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In this issue of *The Arrest News:*

Ever Given Cargo: Is It Insured? by Kenra Parris-Whittaker, ParrisWhittaker (The Bahamas)

When the Ever Given cargo ship was finally refloated on 29 March 2021, the spokesperson for the Suez Canal Authority was jubilant. It had been estimated that for every day the ship blocked the Suez a $6 billion hit to global trade resulted. While the full implications of the blockade for the global supply chain are only beginning to become apparent, there's no doubt that insurance claims will come thick and fast – relating not just to cargo on board the Ever Given itself but also to cargo on all those ships that were delayed because of the canal's closure. Here we look at some of the insurance questions raised by the Suez blockade, and consider generally the issues ship owners and businesses that transport goods by sea should bear in mind.

Can I Claim For Losses Caused By Delay?

It wasn't just the goods in containers on board the Ever Given whose transit was severely delayed in March 2021. Hundreds of other vessels were held up at the entrance to the canal as attempts were made to re-float the distressed ship. Many of these vessels waited until the blockage was cleared before proceeding through the canal. Many others sought alternative, longer routes to get to their destination.

In all cases, goods faced significant delays. For the owners of these goods the question of making a successful claim is clouded somewhat by the fact that the majority of marine cargo insurance excludes or limits losses caused by delays. The widely used Institute Cargo Clauses (ICC) derive from English law,

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specifically the UK's Marine Insurance Act, 1906. Policies tend to exclude:

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

It will be necessary to check the precise wording of policies to see if this exclusion has been removed. (In the context of Covid19 which had already led to widespread transport delays in 2020-2021, and the anticipation of claims arising from these delays it may well be that many policies covering Ever Given cargo had been appropriately endorsed to include claims for delay.)

General Average

The ability of cargo owners to claim for losses arising from the Ever Given blockage has been complicated by the declaration by the vessel owners of 'general average'. This is a widely recognised principle of international shipping law under which every cargo owner helps cover the losses of all – even if their own cargo is undamaged. In the context of the Ever Given accident the owner's reliance on the general average rule will have the net effect of delaying recovery of freight from the vessel and lengthening the time it will take to conclude settlement of claims. That's because once general average has been declared loss adjusters are required to assess the value of each batch of cargo before calculating the liability of each cargo owner under the general average scheme

Was There Due Diligence?

The whole Ever Given debacle is a timely reminder of the perils of shipping generally and the need for ship and cargo owners to exercise due diligence ahead of any voyage. Of course an exercise of due diligence is advisable before entering any commercial transaction but it's essential in shipping and maritime transactions where the value of goods involved is so significant.

From a ship owner's perspective carrying out due diligence to ensure a vessel is seaworthy before a voyage can provide protection against claims. That's because under the US Carriage of Goods by Sea Act, recovery of damages against a ship carrier or owner is limited in the event of navigational errors so long as due diligence was performed ahead of the voyage.

Does Force Majeure Apply?

Some reports suggest that the Ever Given ran aground as a result of a sudden sandstorm. If this is the case it may be possible for the ship owner to seek to avoid any liability by relying on the concept of force majeure. However it's not always easy to rely on force majeure clauses – everything comes down to the skill of the lawyer drafting the clause and the circumstances of the particular case.

How We Can Help

The Ever Given incident is a remarkable, almost unique case with multiple jurisdictions and sometimes contradictory international legal rules at play. It's clear that the ramifications of the debacle will be felt for years to come, and be of interest even to those ship owners and cargo interests not directly affected.

We believe the outcome of the various claims and disputes resulting from the Ever Given grounding in March 2021 will have a general application to anyone engaged in international shipping and transportation. It's crucial to get legal advice on details of your insurance polices and due diligence procedures for example. The lawyers at ParrisWhittaker are ready to discuss and assist with any of the issues we have raised.

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The Hamas/Israel Conflict, is it an 'Act of War'? by John Harris & Yoav Harris, Harris & Co. (Israel)

The recent escalation of the conflict between Hamas and Israel began on the 10th May 2021 with Hamas' missile attacks on Jerusalem and ended in both parties accepting the Egyptian officials offer to have a ceasefire, which entered into force at 02:00 (Am) on the 21st of May 2021. During this period, named by Israel as the 'Guardian of the Walls', the Israeli Home-Front Command issued 79 alerts of missile attacks on The Ashdod's marina area and 392 alerts on attacks on the city of Ashkelon, located 38.1 km and 21.km from the Gaza Strip, respectfully.

