THE EVER GIVEN: POTENTIAL LIABILITIES AND INSURANCE COVER

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In March 2021, the Suez Canal was completely blocked for six days when the Ever Given ran aground. The incident obviously gave rise to several liability and insurance issues. This contribution discusses the insurance coverage of the hull damage suffered by the Ever Given, the argument as to whether or not a salvage agreement had been concluded and the insurance coverage for the resulting salvage awards, whether there is liability for delay in the sea carriage of goods, and the potential impact of the general average that was declared by the owner of the Ever Given.

***Keywords**: salvage; carriage of goods by sea; Hague-Visby Rules; delay; general average.*

1. INTRODUCTION

On 23 March 2021, the Ever Given ran aground in the Suez Canal, completely stopping all traffic for six days. The first priority, of course, was to refloat the vessel. Negotiations between the owners of the Ever Given (and their insurers, no doubt) and the salvors ensued, but were apparently inconclusive enough to give rise to legal proceedings as to whether a binding agreement had been concluded between them or whether the salvors were free to pursue a salvage claim. The physical damage to the Ever Given itself was apparently limited, but could still raise insurance issues. Furthermore, the owners of the Ever Given declared general average, a maritime law technique to recover part of the losses from cargo interests. For the latter, the question then becomes whether they can turn to their insurers or whether they have to bear this (unexpected) liability

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themselves. Finally, even if many cargoes ultimately did not suffer damage or loss, they were in any case substantially delayed. Is there liability for delay in ocean carriage, and is there insurance cover for delay?

Even though the number of legal proceedings that were actually started seems to have been limited, the Ever Given incident reminded maritime lawyers that, notwithstanding the wealth of reported cases, there are still issues to which the answer is not (immediately) clear. This contribution analyses a number of these issues, primarily from an English law perspective, but also taking into account other legal regimes where relevant.

2. DAMAGE AND LIABILITY

2.1. Hull and Other Damage to the Ever Given

For the Ever Given itself, the damage apparently remained limited to its bulbous bow, a section of which had to be renewed in drydock. Such damage is typically covered under a Hull & Machinery (H&M) policy.

Hull policies can be either "named perils" policies (e.g. the Institute Time Clauses Hulls (ITCH) or the International Hulls Clauses (IHC))[1] or "all risks" policies (e.g. the French or German hull policies[2]). Hull damage caused by a grounding of the vessel would clearly be covered under an "all risks" hull policy, and generally also under "named perils" policies, the damage being caused by "perils of the seas, rivers, lakes or other navigable waters".[3]

The repair of hull damage will often require the drydocking of the vessel (as was the case with the Ever Given), which in itself entails additional costs. The damaged vessel needs to travel to a suitable drydock, may need to be emptied of cargo and/or fuel or be gas-freed, and there will be (daily) fees for the use of the drydock, etc. To the extent that such costs are reasonably necessary to repair the vessel, they are recoverable under the hull policy.[4]

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1 These clauses can be found on the website of the International Underwriting Association of London, www.iua.co.uk (accessed 20 April 2025).

2 French hull policy: *Police Française d'Assurance Maritime sur Corps de Tous Navires*; German hull policy: *DTV – Allgemeine Deutsche Seeschiffsversicherungsbedingungen 2009 (DTV-ADS 2009)*.

3 Clause 6.1.1 ITCH 1983/1995, Clause 2.1.1 IHC 2003.

4 See for example Section 69(1) of the UK Marine Insurance Act: "Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs (...)".

2.2. Liability

It is, of course, easy to see that the grounding of the Ever Given and the resulting blockage of the Suez Canal may give rise to multiple liability claims by different parties – the Suez Canal Authority (SCA) for physical damage caused to the canal and for commercial losses, the Government of Egypt, the owners and operators of other ships that incurred substantial delays, etc.

Such liability claims are the province of the P&I Clubs which provide cover against different types of liability.[5] It should be noted that for EU-flagged vessels and vessels calling at EU ports, insurance covering the owners' liability for maritime claims within the scope of the Convention on Limitation of Liability for Maritime Claims (LLMC, 1996) and up to the limits of that Convention is mandatory.[6] Liability for collisions (contact between vessels, often referred to as the Running Down Clause (RDC)[7] cover) and liability for contact with fixed and floating objects (FFO) can be covered either under the shipowner's P&I or H&M policy. The decision on where to place the RDC and the FFO liability will be influenced by the levels of deductibles (mostly higher under H&M policies) and whether or not the leading H&M underwriter is prepared to provide security on behalf of all the other H&M underwriters involved. The advantages of placing the RDC and FFO liability with a P&I Club are the availability of 100% security capacity by one and the same Club and the specialised knowledge of dealing with liability claims.

