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Ever Given – Insurance and Legal Implications

Article by Philip Teoh, given for publication by the Singapore Chamber of Maritime Arbitration (SCMA)

Shipping is directly driven by global economic growth and the need to carry goods internationally. Global economic growth directly influences international trade which in turn directly affects shipping and growth in seaborne trade volumes (which directly measures demand for shipping, port and logistics services). Shipping is the most commonly used mode of transport in international trade, carrying some 85 per cent of the total transport volume¹.

Shipping in 2021

On 1 January 2020, the Shipping Industry and Traders were adapting to the onset of IMO 2020 with the low sulphur fuel regime for Ships, consequences of Trump's Trade War with China and the lingering effects of the crash in Oil Prices, each causing different effects. The Beirut Port explosion and disaster also highlighted the lurking danger of shipping and storage of dangerous goods².

When Covid-19 hit in early 2020, countries rushed to contain the infection by closing borders, shutting down industries and restricting movements.

At the height of the Pandemic businesses faced tight lockdowns, factories were closed, but essential services were still allowed to operate. Movement of goods were drastically affected³. Freight Forwarding and logistics companies were allowed to operate with permits. Governments realise that while guarding lives were important, trade and commerce must still operate. Trade flows through Shipping require critical coordination of all parties eg Forwarders / Logistics companies, Shipping Lines / Carriers, Ports and Warehouses⁴.

One of the effects is the utilization of shipping containers. Since they were first deployed in 1956, containers have revolutionized trade by allowing goods to be packed into standard size receptacles and hoisted by cranes onto rail cars and trucks – effectively shrinking the globe. Containers are how most commodities and consumer goods are moved internationally. Yet even amid the downturn, orders surged for protective gear like surgical masks and gowns used by frontline medical staff, much of it made in China. Chinese factories ramped up, and container ships carried their products to destinations around the planet. The recovery was not uniform for all cargoes and markets⁵.

¹ See Dong-Wook Song, Photis M Panayides, Maritime Logistics 2nd Edition at p. 36.

² See the Author's article : <https://theimpactlawyers.com/news/beirut-port-tragedy-law-relating-to-dangerous-goods-the-imdg-code>

³ See the Author's article 'The Impact of the Covid-19 Pandemic Effects on Shipping', The Maritime Executive 7 April 2020, <https://www.maritime-executive.com/editorials/the-impact-of-the-covid-19-pandemic-on-shipping>

⁴ See the Author's article 'Operating in a Changed World', The Maritime Executive 7 February 2021, <https://www.maritime-executive.com/magazine/operating-in-a-changed-world>

⁵ See 'Chaos strikes Global Shipping', The New York Times 6 March 2021: <https://www.nytimes.com/2021/03/06/business/global-shipping.html>, See also the Author's article 'Operating in

Containers that carried millions of masks and other cargoes to countries in Africa and South America early in the pandemic remain there, empty and uncollected, because shipping lines have concentrated their vessels on their most popular routes – those linking North America and Europe to Asia.

The chaos on the seas has proved a bonanza for some shipping companies⁶.

Furniture giant Ikea is among the retailers experiencing supply issues. Shipping costs to import goods from countries such as China have risen dramatically. The shipping costs of about \$1,200 to get a container over from China and Indonesia to the UK a year ago rose to anywhere between \$7,000 and \$10,000 in March 2021⁷.

Ever Given grounded in Suez Canal

In March 2021, the fragility of trade routes which had been sorely tested by disruptions caused by Covid 19, shortage of containers was once again exposed when the large container ship the Ever Given ran aground while transiting the Suez Canal on 23 March 2021, lodging itself against both banks of the Canal⁸.

The ship ran aground diagonally after losing the ability to steer amid high winds and a dust storm. The ship ended up with its bow wedged in one bank of the canal and stern nearly touching the other.

The ship was sailing from the Port of Tanjung Pelepas, Malaysia en route to Rotterdam. The route taken was through the Suez Canal which was a common route from Asia to Europe, which is much shorter than the alternative route through the Cape of Good Hope.

The ship is of about 400 m in length, as tall as the Empire State Building and of carrying capacity of 20,000 containers / TEUs is an Ultra Large Container Vessel⁹. The ship is owned by Shoei Kisen Kaisha (a shipowning and leasing subsidiary of the large Japanese shipbuilding company Imabari Shipbuilding), and time chartered and operated by Taiwanese container Line Evergreen Marine (tied with other Golden-class ships as the largest that Evergreen operates, as of 2021). Ever Given is registered in Panama and technically managed by the German ship management company Bernhard Schulte Shipmanagement.

