Kluwer Arbitration Blog

Shipping Casualties and Arbitration: Reflections on the "EVER GIVEN"

James Michael Turner, Nichola Warrender (Quadrant Chambers) · Thursday, June 10th, 2021

The grounding of the container carrier "EVER GIVEN" in the Suez Canal in March 2021 has been dubbed by some as "*shipping's 15 minutes of fame*". This post hitches its star to that wagon and considers the contracts, claims and dispute resolution clauses likely to be affected by this casualty.

The Casualty, Salvage and Re-floating

The Evergreen-operated vessel is reported to have been carrying 18,300 containers out of a total theoretical capacity of 20,124 TEU. After unsuccessful attempts to re-float using local tugs and excavators, the owners (or perhaps demise charterers) engaged leading professional salvors, Boskalis-owned Smit. It was reported in the maritime press that Smit had been engaged under Lloyd's Open Form of Salvage Agreement ("LOF"), although the vessel's owners denied that.

The salvage presented almost unique challenges, with the vessel wedged into opposite banks of the canal. Once re-floated and finally freed of the bank, it was towed to the Great Bitter Lake for inspection. There it and its cargo were seized by order of the Egyptian Court, against a demand by the Suez Canal Authority ("SCA") for US$900 million, since reduced twice (so far): first to US$600 million and, more recently, to US$550 million (with a "deposit" of 'only' US$200 million demanded for the vessel's release).

Contracts, Claims and Clauses

Looking at the "EVER GIVEN" alone, and so leaving aside the hundreds of other ships affected by its grounding, there is the potential for thousands of contracts to be affected by the casualty and its aftermath. All these contracts will contain dispute resolution clauses. In the shipping world, arbitration is the favoured choice of dispute resolution mechanism and so many – though not necessarily all – of these contracts will feature arbitration clauses.

Salvage

When a ship suffers a marine casualty and needs assistance to escape its clutches, an owner may engage a salvor. Typical forms of salvage contract include LOF and three forms published by BIMCO. An LOF contract is made with all owners of property endangered by the casualty, whereas the BIMCO contracts are made with the owner of the ship alone, who may look to recover some of the cost in general average (explained below).

Disappointingly for fans of Wilbur Smith's *Hungry as the Sea*, salvage claims under LOF are not heard by grizzled master mariners sitting at Lloyd's of London. Agreement to LOF carries with it agreement to Lloyd's Salvage Arbitration Clauses ("LSAC"). This is a form of semi-managed arbitration, in which the arbitrator is picked by the administrator (the Council of Lloyd's Salvage Branch), in rotation, from a panel of (nowadays) three senior barristers. All property interests are entitled to be heard and it is common, though not invariable, for ship and cargo interests to be separately represented.

Unusually for English arbitrations (outside the commodities sphere), the LSAC provide for appeal to the appointed Lloyd's appeal arbitrator. Further appeal to the Court on points of law is not excluded, subject to the usual criteria under section 69 of the English Arbitration Act 1996.

The continuation of this arrangement – now over 100 years old – is under threat. Lloyd's is actively considering withdrawing its support for LOF. If it does, it is unclear what – if anything – will replace it, or what the knock-on effects will be for the BIMCO contracts, whose arbitration clauses require the appointment of a single Lloyd's arbitrator with appeal to the Lloyd's appeal arbitrator.

General Average

General Average ("GA") is likely to feature strongly in disputes arising out of the "EVER GIVEN" casualty. GA is not itself a contract, but a species of entitlement grounded ultimately in the law of restitution (though, in English law at least, with a distinct historical development). A party to the so-called "maritime adventure" – such as the owner of the ship, the cargo or the fuel – benefitting from a payment or a "sacrifice", made at a time when the maritime adventure is in peril to free it from that peril, may become liable to contribute towards that payment or sacrifice. The contribution is assessed according to the respective values of the various property at risk.

The mechanism for GA assessment typically agreed in contracts of carriage and charterparties (described below) is for the assessment to be governed by the York-Antwerp Rules ("YAR") and carried out by an "average adjuster". The YAR are agreed internationally (though not at state level) and published through the Comité Maritime International. They can be complicated to apply, but for present purposes only the "*actionable fault*" defence in Rule D need be noted: where the casualty was caused by the claimant's fault, and the claimant is or would be legally liable for it, then the GA claim must fail. The defence does not work if the claimant would itself have a defence for (say) negligent navigation under the Hague Rules.