3. THE SALVAGE OPERATION

3.1. Payment for Salvage Services

After six days of blocking the Suez Canal and several earlier unsuccessful attempts, the Ever Given was finally pulled free by Smit Salvage (hereinafter: Smit) on 29 March 2021. Given the very broad definition of "salvage operations" in Article 1(a) of the International Convention on Salvage, 1989, (any act or activity undertaken to assist a vessel or any other property in danger in navigable

[5] International Group (IG) P&I Clubs are mutual associations. Today, P&I cover (though with lower limits) can also be obtained from commercial (non-IG) insurance companies.

[6] Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims, OJ L 131, 28.5.2009.

[7] This clause is also known as the 3/4ths Collision Liability Clause and provides, in general, that the hull policy will cover not only damage to the insured vessel, but also 3/4ths of the collision liability incurred by the insured vessel.

waters or in any other waters whatsoever), it is clear that the assistance provided by Smit to the Ever Given was indeed "salvage" within the meaning of the International Convention on Salvage, 1989, thus in principle entitling Smit to a salvage award.

The International Convention on Salvage, 1989, which has been ratified by 77 countries (including Egypt), is not mandatory, though. Article 6.1 of the International Convention on Salvage, 1989, explicitly allows the parties to come to a different agreement than that provided in the International Convention on Salvage, 1989. Parties are, for example, free to agree a fixed rates or tariffs for the service to be provided by the salvor.

In the Ever Given case, the owners and their H&M insurers argued that they had concluded a binding agreement with Smit as to the scope and, even more importantly, to the remuneration payable for the latter's services, based on SCOPIC (Special Compensation P&I Clause) tariffs.[8] Such remuneration would have been significantly lower than the salvage award Smit could potentially claim under the International Convention on Salvage, 1989, which would take into account the value of the ship, the cargo on board, etc. (Article 13.1 International Convention on Salvage, 1989). If indeed such an agreement had been concluded, it was undisputed that this would exclude a salvage claim under the International Convention on Salvage, 1989.[9] Smit, on the other hand, argued that, although there had been negotiations and the parties had indeed reached an agreement on certain points, no binding contract had by then come into being,[10] leaving them free to pursue a salvage claim under the International Convention on Salvage, 1989.

After the Ever Given ran aground on 23 March 2021, the owners and their insurers immediately contacted Smit. Just after midday on the next day, 24 March 2021, Smit sent the owners a detailed commercial proposal, as requested by and agreed with the owners on a daily hire basis. Earlier that day, Smit had suggested and recommended a Lloyd's Open Form. One of the reasons for the owners' preference may have been that the SCA was considered the main salvor, and that Smit would "only" be engaged to assist the SCA. The contract itself would be on a Wreckhire 2010 Form, amended as necessary. During the afternoon of

[8] *Smit Salvage BV v Luster Maritime SA (The Ever Given)* [2023] EWHC 697 (Admlty) (King's Bench Division (Admiralty Court), 30 March 2023), para. 11.

[9] *Ibid*., para. 7. See also *Smit Salvage BV v Luster Maritime SA (The Ever Given)* [2024] EWCA Civ 260 (Court of Appeal, 19 March 2024), para. 9.

[10] *Smit Salvage BV v Luster Maritime SA (The Ever Given)* [2023] EWHC 697 (Admlty) (King's Bench Division (Admiralty Court), 30 March 2023), para. 20.

24 March, operational communication took place between the parties, but there was no (formal) acceptance of the commercial terms proposed by Smit. In the morning of 25 March, Smit insisted on receiving "some kind of assurance" before ramping up their mobilisation efforts. In the late evening of 25 March, Smit sent a somewhat revised commercial proposal and a draft detailed Wreckhire wording to the owners. The remuneration terms were finally agreed shortly before noon on 26 March, with both parties agreeing that they still needed to "iron out" the draft Wreckhire agreement so that it could be signed as quickly as possible. The next day (27 March) was spent on other issues, and it was only on 28 March that the owners finally provided their comments and quite significant amendments to the draft Wreckhire. Smit replied the same day that they could not accept most of the proposed amendments. As the Ever Given was successfully refloated early in the afternoon of the next day (29 March), the negotiations did not progress further and no formal contract was ever signed.[11]