This escalation took place while vessels called at the Israeli ports and others were on their way, or were expected to be on their way to an Israeli port as their ports of nomination or destination, raising the concepts of "War", "Acts of War", which will be the viewed in this Article.

The concept of "War" or "Acts of War" can be found in many formations related to the shipping industry and maritime law. An "Act of War" is one of the defence of the carrier dismissing his liability from loss to cargo which was under his care, under the Hague-Visby Rules, listed together with "Peril of the Sea" at the sub clauses of Article IV of the Rules. It is a risk covered by the Institute War Clauses (Cargo), according to the insurance covers loss or damage to the subject-matter insured caused by "war, civil war, revolution, rebellion, insurrection". According to the ASBATANKVOY charterparty form, the charterer is entitled to avoid loading or discharging at a nominated port if "*owning to any war, hostilities, warlike operations, civil war…*" the entry to such port or the loading or discharge of cargo at any such port is considered by the Master or owners in his or their discretion dangerous or prohibited; "SHELL TIME 4", provides, under clause 33, both the owners and the charterers with the right to cancel the charterparty if a war or hostilities break out between two or more of the following countries: The U.S.A, the countries having been part of the former U.S.S.R, P.R.C, U.K, the Netherlands. Under clause 34, if the vessel is ordered to trade in areas where there is war (de facto or de jure) or threat of war, charterers shall reimburse the owners for any additional insurance premia, crew bonuses and other expenses which are reasonably incurred by owners as a consequence of such orders. Also, under clause 35 (a) the master shall not be required to sign bills of ladings for any place in which in his or owner's reasonable opinion it is impossible or dangerous for the vessel to enter or reach owing to blockade, war, hostilities, warlike operations, civil war.

Under the BP OIL INTERNATIONAL General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products, 2015 Edition, Section 65 the events such as "**war, whether declared or not, civil war, riots and revolutions, acts of piracy**" are listed as Force Majeure events- impediments which are beyond the control of the Buyer or the Seller, allowing them to suspend their performances and obligations under the purchase and sale agreement.

In the matter of *Kawasaki v. Banthem Steam Ship Company* [1939] 2 K.B. the charterparty provided that: "*Charterers and Owners to have the liberty if canceling the charter party if war break out involving Japan*". The owners purported to cancel the charterparty on the grounds that a war broke out, and the owners argued that the cancelation was wrongful and claimed damages. At the time of cancelation, no declaration of war was made by Japan or the U.K in relation to the other and diplomatic relations continued between the countries and the UK government, in the words of a letter from the Foreign Office, were "*not prepared to say that in their view a state of war existed*". Nevertheless, at the same time, hundreds of thousands of Japanese soldiers were engaged in battles with hundreds of thousands of Chinese soldiers, and Japan was maintaining a naval blockade over a 1,000 mile stretch of the coastline of China. The arbitral umpire held that if and as for as it was a question of fact, war had broken out involving Japan. The Court of Appeal rejected the argument that, for the purpose of construction of the clause the word "war" had any technical meaning derived from international law. The views of the UK

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government were not conclusive. The matter to be decided in a "common sense way": What would a commercial person exercising common sense say if the nation in question was involved in a war? On the facts he would say that Japan was involved in the war.[1]

The conclusion drawn by Ewan Mckendrick, in "Force Majeure and Frustration of Contracts" from the matter of *Kawasaki v. Banthem Steam Ship*, in relation to the construction of the commercial contracts using the term "War", is that whether a country is involved in a war is to be answered by common sense, and that the fact that no declaration of war has been made is not conclusive. Nations may claim that they are in a state of war with each other without there being any actual fighting on the ground, at sea or in the air (such was the position for many years between Egypt and Israel until their final peace treaty in 1979, when the heavy fighting took place in 1948, 1956, 1967, 1973). On the other hand, the fact that diplomatic relations are not broken off, is not a conclusive factor against the existence of a war. Today, the existence of a state of war may not only be difficult to describe but also difficult to recognize, and the meaning of "War" may change with the passing of time. For example, during the Falkland Islands War, British ships were free to trade to parts in Argentine and Argentinean property in the UK was not sequestrated.[2]

The case of Spinney's (1948) Ltd v. Royal Assurance[3], concerned an incident where groups of people broke into and looted the assured shop in Spinney's Center in the middle of Beirut on 18 January 1976, during an internal political strife, accompanied by violence and destruction on a large scale suffered by Lebanon and the City of Beirut for several months. The Court (Mustill J) held that at that time there were no "sides" which could be identified as being engaged in a civil war and that although the fighting in Lebanon was serious the violence was sporadic, and had not advanced beyond massive civil strife and anarchy and did not reach a stage of "civil war".[4]

