

THE CONTRACTUAL CONSEQUENCES OF THE SUEZ CANAL BLOCKAGE ON CHARTERERS AND SHIPOWNERS

Introduction

The recent blockage of the Suez Canal has drawn the world's attention to major trade routes and highlighted the severe impact disruptions of maritime trade can have on the world economy. With an average of 51 ships passing through the Suez Canal daily, it is estimated that the blockage will cost consumers a staggering USD\$9 billion for each day the interruption persisted.

On 29th March 2021—six days after running aground and blocking the Suez Canal—the container ship 'Ever Given' was finally freed. With almost 500 ships waiting at the Aegean Sea to traverse the canal, it took about a week for the backlog of ships to pass through the Suez Canal. While the Canal itself was able to return to normal operations within a week, the consequences and losses for shipowners and charterers are likely to take months—if not years—to resolve.

Relevant Considerations

Incidents of delay of performance naturally give rise to questions on the rights and liabilities of the shipowners and charterers. While the exact legal position of parties will differ based on the specific charterparty clauses, contractual terms and any other case-by-case circumstances (relevant to the transaction), various provisions and positions that may provide protections to shipowners and charterers have been outlined below.

Time Charter – Off-hire Vessel

One of the key issues for consideration when looking at a time charter is whether the time charterer may put the vessel off-hire due to

delays caused by incidents similar to the blockage of the Suez Canal. Generally, a vessel is only put off-hire when it becomes inefficient or unable to perform the service required. In the case of the Suez Canal blockage, it would be extremely unlikely that an off-hire clause in a charterparty would be useful, since the delay was not caused by any negligence or misconduct of the shipowners, but instead caused by the charterer's instructions to navigate via the Suez Canal, resulting in a completely extraneous event. Therefore, unless there are express clauses or provisions that provide otherwise, the Suez Canal blockage would not put the vessel off-hire.

Voyage Charter Issues

A serious concern for shipowners is the risk of cancellation by the charterers if such delays cause the vessel to arrive after the laycan has expired. Looking at standard voyage charterparties such as GENCON 1994 the 'Cancelling Clause' gives charterers the option of cancelling the charterparty if the vessel is not ready to load by the indicated date. It should be noted however, that the Clause, also allows for the laycan to be extended by way of agreement between the parties involved. As such, it is paramount in such cases for shipowners to communicate and inform charterers as soon as possible of any such delays so that they may decide whether to shift the laycan dates after taking into account the delay. In all likelihood, without any agreement between parties, the time lost and additional costs in situations that involve similar Suez Canal blockage delays will be for the shipowner's account where parties have contracted under a voyage charterparty like GENCON.

Shipowners being held in breach of obligations to proceed with utmost dispatch is another major concern that arises in the face of delays caused by situations like the Suez Canal blockage, since under voyage charterparties, shipowners have an implied obligation to proceed with reasonable dispatch to the load and discharge ports. It seems highly improbable, however, that shipowners could be held to be in breach of such a term in the face of circumstances where transiting the Suez Canal was undeniably physically impossible due to the 'Ever Given' situation. Practical consideration of the logistical and financial consequences of the incident and open communication between parties in the aftermath of such incidents, is the key to managing any potential disputes at the outset.

Frustration of Contract

It is extremely unlikely that charterparties or contracts will be held to be frustrated by delays like those caused by the Suez Canal blockage. The threshold for successfully inciting the doctrine of frustration in both Singapore and the UK is notoriously high, and it is more likely than not that Courts would only find a charterparty or contract to be frustrated in light of a considerable delay that renders performance of the contract radically different from what was intended at the time of contracting, or impossible to perform.

Force Majeure

No doubt a key consideration in the face of incidents like the Suez Canal blockage is the doctrine of force majeure, which, broadly, enables parties to temporarily suspend performance or vary the terms of performance of a contractual obligation in view of a supervening event that occurs beyond the control or fault of the contracting parties.

It bears highlighting that reliance on the doctrine of force majeure is premised on a force majeure clause being explicitly contained in the charterparty or contract. In other words, parties

must have agreed to the incorporation of such a clause at the time of entering into the contract. Such a clause must also cover the specific supervening event off of which parties' obligations are to suspend.

In such 'Ever Given' situations, force majeure clauses would ideally cover circumstances where there are canals or waterway blockages. If there is no such explicit force majeure clause, or it does not specifically cover the intervening event, a force majeure clause is unlikely to successfully be invoked.

Conclusion

The recent incident of the 'Ever Given' and the Suez Canal is a timely reminder that shipping delays and their resulting consequences are perhaps not as remote as one may think. Although it is not possible to predict when and how similar situations may occur in the future, the critical lesson for shipowners and charterers is to ensure that they are aware of and include the specific clauses and necessary provisions that will be instrumental in protecting their rights and obligations.

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