Its large size covered the width of the Canal holding up vessel traffic and the route across the Canal for days while efforts were made to dislodge the ship. This caused

a Changed World', The Maritime Executive 7 February 2021, <https://www.maritime-executive.com/magazine/operating-in-a-changed-world>

⁶ Maersk, which in February 2021 cited record-high freight prices in reporting more than \$2.7 billion in pretax earnings in the last three months of 2020. Ibid.

⁷ See Garden furniture shortage no picnic for retailers BBC 14/3/21: <https://www.bbc.com/news/business-56357221>

⁸ See Suez Canal Traffic Snarled After Megamax Boxship Runs Aground: <https://www.maritime-executive.com/article/suez-canal-traffic-snarled-after-megamax-boxship-runs-aground>

⁹ Container Ships carrying 14,501 TEUs and above.

knock on effects on the movement of cargoes globally as the 12% of global trade are carried on board ships using the Canal to move cargoes from Europe to Asia¹⁰.

The Suez Canal is a crucial shortcut between Asia and Europe that saves ships from having to navigate the Cape of Good Hope around the southern tip of Africa which is a significantly longer journey. Roughly 30 per cent of the world's shipping container volume transits through the 193km canal daily¹¹.

The blockage of the Canal had caused vessels backed up in the Mediterranean to the north and the Red Sea to the south¹². It is estimated that the costs to global trade is estimated to be about US\$400 million per hour based on the approximate value of goods that are moved through the Suez every day, according to shipping data and news company Lloyd's List. Lloyd's values the canal's westbound traffic at roughly US\$5.1 billion a day, and eastbound traffic at around US\$4.5 billion a day¹³.

The effect on the global supply chain due to the incident will also result in insurance claims¹⁴. The claims will not come only from cargo on board the Ever Given but from cargoes on ships which voyage will be delayed due to inability to transit the Canal. Many of these ships face the difficult choice in waiting as the alternative route through the Cape of Good Hope is a longer and costlier voyage¹⁵.

Cargo Insurance

The availability of recourse against marine cargo insurance policies is also not a given as most marine cargo insurance do not cover losses due to delays.

As the Ever Given sailed from the Port of Tanjung Pelepas, Johor, Malaysia, this means:

- a. The Hague Rules as applied under the Malaysian Carriage of Goods by Sea will apply to the bills of lading contracts for containers loaded at the load port;
- b. The Insurers under those CIF contracts will be Malaysian Insurers
- c. There will be issues of salvage and general average for those cargoes

¹⁰ See

http://timesofindia.indiatimes.com/articleshow/81681095.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

¹¹ See <https://www.channelnewsasia.com/news/singapore/suez-canal-blockage-supply-disruptions-asia-psa-ong-ye-kung-14489494>

¹² See https://www.worldoil.com/news/2021/3/25/it-could-take-weeks-to-reopen-the-suez-canal-salvage-experts-say#.YFyBnfx_Eul.linkedin

¹³ See Suez Canal blockage is delaying an estimated \$400 million an hour in goods, CNBC at : https://www.cnbc.com/2021/03/25/suez-canal-blockage-is-delaying-an-estimated-400-million-an-hour-in-goods.html?_source=sharebar|twitter&par=sharebar

¹⁴ See <https://asia.nikkei.com/Business/Transportation/Stranded-Suez-ship-s-owner-insurers-face-millions-in-claims>

¹⁵ Waiting for the Canal to clear also incurs running costs. Instead of waiting for an uncertain period, vessels also deviate from their planned route through the Canal and diverted instead to alternative routes including through the Cape of Good Hope see: https://www.cnbc.com/2021/03/27/suez-canal-cheniere-and-shell-fuel-tankers-change-course-to-avoid-logjam-as-oil-tankers-divert-routes.html?_source=sharebar|twitter&par=sharebar

Delay will arise for vessels already near the entrances to the Canal where the vessels decide to wait for the Canal to clear. Vessels that decide to divert from their planned voyage to take the longer route through the Cape of Good Hope will traverse a longer route and arrive later than the planned schedule. The delay may cause some of the cargoes on board the vessels to deteriorate and for project cargoes, delays may affect deadlines.

Most Cargo Insurance policies adopt the Institute Cargo Clauses issued by the Institute of London Underwriters Wording. These wordings adopt the choice of English law and Practice.

Thus the terms of the UK Marine Insurance Act 1906 will apply.

Most of these policies are of the all risks type, and delay is excluded, see Cls 4.5:

4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against

Unless the policy is amended, by endorsement to remove this exclusion, which would be the reasonable prudent action for the assureds to do.

Salvage and General Average

The Ever Given can carry up to 20,000 TEUs on board. Unless the ship is freed the container cargoes cannot safely proceed to its final port in Rotterdam.