The owners, however, argued that a binding contract had come into being on 26 March, as on that day the parties had an agreement on the essential terms of the contract and intended to be bound by it, even though the detailed text of the contract (on the basis of the Wreckhire Form) still needed to be worked out.[12]

The Admiralty Court, however, found for the salvors, holding that no binding contract had come into being, thus leaving Smit free to pursue a salvage claim under the International Convention on Salvage, 1989.[13] Justice Andrew Baker held that it was clear in this case what the parties had agreed (and what they had not yet agreed),[14] and that the case turned on the question of whether, on 26 March, the parties had intended to be bound once they had reached an agreement on the remuneration. The burden of unequivocally proving that such intention existed lies with the owners.[15] After a careful analysis of the communications between the parties, Justice Baker found that the owners had not carried their burden of proof.[16]

The negotiating parties can, of course, make it explicit that they will only consider themselves bound once a formal contract has been signed, by using

[11] *Ibid*., paras. 42-71.

[12] *Ibid*., para. 11.

[13] *Ibid*.

[14] *Ibid*., para. 29.

[15] *Smit Salvage BV v Luster Maritime SA (The Ever Given)* [2024] EWCA Civ 260 (Court of Appeal, 19 March 2024), para. 71.

[16] *Smit Salvage BV v Luster Maritime SA (The Ever Given)* [2023] EWHC 697 (Admlty) (King's Bench Division (Admiralty Court), 30 March 2023), paras. 100-102.

phrases such as "subject to contract", "subject details", and similar wording, but such language is not necessary if it is clear from the parties' conduct that they did not intend to be bound there and then.[17] The fact that, at a certain point, Smit had threatened to "stand down" unless an agreement was reached did not prove that the parties had already intended to be bound once agreement on remuneration was reached. It is quite possible that this agreement on remuneration was sufficient progress for Smit to continue its involvement, all the more so since a full agreement on all material issues was expected shortly thereafter.[18] The fact that Smit had already undertaken work and had chartered in two expensive tugs was not considered sufficient proof either. It is not unusual for salvors to take a financial risk and to spend money, even though no contract has been agreed by then.[19] Finally, the court underlined that, even if contracts are negotiated more rapidly in situations of urgency, the need for clarity and unambiguity remains unchanged. Even in the case of urgency, there is no contract if it is unclear that the parties intended to be bound "there and then".[20]

This decision was later confirmed by a unanimous Court of Appeal.[21]

3.2. Insurance Cover

Article 13.2 of the International Convention on Salvage, 1989, provides that the salvage reward shall be paid by the salved vessel and by the other property interests (such as cargo interests) in proportion to their respective salved values.

3.2.1. The Owner's Perspective

(Non-contractual) salvage awards and (contractual) salvage remuneration are typically covered under the H&M policy. The well-known UK Marine Insurance Act 1906 provides that salvage charges are in principle recoverable, unless the policy states differently (Section 65). Salvage expenditures are often mentioned in connection with general average,[22] as it may well be possible for the

[17] *Ibid*., paras. 79-80.

[18] *Ibid*., para. 76.

[19] *Ibid*., paras. 46 and 47.

[20] *Ibid*., para. 83.

[21] *Smit Salvage BV v Luster Maritime SA (The Ever Given)* [2024] EWCA Civ 260 (Court of Appeal (Civil Division), 19 March 2024).

[22] Clause 11 of the ITCH 1983, Clause 10 of the ITCH 1995, Clause 8 of the IHC 2003, Clause 1.1.3 of the French hull policy *(Police Française d'Assurance Maritime sur Corps de Tous Navires)*.

owner to declare general average to recover part of the salvage expenditures from the other interests. The vessel's (and thus the owner's) own contribution to the general average adjustment will then be covered under the H&M policy. If the owner does not, or cannot, declare general average, the salvage expenditures may be covered as such, or, alternatively, may be considered a form of sue and labour expenses. In order to be recoverable from the insurers, however, the salvage expenditures must in any case have been incurred in avoiding, or trying to avoid, a peril insured against.

It is to be noted, however, that special compensation under Article 14 of the International Convention on Salvage, 1989, or under a contractual alternative such as SCOPIC and wreck removal costs are often excluded from the H&M cover. These expenditures are part of the P&I cover.

