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## Ever Given: Advice For Those Affected By Its Grounding In The Suez Canal



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The container vessel “Ever Given” grounded in the Suez Canal at about 0540 UTC on 23 March 2021 as it was transiting northbound through the canal en-route to Rotterdam, Netherlands. Thankfully all the crew are safe and accounted for and there have been no reports of pollution or cargo damage.

Efforts are currently underway to safely re-float the vessel and to allow marine traffic in the Suez Canal to resume but in the meantime a sizeable backlog of vessels waiting at either end of the Canal has built up and others are considering whether to re-route around the Cape of Good Hope.

In this article, we will briefly aim to address some of the immediate questions that Members may have if they are affected by the grounding of the “Ever Given”.

## Deviation

The carrier contracts to transport cargo from the place of delivery or loading to the place of discharge or delivery and is obliged to proceed with due dispatch on the usual route without any unreasonable deviation or delay. If this route is blocked such as in the case of the “Ever Given” grounding a deviation can arise where the vessel geographically departs from the usual route to arrive at the intended destination.

The Hague Visby Rules say that:

“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”.

Different jurisdictions have different interpretations, and this leads to uncertainty. The consequences of an unreasonable deviation may be loss of rights and limitations under Hague Visby Rules and, potentially, the loss of P&I cover for any amounts over and above those that would have been payable if those rights and limitations had been maintained.

In our view, deviating from the geographical route of transiting through the Suez Canal due to a vessel aground is not a deviation for their own operational and commercial benefit, but to prosecute the voyage safely and effectively. There is therefore prima facie no breach per se of the contract of carriage. We have therefore agreed in principle to hold our Members covered without any additional premium where Members vessel have had to deviate (for example around the Cape of Good Hope) to arrive at their intended destination. The circumstances of each deviation and contract of carriage are different however and Members must therefore consult with their usual Club contacts prior to any deviation in the normal manner.

## Claiming for delay

Members with vessels affected by the grounding and blockage may naturally question whether they can bring a claim for the financial consequences of that delay.

We briefly outline the legal basis upon which a non-contractual party may seek to bring a claim against the owners of the blocking vessel and/or the Suez Canal Authority for losses and damages occurred as a result of the canal blockage.

The Suez Canal Authority “SCA” is a public authority that enjoys a body corporate and holds all authority in the management of the Suez Canal without any restriction by the governmental systems.

The SCA has the sole powers in the issuance of the rules of navigation in the Suez Canal as well as the relevant regulations related to organizing traffic within the Suez Canal.

In light of the Rules of Navigation, transit through the Suez Canal is permissible to vessels of all nations subject to compliance with the conditions set out in the Rules of Navigation and any applicable circulars, provisions of the International Regulations for SOLAS, I.M.D.G. code if carrying dangerous cargo, MARPOL 73/78, as well as the provisions of the International Regulations for Preventing Collisions at Sea (COLREGS) and all laws, orders, and regulations issued by the Egyptian Government.

Pursuant to the Rules of Navigation, the SCA reserves the right to refuse access to the canal water where vessels may be considered as dangerous or troublesome to navigation in the Suez Canal.

By the sole fact of using the Suez Canal water, masters and owners of vessels bind themselves to accept all the conditions of the said Rules of Navigation.

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## Responsibilities in accordance with laws and rules in Egypt:

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As we see in most port authorities' rules and regulations, the Rules of Navigation are broad enough to suggest excluding the SCA and its employees from any responsibilities that may arise during the canal transit and/or navigation within its territorial waters. However, the Rules impose strict liabilities on owners or operators of a vessel causing loss and damage to SCA and/or third parties.

Article 4 of the Rules of Navigation suggests that, responsibilities for damages and consequential loss caused directly or indirectly by any vessel is to be held solely on owners, operators, and/or charterers of such vessel unless it is proved that this damage was not made on purpose, or by mistake or negligence.

Similarly, Article 80 of the Egyptian Maritime law suggest that owners and operators of a vessel shall bear civil liability for errors of the master, crew, pilot and any other person in the service of the vessel, whenever committed by them during the performance or by reason of their duties. Such action is deemed to be a claim in tort that would derive from the general principle of vicarious liability.

Article 163 of the Egyptian Civil Law stipulates that: *"Any mistake that caused harm to others requires compensation."* Such article is widely applicable by Egyptian courts for establishing legal grounds in most claims in tort.

The Master, being a proxy of owners, is under certain legal duties while commanding his vessel, including but not limited to maintaining his command and supervision of his vessel when entering or exiting ports, canals, rivers or while passing sea lanes, even in circumstances of mandatory pilotage, to ensure that all safety and navigational requirements are complied with.

### SCA Exemption of liabilities:

It is expressly provided in Article 11 of the Rules of Navigation, during the mandatory pilotage, that the pilot is not to be held responsible for any damages sustained during transit owing to his advices since the master or his deputy is solely responsible for the ship.

