HAVE YOU *EVER-GIVEN* THOUGHT TO MARITIME ARBITRATIONS?

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Maritime Arbitrations are not unique. The difference lies in the institutions that administer the arbitrations, the arbitrators and the parties involved. Institutions like the London Maritime Arbitrators Association (LMAA) or the Singapore Chamber of Maritime Arbitration (SCMA) cater to the field of Maritime Arbitration. These institutions have a specialized pool of Arbitrators possessing expertise from the technical, commercial and legal aspects of shipping.

What is most interesting about Maritime Arbitration is the variety of disputes that arise. Let's take the example of m.v. Ever Given, which ran aground in the Suez Canal in March 2021, to understand some of the disputes that could arise from such an incident.

m.v. Ever Given is a Suezmax Vessel[1] flying the flag of Panama. She was carrying nearly 20,000 containers when she ran aground. The Vessel had Japanese registered owners who had time chartered the Vessel to Evergreen, a Taiwanese Company. The crew employed were of Indian nationality, and the technical/ISM Manager of the Vessel was Bernhard Schulte, based in Germany (The facts mentioned in this article are simplified, assumed, not neccessarily accurate, and attempt to cover both potential Arbitrations & court proceedings).

So, what are some of the combinations of disputes that may crop up from this incident?

1. **Suez Canal Authorities v. Evergreen**
   If Evergreen was at fault for the grounding of the Vessel, the Suez Canal authorities could claim from Evergreen loss of business from the Canal, damage to reputation of the Canal and reward for the salvage of the Evergreen Vessel.

2. **Evergreen v. Suez Canal Authorities**

[1] Different sizes of Vessel, based on their total tonnage and size, are given different names- for example Aframax, VLCC (Very Large Crude Carrier), VLGC (Very Large Gas Carrier) etc.. "Suezmax" or "Panamax", as the name suggests, are built just to be able to pass through the Suez Canal or Panama Canal.

On the other hand, if the Suez Canal Authority was at fault, then Evergreen could claim for loss of reputation, business interruption, physical damage to the Vessel's hull, wrongful withholding of the Vessel (along with the cargo on-board), and seek an indemnity for the cargo claims which Evergreen may receive.

3. If it is found that the Vessel's steering/rudder systems were malfunctioning and was yet approved/overlooked by the Classification Society

3.1. *Suez Canal Authorities v. Classification Society*

The Vessel was permitted to ply through the Suez Canal as she was wrongly certified by the Class as being built and maintained in good order and condition. The Classification Society could argue that it owed no duty of care to anyone apart from their customers, i.e. the registered ship-owners.

3.2. *Evergreen v. Classification Society*

Evergreen may sue its Classification Society for its failure to point out of the defects in the Vessel.

4. If the Vessel's construction/repair/dry-dock yard had failed to properly install the Vessel's steering/rudder systems-

4.1. *Suez Canal Authorities v. Ship yard*

The Authorities could claim loss of business, damage to reputation, etc., from the Ship Yard.

4.2. *Evergreen v. Ship Yard*

Evergreen could claim loss of business, damage to reputation, indemnity for cargo claims, etc., from the Ship Yard. fascinate

5. **Disputes with the Salvors**

Salvage is a spellbinding concept unique to maritime law. If one voluntarily saves the property of another at sea, the person saving the property ('the salvor') will be entitled to a reward, proportionate to the value of the property saved.[2] Two internationally reputed

[2] Simon Baughen, *Shipping Law* (6th edn, Routledge 2015)

Salvors[3] worked together to render salvage services to m.v. Ever Given.

5.1. *Evergreen v. Salvors*

More generally, there are atleast two kinds of Salvage services- (a) "Pure Salvage" or Non-contractual salvage; and (b) Contractual salvage. The most interesting type of contractual salvage is the Lloyd's Open Form (LOF) Salvage[4]. The LOF Salvage is on a '*no cure-no pay basis'* and has no reward fixed. How does this work then if no price is pre-agreed? Once the salvage operations have been completed, the reward is either agreed and negotiated, or else determined by the Lloyd's Salvage Arbitration Branch. In arriving at the reward amount, the Salvage Arbitration Branch will look into the risk, skills, efficiency and degree of success of the salvage operations, promptness of the services rendered, the value of the Ship/Cargo salvaged, whether any steps were taken to protect the Ship/Cargo, etc. This kind of LOF Salvage exists for mainly two practical reasons- (a) It is difficult to ascertain the amount of work that may be required to Salvage the Vessel/Cargo- since most of the facts required for analysis may be inaccessible/underwater; and (b) There is little time for negotiations since there is an ongoing maritime emergency to be resolved. The aim is to get on with the job, resolve the distress situation at the earliest, and have the reward later determined by a neutral arbitral forum. There is scope for disputes on the quantification of the salvage reward by the Lloyd's Salvage Arbitration Branch.

5.2. *Salvor v. Sub-Contractors/Tug-Owners*

The Salvor will not have readily available tugs, pumps, earth-moving equipment, man-power at every part of the world where an incident may occur at an unknown time. The Salvors would take the assistance of locally available tugs, powerful boats, ropes to complete the Salvage work. Disputes could arise between the salvors and their sub-contractors.

5.3. *Crew Members v. Evergreen*

The Vessel's Crew might have a Salvage Claim if they undertook some risk and exercise that fell beyond the course of their regular employment and which

[3] SMIT Salvage and Nippon Salvage.