3.2.2. Cargo Interests

Cargo insurance typically also covers the (contractual or non-contractual) salvage charges owed by the cargo owners (Clause 2 of the Institute Cargo Clauses A, B and C, Article 6.3 of the French cargo policy[23]). Under the Institute Cargo Clauses B and C, which provide named perils cover, salvage charges are insured when incurred to avoid or in connection with the avoidance of loss from any cause, except those causes explicitly excluded in Clauses 4 to 7.

The Belgian, Dutch and German cargo policies do not mention salvage charges specifically, but do provide cover, in general, for the costs to avoid or minimise insured losses.[24] The German market also offers a specific Salvage and Debris Removal Clause.[25]

4. DELAYED CARGO

4.1. Liability

Both the cargo on board the Ever Given itself and the cargo on board the many vessels that had to wait until the canal was reopened were seriously delayed. The Hague and Hague-Visby Rules do not address the issue of delay,

[23] *Police Française d'Assurance Maritime sur Facultés (Marchandises).*

[24] Article 10 of the Belgian *Goederenverzekeringspolis van Antwerpen*, Article 3.2 of the Dutch *Beurs-Goederenpolis*, Article 2.3.1.2 of the German *DTV-Güter 2000/2011.*

[25] *Bergungs- und Beseitigungsklausel*, the wording of this and other clauses, in German and in English, can be found at www.tis-gdv.de (accessed 20 April 2025).

which is hardly surprising given the unpredictability of shipping in the days the original Hague Rules were drafted. The later conventions – the Hamburg Rules and Rotterdam Rules – do include provisions on liability for delay, similar to the delay provisions in other carriage conventions.[26] Article 5 of the Hamburg Rules makes the ocean carrier liable for delay, which is defined in Article 5.2 as goods not having been delivered at the port of discharge within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case. As is common,[27] a written notice (within 60 days of the date of delivery) is required to hold the carrier liable. Under the Rotterdam Rules (currently not in force), remarkably, there is only delay if a time for delivery has been agreed (Article 21).

It could be argued that the silence of the Hague-Visby Rules on delay means that carrier liability for delay is excluded under these Rules.[28] The majority view, however, is that delay is simply omitted from the Rules but not excluded by the Rules, and that it is for the applicable national law to determine whether or not and under what circumstances an ocean carrier can be held liable for delay in delivering the goods.[29]

It is clear that, from a commercial or economic point of view, the cargo on board the Ever Given and the other vessels was significantly delayed. It does not automatically follow, however, that there was also delay in the legal sense of the term, and thus potential liability of the carriers involved. If a specific time for delivery had been agreed, the vessels that were held up by the blockage of the Suez Canal would most likely have overshot this agreed delivery date, thus incurring delay in the legal sense. In ocean carriage, however, agreed delivery times are

[26] Definition of delay ("transit period" in CIM) and liability: Articles 19 and 17.1 CMR (road carriage), Articles 16 and 23 § 1 CIM (rail carriage). Liability only, no definition: Article 19 Montreal Convention (air carriage), Article 16.1 Budapest Convention (CMNI) (inland waterways carriage).

[27] Article 30.3 CMR, Article 47 § 2 (c) CIM, Articles 31.2 and 31.4 Montreal Convention, Article 23.5 Budapest Convention (CMNI).

[28] Compare Naboush, E., The Carrier's Liability for Delay under UAE Maritime Law, *Arab Law Quarterly*, vol. 34 (2020), no. 3, p. 296, "Regarding the Hague/Hague-Visby Rules, provisions on delay are not expressly given. Therefore, whether their intention is to exclude all liabilities for delay or to leave the matter to the national law in each contracting state, is not definitive".

[29] See, for example, Stevens, F., De overeenkomst van zeevervoer, in: Poelmans, A. (ed.), Overzicht van rechtspraak vervoersrecht (2013-2020), *Tijdschrift voor Privaatrecht*, vol. 58 (2021), no. 2-3, p. 1297.

rather exceptional. Without an agreement, the yardstick (under the Hamburg Rules and likely also under several national regimes) is the time a diligent carrier would have taken, having regard to the circumstances of the case.[30] Once the canal had become blocked, even the most diligent of carriers had little choice other than either to wait for the canal to be reopened or to take the long detour around the African Continent. Both of these options would have significantly prolonged the duration of the voyage.

Delay is a form of immaterial, financial loss. It is of course possible that if the voyage takes (much) longer than foreseen, the carried goods deteriorate – foodstuffs and fresh produce are obvious examples. The deterioration can also be "commercial", for example when goods have a "sell-by" date. In such a case, however, the carrier's liability is for loss or damage, and no longer for delay as such. Furthermore, it is possible that, during a delayed voyage, the goods suffer an insured damage or loss, not causally related to the delay.[31] In this case, there are two separate instances of loss or damage, which will be dealt with separately.