Furthermore, Article 59 of the rules suggests that when a vessel runs aground, Suez Canal Officials are alone empowered to order and direct all operations required to refloat the vessel. Nonetheless, the master remains responsible for all damages or accidents of any kind which may be the direct or indirect consequence of the grounding.

### Temporary delaying of vessels:

By virtue of Article 5 of the Rules of Navigation, the Canal Authority may delay a vessel for the purpose of investigating any claim that may arise, or due to traffic conditions or for technical surveys or for any reason the SCA deems necessary

for safety of the ship and navigation until, in the opinion of Canal Authority, the vessel's stability, trim, list, cargo, hull and machinery have been put into such condition as will make the vessel reasonably safe for her passage through the Canal.

Under such circumstances, SCA shall not accept and/or consider any claim for damages arising out of the temporary delay.

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## Charterparty/contractual issues

Incidents like this one inevitably give rise to questions as to the rights and liabilities of owners and charterers as a result of delays in performance.

We outline below the position under English law regarding the relevant provisions under a charterparty that may afford various contractual protections to owners and charterers as a result of the canal blockage.

The legal position of the parties with reference to the protections outlined in this circular will vary on a case-by-case basis depending on the specific contract in question and the facts.

Members should therefore carefully assess each contract and seek the further guidance of the Club where necessary.

The relevance of the below contractual/common law protections will crucially depend on the objectives of charterers and/or owners, the most important being whether they wish to continue operating the vessel under the charterparty.

Where the vessel is currently located and whether performance is still possible will also determine the relevance and success of invoking any of the below protections.

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## Cancellation

Turning first to charterparties which have been agreed but which are yet to be performed, it is common for both time and voyage charterparties to contain cancelling clauses, which give charterers the right to cancel if a ship is not ready for delivery by the specified cancelling date. These clauses are likely to come into play in relation to many of the vessels that are currently held up as a result of the grounding of the EVER GIVEN.

In relation to voyage charters, charterers should be mindful of the fact that where they do not exercise a right to cancel the charterparty it will remain binding on both parties. In that regard, charterers will be bound to load a cargo within the laydays and may be liable for demurrage should they fail to do so.

English law does not permit for charterers' anticipatory right to cancel – accordingly, where it may be apparent that owners are unlikely to deliver a vessel by the cancelling date, charterers must proceed cautiously. To cancel prematurely may constitute an anticipatory repudiatory breach, which if affirmed by owners could give rise to substantial damages, provided that owners can subsequently show that they would have reached the delivery location by the cancelling date. If however owners would not have made the cancelling date, they may only be entitled to nominal damages.

In the present circumstances, where it is not clear how long a vessel may be delayed or whether or not it will make the cancellation date, the parties must proceed with caution. Charterers may seek to make arrangements in respect of substitute vessels. They may also seek to obtain confirmation from owners as to whether they anticipate being able to comply with the charterparty.

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## Force Majeure

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Many parties may instead seek to identify the grounding and blocking of the canal as a force majeure event or may be on the receiving end of a notice of force majeure from their counterparty.

A force majeure clause is one that entitles one or both parties to cancel the contract or be excused from or otherwise amend the terms of performance of the contract (for example, suspension or extension of performance) following a certain event that is outside a party's control. In most cases, the clause will require the force majeure event to have an impact on a party's ability to perform the contract.

Since English common law does not recognise this principle, the charterparty must contain a force majeure clause and the wording of that clause must be analysed carefully to determine whether it covers the specific event in question, i.e. canal/waterway blockages and/or closures. If the clause does not cover the specific event, force majeure will not be successfully invoked. Therefore, its success largely depends on the wording of the clause.

Finally, it is important to note that a party invoking force majeure must do its utmost to minimise the delays and mitigate any economic losses or other damages caused by the canal blockage.

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## Frustration of Contract

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If the charterparty does not contain a broad force majeure clause, then frustration of contract may take effect. Frustration is when a supervening event occurs after the contract has been entered into, which is outside of the control of the parties, and makes the contractual obligations impossible/incapable of being performed because the circumstances in which performance would take place is so radically different from what was originally intended/envisaged under the contract. To rely on this doctrine, the parties must have not expressly made provision for the specific event in the contract.

Frustration under English law is difficult to satisfy; therefore, it depends on a true construction of the charterparty's terms in light of the nature of the contract in addition to certain circumstances that will be taken into account.

A key consideration is whether the contract is impossible to perform. A contract will not be frustrated where an alternative method of performance is capable and where there is no significant difference from performance originally intended, e.g. changing course of passage and heading for the Cape of Good Hope instead (even if it becomes more difficult, expensive or inconvenient). One exception to this might be if the particular route taken is the only route allowed under the charterparty. Delay in some circumstances may frustrate the charterparty, but it usually needs to be substantial so as to render performance as being radically different from what was intended under the charterparty. It is therefore a high threshold to satisfy under English law and may only be successfully invoked in limited circumstances.