1 Ewan Mckendrick, "Force Majeure and Frustration of Contracts", first published 1991, page 133.
2 Pages 135-136
3 Spinney's (1948) Ltd, Spinney's Centers SAL and Michael Doumet, Joseph Doumet and Distributors and Agencies SAL v. Royal Insurance Co. Ltd [1980] 1 Lloyd's Rep. 406

In the matter of the *Northern Pioneer* [2003] 1 Lloyd's Rep. 212, On 29 April 1999 the charterers purported to cancel the charterparty for the chartering of four German flag ships, relying on a clause similar to the above-mentioned clause 33 of the “SHELL TIME 4" and under circumstances where from 24 March 1999, Germany, as a member of NATO, participated in the military operations in Kosovo, by deployment of a number of air craft of the German Air Force. The majority of the arbitrators held that a businessman applying common sense in the contents of the war cancelation clause would not regard the NATO operation in Kosovo as a war, while the minority arbitrator considered that if a business man had been asked whether there was a war in Kosovo in March and April 1999 he would have said "yes" and Germany was involved in the conflict. However, the arbitrators were unanimous in holding that the charterers should have exercised the option to cancel the charterparty within a reasonable time and the charterers had not done so. Therefore, the Court of Appeal did not determine between the different views between the arbitrators, although the majority decision was "open to serious doubt"[5].

In the matter of *If P & C Insurance v. Silversea Cruises*, the operator of a fleet of four ultra-luxury cruise ships claimed loss of income and anticipated income due to the impacts of the 9/11 attacks and the subsequent US government warning US citizens making travel plans on its activities, such as the closing of New-York Port which remained closed to cruise ships until April 2012, passengers' cancelations of cruises, drop in bookings, resulting also with the lay up of one of its four vessels for the balance of 2001 season and the whole of 2002 season, operating temporarily during that period with a three ship fleet. The claim was filed on the grounds of a "*Loss of Income and Extraordinary Costs*" insurance policy, covering the assured loss of income and loss of expected income, inter alia, as a result of "*Acts of war, armed conflict, strikes, riots and civil commotions which interfere with the scheduled itinerary of the insured*

4 John Dunt, **"Marine Cargo Insurance"**, Informa, 2009, page 192.
5 M.T Wilford and T.G. Coghlin, **"TIME CHARTERS"**, Fifth Edition, .2003 Paragraph 24.38, page 402

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vessel, whether actual or threatened." The claim for the loss of income related to the lay-up of the one of the vessels was dismissed as the insurance argument that the decision to take a vessel out of the circulation was not the 9/11 attack but over-capacity and the matter of "war" or "acts of war" was not addressed directly by High Court and the Court of Appeal. However, under few brief comments provided by Lord Justice Rix he expressed his opinion that "*acts of war and "armed conflicts*" might be broader than war itself, and that it might be that a *casus belli* can be a candidate to an 'act of war', and as much as the 9/11 attacks led to the invasion of Afghanistan it could be argued as being such. He also mentioned that the fact that the 9/11 attacks were an example of a terrorist's attacks does not, for itself, answer the question whether it amounted to something more. Meaning that, considering the structure of Al Qaeda, its ideology and aims, and its relationship with Taliban, the 9/11 attack might be considered also as an "act of war", which usually takes place between two states. However, this issue was not decided by the Court.

The matter of a tanker chartered under a voyage charter and the influence of a military escalation in Israel has been dealt with under a Supreme Court Judgment in civil appeal 7802/11 *TRANS KA TANKERS Vs. VITOL ENERGY S.A*. In that matter, under a fixture dated 26.07.2006 the vessel *Bereket Va* had been chartered for the carriage of 5,000 tons of methanol between the load port of Marsa al Brega, Libya to the discharge port of Marmara, Turkey. The agreed laydays for loading the cargo was 10-15.8.2006. However, the Owners kept on postponing the loading of the cargo, arguing that they should be exempt from the damages caused due to the postponement because during that time the vessel was located at the east of the Mediterranean Sea and was subject to the military activities which took place during that period, between the State of Israel and Hezbollah located in Lebanon.

This argument was rejected by the Court, which held, that, the above military activities had begun on 12.7.2016 and was perfectly known to Owners on the date of the fixture (26.7.2016). Therefore, under such circumstances, if the Owners wished to determine in the agreement that these events should be considered as a risk which should exempt the Owners from its liabilities, it should have been drafted in specific wording in the charter party agreement, and the general exemption of "*all going well, weather and safe navigation permitting*" cannot be considered as covering known military activities. Especially, when considering the importance of the time schedule for the arrival, loading and discharge of the vessel under a voyage charter party. Therefore, the Owners were found liable by the Court for the damages which were caused due to its delay in loading the cargo.