[4] Council of Lloyds, LOF-20 Lloyd's Standard Form of Salvage Agreement <https://assets.lloyds.com/assets/pdf-lloyds-open-form-lof-lof-2020/1/pdf-lloyds-open-form-lof-LOF-2020.pdf> accessed 26 March 2022

substantially contributed to the Vessel's re-floatation.

6. **Cargo-interests v. Evergreen**

   Being a container vessel, m.v. Ever Given would have had thousands of Shippers/cargo interests- each of whom would have been issued a Bill of Lading (BL) for the Cargo they loaded on-board the Vessel. Every BL is a contract of carriage between the Carrier / Vessel and the Shipper. With the Vessel running aground, each container would have either suffered from a delay claim or damage claim (if perishable).

7. **Cargo-interests v. Suez Canal Authorities**

   If it is found that the Suez Canal Authorities were at fault for the incident, the Cargo-interest could have a potential claim in tort for negligent navigation channel maintenance.

8. **Cargo-interest v. Cargo underwriters**

   Each Cargo-interest would have taken a Marine Cargo Insurance Policy for its Cargo. If the Cargo was damaged, lost in transit, mis-delivered, the marine insurance contracts will be enforced. Disputes could arise on whether the Cargo is a total loss, whether the Cargo has a re-sale/salvage value, etc.

9. **Cargo Underwriter (Subrogees) v. Suez Canal Authority**

   If the Cargo underwriter settles the claim of the Cargo-interest, then the Underwriter (in the capacity of a subrogee) may have an action in tort against the Suez Canal Authorities, in the same way as a Cargo interest/assured would have had.

10. **Cargo Underwriter (Subrogees) v. Evergreen**

    The Cargo Underwriters, as Subrogrees, could also have a claim under the BLs against Evergreen for negligent navigation by the Vessel's crew.

11. **Cargo Underwriter (Subrogees) v. Vessel registered Owners**

    Since the Vessel's crew are employed by the registered Owner, the Cargo underwriters could have a claim in tort against the registered owners of the Vessel.

12. **Subsequently delayed Vessels v. Suez Canal Authority/Evergreen**

Several ships in the northbound and southbound of the Suez Canal were delayed or had to take a much longer route around the Cape of Good Hope because of the Ever Given blockage incident. Owners and the Cargo-interests of those Vessels may have a potential claim for consequential losses against the Suez Canal Authority, Evergreen or the registered owners of the Vessel.

13. Buyers of the cargo on-board v. Sellers

Goods loaded into every container would have had a buyer and seller. The delay in the delivery of the goods may have led to disputes under the sale contract, with Buyers looking to claim the losses they suffered due to the delay in the receipt of the goods.

14. Disputes on General Average

In the case of m.v Ever Given, the Owners of the Vessel were declared General Average. General Average is when the Master / Owner voluntarily incurs an extraordinary expense for the protection & preservation of the Vessel and the goods on board. The expenses incurred by the Shipowner must be proportionally borne by all parties who have undertaken the "common maritime adventure" (vessel owners, cargo interests, charterers) in the ratio of the value of all the properties that have been saved. General Average Adjustors are appointed, and a complex formula is drawn to arrive at each party's proportion of contribution. Potential disputes may come up regarding the General Average Adjustor's assessment of each party's contribution.

15. Disputes on the cause of grounding of the Vessel

There will be multiple forums and potentially multiple arbitrations adjudicating disputes arising out of the incident. Every forum may have to look into the causes of the Vessel's grounding. Parties to these disputes stand the risk of repeating expensive evidence, high legal fees, and multiple experts & surveyors attempting to arrive at the cause. Contradictory conclusions of the cause may lead to arbitral awards being challenged.

16. Evergreen v. Hull Underwriters

Every Vessel takes a Hull & Machinery Insurance and a P&I Insurance. If the Vessel sustains physical damage/machinery failure, Evergreen will have a claim against its Hull underwriters.

17. **Evergreen v. Registered Owner of the Vessel**

Evergreen, as charterers, could potentially have two heads of claim against the Owners-

17.1. *Disputes re. the competency of the Crew/Vessel Seaworthiness*

Allegations were cast upon the Master of m.v. Ever Given of incompetence. Incompetency of master/crew could render the Vessel "unseaworthy". This is a ground for the Charterer to terminate the Charterparty. In the case of "*The Eurasian Dream,"*[5] the QB Division of the EWHC held that the Vessel lacking proper fire equipment and the crew lacking fire-fighting skills would render a Vessel unseaworthy. In the case of m.v. Ever Given, it has not been proven that the Master/Crew were incompetent, but it exposes a possible avenue for disputes.

17.2. *Disputes re. Hire payments*

Evergreen, as the Charterer, may argue that the Vessel was off-hire during the period the Vessel was stuck in the Suez Canal. The Owner may argue that the Vessel remained on-hire throughout. This may ultimately lead to disputes on the total hire payable under the Time Charterparty between Evergreen and the Owners.

Given the multitude of parties involved, principles of conflict of laws will be tactically played out in determining liabilities. Disputes will be complex, challenging and require efficient strategizing. We hope that the limited information given in this article sparks an interest in every reader to delve deeper into shipping disputes and encourages students into a career in this exciting branch of law.

[5] *Papera Traders Co Ltd and others v Hyundai Merchant Marine Co Ltd and Another* (The "*Eurasian Dream*") [2002] EWHC 118 (Comm)