4.2. Insurance Cover

If delay leads to physical damage to or complete loss of the goods, such damage or loss is covered under the cargo policies – provided at least that the delay was caused by an insured peril. Under an "all risks" cargo insurance, this is not too big of a hurdle, but under a named perils policy like the Institute Cargo Clauses B or C, the insured must show that the delay (which ultimately caused the deterioration of the goods) was caused by one of the perils insured against. In the case of the Ever Given, for the cargo on board the Ever Given itself, this

[30] See, for example, Ciger, S., Claims for Compensation for Delay in Delivery and Notice Requirements under Article 23.4 of the Rotterdam Rules, *Journal of International Maritime Law*, vol. 21 (2015), no. 1, p. 40. See also Naboush, E., The Carrier's Liability…, *op. cit*., p. 295, who refers to Article 285.(2) of the UAE's Commercial Maritime Law and Article 12.(6.7) of the Convention on the Multimodal Transport of Goods between the Arab States. According to these provisions, delay occurs "if the goods are not delivered at the agreed time, or, in the case where none is agreed, within a reasonable delivery period, taking into consideration the circumstances leading to the delay". The Dutch Civil Code provides in Article 8:379 that the carrier must deliver the goods "without delay", which is interpreted to mean either within the agreed time period or within a reasonable time period (see Jolien Kruit, Tekst & Commentaar BW, Commentaar op art. 8:379 BW). The Belgian Shipping Code also makes the carrier liable for delay (Article 2.6.2.30), but only defines delay as the non-compliance with an "agreed" time period (Articles 2.6.2.11 and 3).

[31] For example, at the end of a delayed voyage, a container is dropped during discharge, causing damage to the goods in the container.

requirement would indeed have been satisfied under Institute Cargo Clauses B or C, as one of the named perils under these conditions is "vessel or craft being stranded, grounded, sunk or capsized".

Cargo policies generally also provide that the insurance remains in force during delay beyond the control of the assured.[32] If, for example, two vessels forced to wait at the entrance of the Suez Canal collided, the cargo damage caused by this collision would be covered, even if – under normal circumstances – the cargo would already have reached its destination and the insurance would already have terminated. In some policies, the insurers are entitled to demand an additional premium if the duration of the cover is extended by delay;[33] other policies explicitly provide that there will be no surcharge for such extension.[34]

The main issue is, however, delay in the strict sense – purely financial, immaterial loss. If goods are delivered weeks or even months later than expected, it is easy to see that this can cause substantial losses to the cargo owners. In some cases, late delivery may even rob the carried goods of their commercial value entirely (e.g. Christmas decorations, goods destined for exhibition at a fair). Is such financial loss covered under the cargo policy, though?

Different answers are possible, depending on the policy. The Institute Cargo Clauses, in all three versions, explicitly exclude loss, damage or expense caused by delay, even if this delay is caused by a risk insured against (Clause 4.5). The only exception is delay-related loss or damage that is recoverable in general average under Clause 2.

The French cargo policy[35] covers only physical loss or damage (Article 5) and the costs exhaustively enumerated in Article 6, which do not include financial losses caused by delay. Moreover, the French policy excludes physical loss or damage attributable to delay (such as, archetypically, spoiled foodstuffs), unless the delay was due to a number of named perils.[36]

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[32] Article 8.3 of Institute Cargo Clauses A, B and C, Article 4.2 of the Dutch *Beurs Goederenpolis*, Article 3.1 of the Belgian *Goederenverzekeringspolis van Antwerpen*, Article 9 of the French *Police Française d'Assurance Maritime sur Facultés (Marchandises).*

[33] Article 4.2 of the Dutch *Beurs Goederenpolis*, Article 9 of the French *Police Française d'Assurance Maritime sur Facultés (Marchandises).*

[34] Article 3.1 of the Belgian *Goederenverzekeringspolis van Antwerpen*.

[35] *Police Française d'Assurance Maritime sur Facultés (Marchandises).*

[36] Shipwreck, capsising or grounding of the vessel; fire or explosion; collision or allision, including allision with ice; aircraft crashes; water ingress forcing the vessel to enter a port of refuge and unload all or part of its cargo there.