Consequently, frustration automatically brings the contract to an end and the parties are absolved of their future contractual obligations. However, the contract is not dissolved, i.e. the parties are not restored to their pre-contractual position as if the contract never existed. Therefore, any obligations arising before the time of frustration are still bound to be performed by the relevant party.

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## Specific Considerations - Time Charters

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Where a vessel is unable to perform the charterparty due to the canal blockage, charterers may consider whether the vessel can be placed off-hire for any time lost. Charterparties often contain tailor made off-hire provisions. These should be considered in detail to ascertain whether a vessel may be placed off-hire by charterers in the present circumstances.

This is not likely to be possible through operation of the ordinary off hire provisions to be found in the standard forms, which address time lost by reason of a cause, intrinsic to the vessel, that prevents its full working.

The success of invoking an off-hire clause again needs to be assessed on a case by case basis depending on the specific facts of the case. However, it is clear that a vessel that is able to reroute but incurs delays in doing so is unlikely to be placed off-hire.

In circumstances where no such off-hire clause may apply and charterers must continue to pay hire with little insight as to how long the present situation may continue, they must carefully consider whether they should be giving the vessel alternative instructions.

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## Specific Considerations - Voyage Charters

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In the absence of express contractual provisions that provide otherwise, owners/carriers are under an implied obligation to proceed upon the voyage without unnecessary deviation in the usual and customary course. Owners are under a further obligation to proceed with reasonable despatch.

Where carriers are faced with a voyage that would ordinarily transit the Suez Canal, they must now consider the above obligations and whether a deviation in the circumstances may be permissible, if the vessel is still in a location where it may be possible to adopt an alternative route. However, in circumstances where the deviation is not justified, it may be considered to be a breach of a condition of the charterparty in respect of which charterers may elect to rescind or affirm the charterparty. Some charterparties contain specific clauses, which give the vessel the liberty to intentionally change its route under specified circumstances:

### 1. BIMCO Stoppage of Canals and Waterways Clause

This clause permits owners to adopt an alternative route if, before sailing from the load port, it appears that the vessel would be delayed for a specified number of days beyond owners' control if it were to proceed through a specific waterway (expressly including the Suez and Panama canals). The owners are then permitted to require charterers to declare the voyage to be performed by an alternative route as selected by the Master and that freight shall be increased proportionately.

If the delays become apparent after the vessel has sailed from the load port or charterers fail to make the above declaration, owners may instruct the Master to discharge the cargo at the nearest safe port in fulfilment of the charterparty. In both circumstances owners are to have a lien over the cargo for any freight and discharging costs.

### 2. BIMCO Liberty and Deviation Clause

This clause provides for the vessel to have liberty to deviate for any reasonable purpose. Where requested by charterers, such deviation is to be at owners' discretion and charterers must indemnify owners in respect of any claims arising out of the deviation.

When considering any deviation, parties should refer to the P&I Cover they have in place and whether it would cover the alternative route proposed.

Should the charterparty not contain a deviation clause or the clause is not drafted widely enough to include the such event, charterers may wish to simply approach owners for permission to deviate from the route specified in the charterparty.

If no agreement is reached between the parties, the charterer may instead rely on "reasonable deviation" under the Hague Visby Rules ("HVR"), Article IV, rule 4 (if HVR are incorporated into the charterparty). Crucially, the deviation must be for the benefit of all parties concerned and not just for the exclusive benefit of one party seeking to rely on it.

In circumstances where owners are found to have deviated unjustifiably and charterers have elected to rescind the contract, owners are no longer entitled to their contractual rights to freight, demurrage, deadfreight or general average contribution following the deviation. That being said, owners may be entitled to receive a *quantum meruit* (i.e. a fair price for the service provided) for the carriage of the cargo, though this will depend on the specific facts of any case.

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## Final considerations

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When considering any of the above protections, members should take into account the following:

- **Notice:** When invoking a particular clause, a party must carefully check whether a notice is required under the charterparty and when it must be served by. Some clauses contain stringent conditions that need to be complied with for the relevant clause to be effective.
- **Mitigation:** owners and charterers must work together cooperatively in order to find solutions, where possible, that can mitigate any losses or delays caused by the event.
- **Gather evidence:** It is important for parties to collect all contemporaneous documents and all communications related to the event in order to demonstrate the mitigation steps taken and extent of losses suffered should the matter result in a dispute later down the line.

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## Get in Touch

The Club is on hand to assist Members with any queries resulting from the blockage of the Suez Canal and is happy to provide further guidance and advice.

The Managers are extremely grateful to Stephenson Harwood for their assistance in the preparation of this advice.