The efforts to refloat the ship and to undertake any repairs so that the ship and cargo can safely continue its voyage will form part of general average.

General average is part of the law of the sea founded on equity. It formed part of the Rhodian law, was based in earlier custom and existed many centuries before the existence of marine insurance. Rhodian law provided that, when cargo was thrown overboard to lighten a vessel, that which had been given for all had to be replaced by the contribution of all.

The most often cited legal definition of 'general average' is 'all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo losses within general average, and must be borne proportionately by all who are interested'.

The cargo insurance of these container cargo on board is covered by the Marine Insurance Cover using the English Forms, above see Clause:

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

Lessons can be learned from the Malaysian Federal Court decision of *Fordeco Sdn Bhd v PK Fertilizers Sdn Bhd*¹⁶. The Court held that four elements are essential to establish a contract of salvage (as opposed to a contract for the provision of towage, pilotage or the carriage of goods): (i) there should be a recognised subject matter; (ii) the object of salvage should be in danger at sea; (iii) the salvors must be volunteers;

¹⁶ [2019] MLJU 596

and (iv) there must be success by either preserving or contributing to preserving the property in danger.

In the case, the vessel was on a voyage from Ain Sukhna, Egypt to Lahad Datu, Sabah, carrying a cargo of about 22,000 metric tonnes of rock phosphate in bulk. The vessel grounded on coral rocks, and both the vessel and the cargo were in peril. The cargo was owned by PK Fertilizers Sdn Bhd ('the cargo owner') who was the plaintiff in the High Court and the respondent in the Court of Appeal and before this Court. The mode of rescuing the stranded vessel was to lighten it, so that it could be refloated, and continue on its journey. The lightening of the vessel in turn meant that cargo had to be offloaded. It could not simply be jettisoned because that would give rise to marine pollution. The cargo had to be offloaded onto other vessels in order to lighten the load on the vessel.

The master could not refloat the vessel without assistance. He notified the vessel owners. The owners declared general average and took steps to refloat the vessel. This was done by discharging a part of the cargo on board the vessel onto two other vessels one of which belonged to the defendant, until the vessel could be refloated. In order to procure the lightening of the load on board the vessel, the owners' agents, sought the assistance of a tug boat operator. When the Cargo was unloaded at a port in Sabah, a portion of the Cargo was found to be wet and contaminated with debris. The Plaintiff brought a claim in bailment and/or negligence against the Defendant. The Plaintiff contended that the Defendant was a sub-bailee of the Cargo and thus the Defendant had a duty to deliver the Cargo in the same condition as the Defendant had received the Cargo - rather than wet and contaminated with debris. The Defendant, on the other hand, contended that the operation was one of salvage and not a contract of carriage of goods - thus, it was not in breach of any obligation to the Plaintiff.

The Questions of law which the Federal Court following the leave to appeal which had been obtained¹⁷ included:

Where a vessel had run aground on the high seas and the owners of the vessel had declared general average in respect of the cargo, whether the rescue operation to save so much of the cargo as possible by other vessels hired for that purpose would in maritime law be classified as a salvage operation?

The Court held there was no dispute that general average was declared, accepted and that the cargo owner voluntarily contributed towards general average. It follows therefore that the cargo owners agreed and accepted that there was a common jeopardy or misadventure that affected the common interest of the parties involved, warranting the incurring of expenditure beyond the agreed contractual duties.

The next issue that falls for consideration is whether, general average having been declared, it would follow definitively that the contract for the rescue and refloating of the vessel through the discharge and transport of the cargo on the vessel carrying the cargo, was one of salvage, rather than towage or carriage of goods.

¹⁷ Under Malaysian law, appeal from Court of Appeal to the Federal Court is not automatic. Leave must be obtained from the Federal Court on the criteria set under Section 96(a) of the Courts of Judicature Act :

An appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage

The adjustment of general average will proceed under the procedures set out in the York Antwerp Rules which will apply through incorporation of the Bills of lading of the Carrier.

The Salvors and contractors will offer their services through their salvage contracts most of which will be based on the Lloyd's Open Form of Salvage Contract.

Claims by Cargo

The Carriage of the containers by the vessel Ever Given is regulated by the bills of lading issued by Evergreen. For cargoes loaded at the Port of Tanjung Pelepas, Johor Malaysia, the terms of the bill of lading will attract the application of the Hague Rules as applied by the Malaysian Carriage of Goods by Sea Act.

The Hague Rules provide several defences under Article IV Rule 2 which will make recovery against the Carrier difficult:

(a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; (c) perils, dangers and accidents of the sea or other navigable waters; (d) act of God.

As the efforts are still continuing, the legal and claim issues will come to fore later, after the ship is freed. It is clear that the saga of Ever Given will continue long after the Canal is cleared.

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