The Belgian cargo policy[37] excludes (unless otherwise agreed) loss, damage and expenses due to delay, not caused by an insured peril (Article 11.2.4 third bullet). This could seem to mean that, *a contrario*, if the delay is indeed caused by an insured peril, the loss caused by such delay is covered. This interpretation, however, is excluded by Article 11.2.6, which excludes from cover (unless otherwise agreed) any "indirect" (consequential) loss or damage, even if caused by an insured peril. Ultimately, therefore, immaterial, purely financial loss caused by delay is not covered, unless the policy explicitly provides differently.

The Dutch cargo policy[38] does provide cover for loss or damage caused by delay, but only if a double condition is satisfied: the delay was caused by an insured peril, and the vessel carrying the goods was damaged as a result of this peril (Article 16.2).

The German market offers a Pure Financial Losses Clause[39] which specifically provides cover for loss caused by delay, be it with a number of exceptions. However, a decision of the *Landgericht (LG) Düsseldorf* demonstrated that even such specific cover is not always the answer.[40] A German company had bought a consignment of synthetic fleece from a Chinese supplier for the production of breathing masks. As this consignment happened to be carried on board the Ever Given, it did not arrive in Hamburg in early April 2021 as expected, but only in mid-August 2021. As the fleece had a shelf life of only 12 months, the buyer claimed that the delay had reduced the commercial value of the fleece by 50%. Furthermore, as the buyer had to meet delivery deadlines himself, he was forced to buy replacement goods, at extra cost. Finally, since the delayed fleece was meant for use in health and safety products, the buyer had it tested before use, which also caused additional costs. The consignment of fleece was insured under a German cargo policy *(DTV-Güter 2000/2011)* with a Pure Financial Losses Clause added, and the buyer claimed the extra costs he had incurred as a result of the delay from his insurers.

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37 *Goederenverzekeringspolis van Antwerpen*.

38 *Beurs Goederenpolis*.

39 Gesamtverband der Versicherer (GDV), DTV-Güterversicherungsbedingungen 2000/2011 (DTV-Güter 2000/2011), Vermögensschadenklausel, https://www.tis-gdv.de/wp-content/uploads/tis/bedingungen/avb/ware/2011_W14_Vermoegensschadenklausel.pdf (accessed 20 April 2025).

40 LG Düsseldorf 11 July 2022, Case 9 O 410/21, in: Paschke, M. (ed.), *RdTW – Recht der Transportwirtschaft,* 10. Jahrgang 2022, C. H. Beck, Nördlingen, 2022, p. 370. See also Schwampe, D., Ever Given revisited – die Deckung reiner Verspätungsschäden unter der DTV Vermögensschadensklausel, in: Paschke, M. (ed.), *RdTW – Recht der Transportwirtschaft*, 10. Jahrgang 2022, C. H. Beck, Nördlingen, 2022, p. 343.

The Düsseldorf court, however, rejected the claim, for several reasons. Article 1 of the Pure Financial Losses Clause requires the carrier to be liable "under the terms of a standard forwarding contract under German law".[41] It remains unsettled whether this provision means that the "forwarding" contract must actually be subject to German law through a choice of law clause in the contract or through the application of conflict of law rules and that the carrier must indeed be liable under German law, or that it suffices that the carrier would have been liable had the contract been subject to German law. The Court did not consider it necessary to decide this issue, as it was clear in any case that the carrier could invoke the nautical fault exception (which would be available in a "standard" forwarding contract) to escape liability for the losses suffered by the German buyer.

Furthermore, Article 4.1.3 of the Pure Financial Losses Clause excludes losses caused by "confiscation, deprivation of possession or other acts of authorities".[42] This exclusion includes any type of act by authorities that restricts the cargo owner's normal powers to deal with his goods. The buyer's argument that a difference should be made between authorities acting for civil law purposes or reasons on the one hand and authorities acting for public or criminal law purposes on the other has no basis in the wording of the Clause. The arrest by the Egyptian authorities qualifies as "other act of authorities" and thus excludes cover. From the Egyptian arrest decision as produced and translated by the parties, it appears that not only had the Ever Given been arrested, but also the cargo on board. The buyer's argument that the owners of the Ever Given should have provided a guarantee to obtain the quick release of the vessel was therefore also rejected. A guarantee by the vessel owners (or insurers) would not have made the continuation of the voyage possible.[43]