Returning to the most recent events, during the "Guardian of the Walls", the Hamas launched 4,360 missiles and mortar bombs towards the state of Israel. 680 of these fell in the Gaza strip itself, 1,843 fell in non-populated open areas in Israel and out of a total 1,837 missiles and bombs aiming to fall at populated areas in Israel, 1,661 were intercepted by the "Iron Dome", and 176 were not intercepted and fell in populated areas. During this period, Haifa and Eilat were not alerted, not even once, and as mentioned above, the Ashdod marina area received 79 alerts of missile attacks and 392 alerts on attacks on the city of Ashkelon, The port of Ashdod listed in its daily working plan for the 19th May: 19 vessels which were under loading or discharging operations at the piers, 32 vessels located at the piers themselves, and about 50 vessels which were waiting on anchor outside the port. 17 of these were bulk carriers which arrived at Ashdod Port during 12-18 May 2021.

Whether are not for a vessel to call at an Israeli port during the period of 10-21 May 2021 could be considered as putting the vessel in danger according to a "war clause" either in a charter party or an insurance policy, will be determined by the location of the port itself, the manner in which the charterparty was concluded and the specific circumstances which would lead to the conclusion if a reasonable business man would consider the port as dangerous at that time. However, it seems that although being under continuous rounds of hostility and escalations with the

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Hamas controlling the Gaza Strip, still, considering the authorities, there can be no category determination if Israeli ports are or were "dangerous" due to "acts of war". This aspect, which seems to follow the shipping industry, will continue to be examined.

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Testing the Limits…Again. Will the UAE's Ratification of the LLMC 1996 Protocol Make the Difference? By Adam Gray & Omar Omar, Al Tamimi & Company (UAE)

Introduction

On 10 November 2020, the UAE ratified the 1996 Protocol to the Limitation of Liability for Maritime Claims 1976 by virtue of the Federal Decree No. 167 of 2020 ("1996 Protocol"). On 23 May 2021, the 1996 Protocol will come into force in the UAE. The purpose of the 1996 Protocol is to increase the per-ton limit of liability throughout all tonnage levels, resulting in higher compensation payable in personal injury or casualty incidents. The increases involved are significant uplifts on the Limitation of Liability for Maritime Claims 1976 ("LLMC 1976") regime.

Two years ago we wrote about the UAE's treatment and implementation of the LLMC 1976. You can read it here. In that article, we concluded that the UAE Courts will not constitute a limitation fund in the UAE, even if a limitation fund would ordinarily be constituted in other contracting States in the same circumstances. There are two reasons cited for this:

1. The Federal Transport Authority – Land & Maritime ("FTA") is the 'competent authority' entitled to constitute a fund as opposed to the UAE Courts; and

2. The FTA has not enacted a domestic legislative framework to facilitate the constitution of a limitation fund.

This has not changed in the last two years (the "Status Quo").

In view of the ratification of the 1996 Protocol, the obvious question remains whether the imminent application of the 1996 Protocol will make a difference to the Status Quo in the UAE. Will litigating parties to maritime disputes be able to avail themselves of the limitations of liability afforded by the 1996 Protocol, in part or in whole? This article explores two possible outcomes.

Comment

The future treatment and implementation of the 1996 Protocol in the UAE is far from clear. However, we anticipate that one of the following two outcomes is likely.

(1) No limitation fund, but implementation of the tonnage-linked limitation cap

It is our opinion that the Status Quo, in so far as it applies to the constitution of a limitation fund, will not be impacted by the entry into force of the 1996 Protocol. The corollary is that, until the UAE legislature enacts a framework for the constitution of a limitation fund, the 1996 Protocol will have no mechanism by which to implement such a fund.

The enacting UAE Federal Law does not provide for such a framework nor does it clarify whether the competent courts are the 'competent entity' for the purposes of setting up a fund. Therefore, parties commencing litigation in the UAE and seeking to rely on the 1996 Protocol could be unpleasantly surprised by this revelation once proceedings to constitute a fund

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are commenced. P&I insurers should also be mindful of this when advising their Members.

However, it does not follow that the absence of a facilitative framework for constitution of a limitation fund means that a party cannot rely upon the monetary, tonnage-linked, limitation of liability cap. The LLMC 1976 and the amending 1996 Protocol provides for both a limitation cap and the function of a fund but arguably they are stand-alone provisions. We see no reason why the UAE Courts should not apply the limitation of liability calculations under the 1996 Protocol, regardless of whether it, or any other competent authority, constitutes a fund.

