuming that it is a Congenbill form, that either the Hague or Hague-Visby Rules will apply and that there are no seaworthiness issues with any third party vessel, then cargo interests would need to allege that the carrier is in breach of its Article III r2 obligation to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. In response, the carrier would likely be able to rely on an exception under Article IV r2 – either "perils, dangers and accidents of the sea or other navigable waters", "Act of God" or "any other cause arising without actual fault or privity of the carrier" – to excuse themselves from liability for damage caused by delay.

5. Q: Can I claim against the EVER GIVEN for the losses and / or delays suffered?

A: Fact and jurisdiction specific and would be decided on a case by case basis

It seems highly unlikely that a third-party ship owner would be able to bring a successful claim against the owners of the EVER GIVEN for losses and delays suffered. Unless for some reason that owner had a contract with the owners of the EVER GIVEN and there was a breach of that contract by reason of the grounding and the delay, in which case that owner would be left with trying to sue the owners of the EVER GIVEN in tort. The proper jurisdiction for any such claim (and therefore the applicable law) would be questionable: would this be where the owners of the EVER GIVEN are domiciled (Panama), or the place of the commission of the tort (Egypt)? Proving that the owners of the EVER GIVEN owed a duty of care to every single user of the canal under English law at that time seems very unlikely. In short, there would be significant obstacles to any such claim. The legal position in Panama or Egypt may alter, however.

It is important to note that the above will not apply to each and every vessel impacted by this incident, nor is it to be interpreted as a conclusive legal advice. The courts in the various jurisdictions involved may decide differently. In the event you have further questions, please contact your local P.L. Ferrari or Lockton associate, or Preston Turnbull LLP with whom this document was drafted.