Finally, the Düsseldorf court points out that, under German law, a carrier is only in default with regard to the duration of the voyage if either a fixed delivery date has been agreed, or if he has been put on notice by the cargo interests (§ 286 Bürgerliches Gesetzbuch (BGB)). In this case, the buyer had put the carrier on notice on 21 July 2021, demanding his goods to be delivered no later than 29 July 2021. The goods were actually delivered on 13 August 2021, so after the deadline set by the buyer, but the Court found that the delay and its detrimental consequences had in fact already occurred before the carrier was in default. The buyer had already bought replacement fleece in May 2021, and the loss of

[41] *DTV-Güter 2000/2011*, Article 1, *"… sofern ein an diesem Transport beteiligter Verkehrsträger im Rahmen eines üblichen Verkehrsvertrages nach deutschem Recht dem Grunde nach haftet."*

[42] *DTV-Güter 2000/2011*, Article 4.1.3, *"der Beschlagnahme, Entziehung oder sonstiger Eingriffe von hoher Hand"*.

[43] LG Düsseldorf 11 July 2022, Case 9 O 410/21, para. 35.

commercial value and the need to test the fleece arose because the goods sat for several months on board the Ever Given, all of which happened before the buyer's notice on 21 July 2021.[44]

5. GENERAL AVERAGE

5.1. The Principle

General average is a time-honoured maritime law concept to equally share sacrifices and expenditures among all participants in a maritime adventure. Actual sacrifices (with the jettison of cargo as the archetypical example) have become exceedingly rare; today, general average is primarily about unforeseen expenditures that carriers are obliged to make during the voyage.

It has been reported in the media that the owners of the Ever Given declared general average, in an attempt to recover part of the money they (and their insurers) have had to pay or will still have to pay to the SCA, the Egyptian government, the salvors, and others.[45] Preparing a general average adjustment is a complex operation, particularly with the number of interests involved in the Ever Given case. What the final outcome will be and whether the owners (and their insurers) will succeed in recovering part of their expenditures from the other interests is unknown at this time.

It should be noted, indeed, that the fact that a general average adjustment has been prepared and the contributions owed by the cargo interests have been determined does not mean that these contributions will necessarily be paid. Apart from the possibility that the cargo interests may have gone bankrupt, that they have been dissolved, etc., over time, the York Antwerp Rules explicitly allow the cargo interests to invoke all remedies or defences they may have against the owner to extinguish or limit their obligation to pay the general average contribution (Rule D). If, for example, it could be proven that the Ever Given was unseaworthy in one way or another when setting out on its fateful journey, this would be an argument for the cargo interests to oppose the owners' demand for payment of the cargo interests' contribution.

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[44] *Ibid*., paras. 27-31.

[45] See, for example, https://fiata.org/n/pr-mv-ever-given-owner-declares-general-average/ (accessed 20 April 2025); https://www.metro.global/news/ever-given-general-average-declared-and-vessel-arrested-by-the-suez-canal-authority-to-recover-1-billion/ (accessed 20 April 2025); https://cyprusshippingnews.com/2021/04/08/general-average-declared-on-ever-given/ (accessed 20 April 2025).

The York-Antwerp Rules and the principles on general average are not mandatory law, though. Parties are free to deviate and to agree, for example, that general average contributions shall be paid in any case, even if the general average situation was caused by a fault of the carrier. BIMCO has created a General Average Clause to this effect, which provides that "Cargo's contribution to General Average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew".

Another possible (though difficult) defence against a general average claim might be that the parties agreed that in the case of loss or damage, their only remedy would be under an insurance policy rather than holding each other liable (such an agreement is also called an "insurance code" or an "insurance fund"[46]). In The Polar,[47] a voyage charter party case, the shipowner declared general average to recover part of the USD 7.7 million ransom money paid to Somali pirates that had hijacked the vessel. Under the general average adjustment, a contribution of USD 5.9 million was due by the cargo interests. The latter, however, argued that the shipowner was precluded from using the general average mechanism, because the shipowner had taken out additional Kidnap & Ransom (K&R) insurance, the premium of which was actually funded by the charterers, as agreed between the parties in the charter party. In the earlier cases of *The Ocean Victory*[48] and *The Evia (No 2)*[49] such an "insurance code" had indeed been found to exist. In The Polar, however, the UK Supreme Court stressed that there is no *prima facie* position in this matter and that the question of whether or not there is an "insurance code" or "insurance fund" depends on the construction of the contract terms as a whole and the necessary consequences of what has been agreed in relation to insurance. The mere fact that the charterers (or cargo interests) agree to pay an additional insurance premium is not sufficient in itself. Ultimately, the Supreme Court found that the alleged agreement that the owners would only seek recourse against the (K&R) insurers and not against their contractual counterparty did not appear from the charter party.[50] Consequently,

[46] By buying insurance, the parties provide for a "fund" that will be available to make good possible losses, without the need for commercially unnecessary and undesirable litigation between themselves.