Notwithstanding this, Al Tamimi & Company has been involved in one recent case in which the limitation of liability availed of by the ship owner in a collision claim was determined by application of the UAE Maritime Law, not the LLMC 1976. Reasons were not provided by the court and consequently it is unclear why the LLMC 1976 limitation regime was not applied to determine the amount of compensation due. To our knowledge, this specific legal issue is untested.

(2) No limitation fund and no tonnage-linked limitation cap

As mentioned above, our view is that constitution of a limitation fund will not be possible by virtue of the enactment of the 1996 Protocol alone. It is possible that the partial non-implementation of the 1996 Protocol may result in its entire non-application.

We surmise that the UAE Courts may presently adopt the view that the constitution of a limitation fund and the application of the limitation monetary caps are so intrinsically linked that the functions should either be applied together or not at all. In other words, 'no limitation fund, no limitation cap'.

It is further suggested that this judicial interpretation, if existential, may survive the entry into force of the 1996 Protocol. The implication of this is that the purpose of the 1996 Protocol would be entirely neutered. It is our view that the absence of a limitation fund should not preclude a party from limiting damages in accordance with the per-ton calculations. There is no apparent reason why the UAE Maritime Law should be utilised for the determination of limitation of liability whilst the LLMC 1976 and 1996 Protocol are ratified.

Conclusion

Owners and P&I Clubs will have a watchful eye on the judicial developments following 23 May 2021. Whether the UAE addresses the curious Status Quo that has impacted the implementation of the LLMC 1976 over the last 25 years since its adoption remains to be seen. The ratification of the 1996 Protocol presents an opportunity for the UAE to do so. The outcome will provide certainty for litigating parties as they go 'forum shopping'. It is also an opportune time to produce a legal framework for constituting a fund in order to extract the full benefits intended by ratification of the LLMC 1976 and 1996 Protocol.

However, we suspect that the 1996 Protocol will not materially change the judicial treatment of the maritime limitation regime. A welcome early development subsequent to its entry into force would be the testing of the applicability of the limitation monetary caps. This would assist the maritime legal community in understanding whether the 1996 Protocol has partial substance or not.

The UAE Ministry of Energy and Infrastructure has advised the maritime community that it will provide further guidance on the adoption of the 1996 Protocol, presumably prior to its entry into force. It is to be hoped that further light will then be shed on the intention for its implementation.

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Maritime Injunctions: An Alternative to Ship Arrest in Panama by Jorge Quijano, Quijano & Associates (Panama)

Nowadays with the economic crisis brought about by COVID-19, it has become a real challenge for creditors to succeed in the recovery of debts and damages, whenever the vessel or shipowner company, charterer, or operator opts for a different navigation route other than the Panama Canal or its territorial seas consequently the arrest is not an option.

Under this circumstance and because there are approximate 8,400 Panama Flagged Vessels, the Maritime Procedure Law of Panama ("Law 8 of 1982") also enables the possibility of filing a maritime injunction known as "**conservative measure** or **of protection**" to avoid title transfer, encumbrances, mortgages, deletion or change of flag provided the vessel is currently registered under Panama Flag. These injunctions can be filed either for *In Rem* claims against the vessel itself or *In Personam* against its owners, charterers, or operators.

The procedure is rather simple and fully enforceable at the Maritime Courts of Panama which have exclusive jurisdiction to bring to trial lawsuits **whenever the vessel involved is of Panamanian flag**, or Panamanian substantive law is applicable under the contract or by operation of Panamanian law, or the parties expressly or tacitly agree to submit themselves to the jurisdiction of the Maritime Courts of the Republic of Panama.

Based on the above, the plaintiffs have complete access to the Maritime Courts in Panama as a forum of convenience and are free to file an *In Rem* or *In Personam* claim with a conservative measure ("injunction") to guarantee or secure the outcome of the process, avoiding a change of ownership or flag by the defendant. Nevertheless, for the claim to be admitted and the injunction granted, the plaintiff must comply with the requirements outlined in Article 206 of Panama Maritime Procedure law described accordingly:

Power of Attorney or Petition to act as unofficial agent until formal POA is received;

Legal grounds or basis concerning possible title transfer, encumbrance, or change of flag on behalf of the defendant to avoid liability before a final judgment;

Certificate of ownership of the vessel issued by the Public Registry of Vessels of the Panama Maritime Authority;

Cash Guarantee in the amount of US$50,000 for damages once the injunction is admitted by the Maritime Courts.

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