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The Ever Given casualty: ripple effects, litigation and arbitration

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1. Introduction

At the end of March 2021, the Suez Canal Authority was able to dislodge the container ship Ever Given from the banks of the Suez Canal in Egypt, after nearly a week's blockage. However, the disruptive effects on global trade caused by the casualty – which involved supply chain stakeholders shipping freight of all kinds – will likely extend far beyond the six-day obstruction.

In addition to demurrage and insurance claims, claims arising from the casualty may concern: (a) the late delivery of goods, supplies and commodities; (b) loss of, or damage to, cargo; (c) effects on future vessel bookings; and even (d) the impact of delayed or failed shipping on the performance of other contracts dependent on the goods carried (e.g., construction contracts).

The outcome of these disputes will depend on (among other things) the circumstances of the case, the applicable terms and conditions of contract – including the contractual risk allocation – and the governing law. Nonetheless, as was the case in previous closures of the Suez Canal, sued parties will probably argue that the incident was an unforeseeable event beyond their control and invoke force majeure provisions or, if absent from the contract, the doctrine of frustration, i.e., claim that performance had become impossible or radically different from what was envisaged when entering into the contract.

2. The Suez Canal blockage as a force majeure event or frustration of contract

Although the Ever Given's grounding is one of the most significant incidents in the Suez Canal in recent years, it is certainly not the first time the canal has been closed to traffic. It was closed for military reasons for a few months between 1956 and 1957 and for eight full years between 1967 and 1975.

These closures led to several disputes concerning delays or cancellation of shipments − many of which involved the allocation of additional costs incurred in opting for the longer route around Africa's Cape of Good Hope. The related caselaw may give some indications as to possible outcomes of claims arising from the Ever Given casualty.
Indeed, in the cases arising from the previous closures, American[1] and English[2] courts rejected claims brought on the grounds of legal impossibility or frustration of contract, based on the following principles:

- the Suez Canal route – though the customary route at the time – could not be considered an exclusive means of performance;
- a contract was not frustrated if the vessel in question was not physically blocked in the Suez Canal but simply had to take an alternative route;
- the alternative route around the Cape of Good Hope was reasonable, well-known and viable;
- performance via the Cape of Good Hope route – though two and a half times longer than the Suez Canal – was not fundamentally different from performance via the Egyptian route;
- the extent of the increased costs inherent to the change of route did not amount to commercial impracticability; and
- performance is considered impossible only if it would entail an extreme and unreasonable difficulty, expense, injury or loss, which was not the case in last century's closures.

In one of the English cases,[3] force majeure was expressly invoked. The sellers had agreed to ship Sudanese groundnuts at CIF terms to Hamburg during November/December 1956. The Suez Canal was then closed to navigation on 2 November, but the groundnuts could have still been shipped via the Cape of Good Hope. But besides the route taking twice as long, freightage would have been far more costly. The sellers failed to ship the goods and invoked Clause 6 of the contract, which stated as follows:

> [i]n case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating the contract shall be cancelled.

The sellers thus contended that shipment was prevented by the closure of the Suez Canal and that, as the closure extended beyond two months, the contract was cancelled. The House of Lords found that the canal's closure was not a force majeure event, as it had no effect on the sellers' ability to

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[1] *American Trading & Prod. Corp. v Shell Intl. Marine*, 453 F.2d 939 (2d Cir. 1972); *Transatlantic Financing Corp. v United States*, 363 F.2d 312 (D.C. Cir. 1966); and *Hellenic Lines v United States*, 512 F.2d 1196 (2d Cir. 1975).
[2] *Ocean Tramp Tankers Corp. v V/O Sovfracht (The Eugenia)*, [1964] 2 Q.B. 226; *Tsakiroglou Co. Ltd v Noblee Thorl GmbH* [1962] AC 93; and The Captain George K [1970] 2 Lloyd's Rep. 250.
[3] *Tsakiroglou Co. Ltd v Noblee Thorl GmbH* [1962] AC 93.

load the groundnuts onto the vessel at Port Sudan. Indeed, Lord Guest pointed out that:

> "[S]hipment" in the context means bringing the goods to the port of shipment, and "prevention" means either physical or legal prevention (…). In no circumstances can it be said that shipment was prevented by the closure of the Suez Canal.

3. Same canal, different circumstances

As mentioned, closure of the Suez Canal (and the consequent increased costs) has not resulted in a discharge of liability in any past cases. That said, the same outcome cannot necessarily be expected in claims arising from the 2021 blockage: different conclusions may indeed be drawn based on the contractual and business relationships between the parties concerned – including whether any force majeure clauses are in force – and the circumstances of each case.

For instance, the outcome of a case could depend on whether:

- the parties agreed upon a given method of performance, which was deemed to be essential and thus amounted to a specific contractual risk allocation;
- the alternative route was somehow detrimental to the condition of the goods or required special storage or other arrangements; or
- the vessel carried perishable goods susceptible to damage in the case of increased transport time.

In some of the above scenarios, another issue could also come into play. If, as a result of the casualty (and assuming the casualty is considered a force majeure event), part of the cargo was damaged or perished (e.g., bananas, half of which spoiled during the voyage), or the entire cargo (as part of a multiple shipment) could not be timely delivered at destination and was supposed to be delivered to multiple receivers under different contracts, the carrier's ability to perform all its obligations to supply might have been frustrated.

In this event – absent contractual provisions or liability allocation clauses – the issue would be what distribution criteria should apply. In other words, which of the carrier's obligations to different contractual parties should have been performed, and to what extent (i.e., wholly or in part). In some jurisdictions (e.g., the UK and Germany), a pro-rata distribution approach – as opposed to performance of one (or more) contract(s) and breach of the other(s) – seems to be the preferred solution, if fair and reasonable in the given case.

In other jurisdictions, however, the outcome is more uncertain. The pro-rata approach is also taken by the Uniform Commercial Code (Section 2-615(b)), whereby a seller is entitled to allocate performance "*in any manner which is fair and reasonable*". Clearly, the assessment of the fairness and reasonableness of the allocation depends on various criteria (including industry practice and prior dealings) and on an accurate fact assessment.

4. Looking ahead: how to draft effective contractual provisions in connection with *force majeure* events

As seen above, the types of claims arising out of the Suez Canal incident could involve several operators: from shipowners to charterers, insurers to cargo owners, sellers to buyers, and carriers to manufacturers.

Those already directly or indirectly affected by the casualty have few options: attempt to settle or be prepared to go to court or arbitration. But a lesson can be learned by all for the future:

- Extraordinary circumstances can happen. The Covid-19 pandemic and the Ever Given casualty have taught us that force majeure events are not just remote, theoretical possibilities. **Do not ignore or underestimate the importance of including in contracts specific language on possible extraordinary events and a catch-all clause**.
- The allocation between parties of the consequences of unexpected events will be dictated by how the contractual provisions are drafted. **Assess in advance which party would be better suited to cover certain types of events inherent to a given type of contract**.
- A force majeure event could restrict your ability to perform all your obligations to different parties, especially in the case of supply or distribution agreements. **Be sure to include wording that allows you to select which ones to perform at your discretion**.

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