[47] *Herculito Maritime Ltd v Gunvor International BV (The Polar)* [2024] UKSC 2.

[48] *Gard Marine and Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35, dealing with a demise charter party.

[49] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))* [1983] 1 AC 736 [HL], dealing with a time charter party.

[50] *Herculito Maritime Ltd v Gunvor International BV (The Polar)* [2024] UKSC 2, para. 75.

the owners were free to recover (part of) the ransom payment using the general average mechanism.[51] In the Ever Given case, it is clear that there is very little chance of the cargo interests being able to prove that they had an insurance agreement with their carrier that precludes the latter from demanding a general average contribution.

5.2. Insurance Cover

General average distributes expenditures among all the interests involved, and this thus concerns owners, charterers (time charterers primarily with respect to the value of the bunkers, voyage charterers primarily with respect to the value of freight at risk) and cargo interests. For the owners, general average contributions are typically insured under the H&M policy.[52] General average expenditures are out-of-pocket expenses for the vessel owner. He will get part of those expenses back through the general average contributions due by the cargo interests, and the balance (his own contribution in the general average) is reimbursed by the Hull insurers. If the cargo interests successfully invoke a defence allowing them to avoid paying their contribution in general average, the owners' P&I Club covers this unpaid claim. At the end of the day, therefore, the owner is fully reimbursed.

For the cargo interests, cargo insurance policies typically cover their contribution in general average.[53] This in practice is very important, as these contributions can amount to a substantial percentage of the value of the goods.

6. CONCLUSION

The Ever Given grounding not only created a worldwide media storm, but also served as a useful reminder to maritime lawyers of the potential complexities and complications of maritime law. It is, first of all, remarkable that even in

[51] *Ibid*., para. 99.

[52] Clause 11 of the ITCH 1983, Clause 10 of the ITCH 1995, Clause 8 of the IHC 2003, Clause 28 of the German hull policy *(DTV-ADS 2009)*, Clause 1.1.3 of the French hull policy *(Police Française d'Assurance Maritime sur Corps de Tous Navires Tous Risques)*.

[53] Clause 2 of the Institute Cargo Clauses (A, B and C), Article 5 of the Belgian cargo policy *(Goederenverzekeringspolis van Antwerpen)*, Article 9 of the Dutch cargo policy *(Beurs-Goederenpolis)*, Article 6.3 of the French cargo policy (*Police Française d'Assurance Maritime sur Facultés (Marchandises))*, Article 2.3.1.1 of the German cargo policy *(DTV-Güter 2000/2011)*.

a high profile and high stakes case like this, the parties still contested whether or not they had actually concluded a salvage agreement. Even in difficult circumstances and under time pressure, communications and negotiations with other parties require care and attention to legal detail. Secondly, the grounding brought back to the attention that delay remains a difficult issue in the carriage of goods by sea. Historically, given the unpredictability of shipping, it is easy to understand why the Hague-Visby Rules do not contain rules on delay. Even if more recent conventions such as the Hamburg and Rotterdam Rules and several domestic law regimes today do provide for carrier liability for delay, enforcing such liability is, in practice, not always straightforward. Finally, the Ever Given again showed that the age-old concept of general average is still of practical importance, and can be used by shipowners and carriers to (partially) redistribute liability in sometimes unexpected ways.

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Sažetak:

»EVER GIVEN« – *POTENCIJALNE ODGOVORNOSTI I OSIGURATELJNO POKRIĆE*

U ožujku 2021. godine Sueski kanal bio je u potpunosti blokiran tijekom šest dana zbog nasukavanja broda »Ever Given«. *Taj je incident doveo do mnogobrojnih pravnih pitanja vezanih uz odgovornost i osiguranje. U ovom se radu raspravlja o osiguranjem pokriću za štetu na trupu broda koju je pretrpio* »Ever Given«, *o pitanju je li ugovor o spašavanju uopće bio sklopljen te o osiguranjem pokriću za nagradu za spašavanje. Također se razmatra odgovornost za kašnjenje u pomorskom prijevozu robe, kao i potencijalni utjecaj zajedničke havarije koju je proglasio vlasnik* »Ever Givena«.

Ključne riječi: *spašavanje; prijevoz robe morem; Haško-Visbyjska pravila; zakašnjenje; zajednička havarija.*