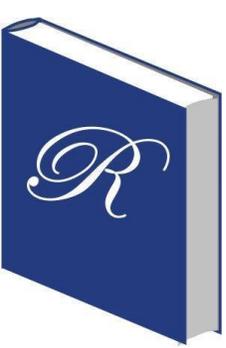


The casualty of MS Ever Given - some legal consequences

Inter-Tran webinar
University of Helsinki
29 April 2021



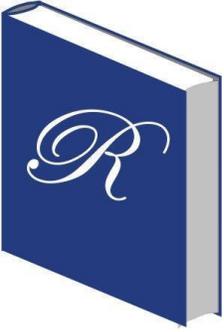
An overview of the legal issues

- My aim is to address some legal consequences of the casualty of MS Ever Given.
- The legal issues are still to be generated. Furthermore, I am dependent on what is available on public sources. It is not yet time for accurate analyses. Moreover, this type of a situation attracts 'legal innovation'.
- The basic consequences follow from maritime law, contract and tort law. Issues of liability and loss lead to the involvement of the insurance sector. Even public international law may be invoked at some stage.
- In the end, goods on board Ever Given and over 400 blocked ships belong to parties of contracts of sale of goods. This is where the risks are assumed.



The scenario in a nutshell

- On 23-29 March 2021 MS Ever Given was stuck abeam between the banks of the Suez Canal thereby blocking other vessels' navigation.
- The Suez Canal Authority (SCA) organised salvage operations including 11 tug boats and two dredger vessels.
- SCA has placed, on 2 April, claims reportedly worth of USD 916 million against the Japanese shipowner Shoe Kisen Kaisha. The shipowner is the party generally liable for the operation of the vessel.
- The charterer of the vessel is Evergreen Shipping Ltd. from Taiwan. The charterer, as the case may be, acts as the carrier of the goods stuffed into some 18.000 containers on board.



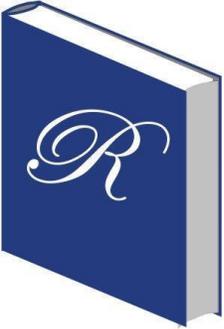
Shipowner



Charterer

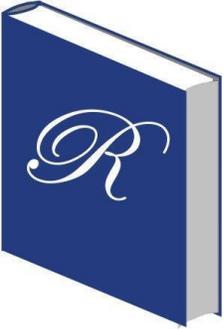


Cargo interests 1, 2, 3....



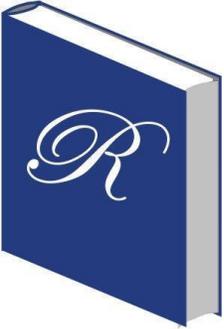
After salvage legal battles ensue

- On 29 March 2021 MS Ever Given could resume her voyage to the Great Bitter Lake in the middle of the Canal.
- Negotiations on the claim of the SCA have continued for weeks. The amount of the claim exceeds the estimated aggregate value of the ship and cargo (around USD 600 million).
- A court order has been issued for the vessel to be held.
- The shipowner has filed a limitation claim before the English Admiralty Court on the basis of the 1996 Protocol of the 1976 Convention on Limitation of Liability for Maritime Claims. It is estimated that the amount of the limitation fund would be USD 114 million.



General average

- On 1 April, the shipowner declared general average (GA). This is a very old principle of maritime law according to which all interests in danger during the voyage have to contribute to averting such danger by expenditures or, as the case may be, by sacrifices. GA is based on York-Antwerp Rules
- The shipowner announced general average to the charterer, Evergreen, and in total to 15 parties. There must be an enormous number of cargo interests affected, and these are either consignees or shippers.
- If the cargo is insured, the cargo insurer issues a general average guarantee based on a general average bond issued by the cargo interest. If the cargo is not insured, a cash deposit is needed. The amount must be substantial.
- Imagine that the claim of the SCA exceeds the estimated value of the ship and cargo: would and how much of the value of the SCA claim considered a GA expenditure? In any case, the salvage security and the GA security could cover a substantial part of the commercial value of the goods.



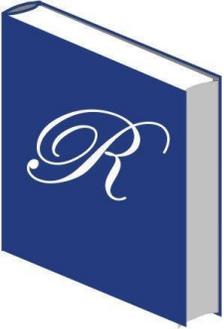
General average and salvage

- Very often, a significant part of GA expenditure consists of salvage.
- Salvage could be administered separately as laws require owners of salvaged property, also cargo, to pay salvage. As there are most often other GA expenditures and sacrifices, salvage is administered as part of the GA.
- In the Ever Given case, it is not yet known, whether and to what extent would the claims of the SCA classify as salvage (=meaning that cargo interests would have to contribute to it) or as liability (=meaning that the carrier's liability insurer, the UK P & I Club, would have to pay).
- The problem is that P & I clubs would normally pay up to the established liability (=limitation amount, USD 114 million) and not more. If you do not pay, MS Ever Given may not be permitted to sail away.



The cargo interests and delay

- There is reportedly no major loss of or damage to the cargo.
- However, the delivery of the cargo to the consignees in Rotterdam will be delayed substantially. There are delays of the cargoes of the over 400 vessels that were blocked by MS Ever Given. There may be demurrage/ detention charges for containers on board of the other vessels.
- The charterer Evergreen has stated that no commitments for arrival time have been made to the senders. Depending on the legal regime, limited liability for delay may subsist. There have been speculations about the jurisdiction of such claims, often made by business interruption insurers.
- Cargo insurance procured under the Institute Cargo Clauses does not cover delay, not even deterioration caused by delay.



The risk for delay

- The CISG and Incoterms[®] 2020 allocate risks for the loss of or damage to the goods only. There exists, however, CISG case law, which addresses the risk of delay connected with delayed transportation, too. It should be recognized that the risk allocation under Incoterms also implies risks of delay.
- Where the seller bears the risk, it is a delivery risk: the seller must bear the adverse consequences under contract (liquidated damages etc.) or law.
- Where the buyer bears the risk, it is a price risk: the buyer must pay the contract price despite the delay. Yet the production may be delayed etc.
- Risk should not be confused with liability: risk simply means bearing the adverse economic consequences of an event, liability means compensating losses, actual or liquidated, sustained by others.



Lack of containers and Incoterms® 2020

- Under Incoterms® 2020 either the seller or the buyer must contract for or, exceptionally, organise carriage.
 - This is in each case a contractual obligation, which must be fulfilled and the breach of which may result in liability to the contracting partner under the contract of sale, especially when the time of delivery has been fixed.
 - Under CPT, CIP, CFR, CIF, DAP, DPU and DDP the obligation is on the seller.
 - Under (EXW), FCA, FAS and FOB, the obligation is as a rule on the buyer.
- However, under FCA, FAS and FOB the parties may agree that the seller contracts for carriage at the **risk** and expense of the buyer: Here the 'risk' means the availability of transport capacity and the related issue of its price.



Thank you for your attention!



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