GA Security

The party liable to contribute in GA is the owner of the property at the time of the peril. That

simple statement masks a complex picture. Since cargo ownership often changes during transit, it can be difficult to identify who owned it at the relevant time. That difficulty is multiplied by the number of containers and sometimes by individual parcels of cargo within each container.

Shipowners nowadays look first to hull and machinery insurance to cover GA contributions. Some hull policies now contain "GA absorption" clauses, by which insurers agree to pay the GA bill up to a certain limit.

If there is no such clause or the limit is reached (as seems likely in the case of the "EVER GIVEN"), then it will be necessary to collect GA security from the cargo interests and their insurers. This is complex enough, given the number of containers and interests involved. It may be harder still, if the cargo was owned by a small company in a jurisdiction where it is difficult, time-consuming or expensive to enforce a judgment or arbitration award, to secure payment. To address these issues, a practice has evolved of shipowners obtaining GA security from both the cargo interests and their cargo insurers, both of which will answer – subject, of course, to any "Rule D" defence – to the assessment of GA.

GA security often contains court jurisdiction clauses. This is not invariably the case; it can provide for arbitration.

The Contracts of Carriage

The bulk of the contracts immediately affected by the "EVER GIVEN" casualty (and other container carrier casualties) are contracts of carriage (typically, though not always, bills of lading) of the cargoes in the containers on board. Some of those contracts may be with the vessel's owner (or bareboat charterer, if the vessel is the subject of a demise charter). However, a more common arrangement is for the shipper of the container to contract (on its own behalf or on behalf of the consignee) with whichever shipping line it booked with.

The contracts of carriage may also see the bulk of the claims. Leaving aside the extravagant claims of the SCA, the principal claims arising from the casualty will be salvage and GA. If salvage is claimed directly against the cargo owners, then it is at least possible that they will seek to recover that from the contractual carriers. If salvage is claimed against the vessel's owners (or bareboat charterer), then they can be expected to claim cargo's "share" of salvage from the cargo owners in GA. Any claims for cargo damage will also be brought in the first instance under the contracts of carriage.

Bills of lading commonly contain arbitration clauses. Like some others, however, EVERGREEN's standard form bill of lading contains a court jurisdiction clause in favour of London (for non-US trades) and the Southern District of New York for trades to or from the USA. It also permits the carrier to sue before any other competent jurisdiction (no doubt to allow it to side-step any difficulties in enforcing a US or English judgment).

There is likely considerable factual overlap among the many claims that might be brought under contracts of carriage, so efficient case management would suggest that similar claims should be brought before the same forum. Ordinarily, this is not a readily available option in arbitration, where consolidation and joinder – despite recent changes in at least two well-known institutions' rules (the ICC and the LCIA) – remain challenging and relatively rare. However, the most

commonly used rules in international maritime arbitration are those of the London Maritime Arbitrators' Association ("LMAA")). The LMAA Terms have long contained an equivalent to what is now Rule 17(b). This allows tribunals to order "*two or more arbitrations [that] appear to raise common issues of fact or law … [to] be conducted and … heard concurrently*". This Rule is often used, for example, where there are concurrent charters of the same ship, often on back-to-back terms. There is real potential for significant efficiency savings where the claims can be managed together. There is equivalent provision in Section 2 of the Maritime Arbitration Rules of the New York Society of Maritime Arbitrators.

Slot Charters

For reasons of efficiency, most if not all container lines book capacity on each other's ships. They do so under vessel-sharing or slot-sharing arrangements, often using a species of time charterparty known as a "slot charter". The "owner" under a slot charter is typically a time charterer of the vessel. The types of claim and dispute resolution provisions under slot charters are generally the same as under 'normal' time charters, considered next. The exception is that slot charterers do not usually own the vessel's bunkers (fuel).

Time Charter

The ship may be owned by a finance house through a special-purpose vehicle. The ship's operator will contract with the SPV (or the demise charterer, explained below) under a long-term time charterparty, often via an intermediate time charter. The time charterer is responsible for the commercial management of the ship.

The time charterer typically owns the fuel that powers the ship. To that extent, it may also be liable to contribute towards salvage or in GA. Both the slot and the time charterers may well also be contractual carriers under the contracts of carriage. Where this is so, they may face claims by cargo interests for an indemnity in respect of cargo's GA or salvage contributions. They may seek to pass both direct and indirect (i.e., via cargo) GA and salvage claims on to the party contracting as owner under the relevant charterparty. Claims from cargo interests are often regulated under the so-called "Inter-Club Agreement" ("ICA"), a rough-and-ready division of liability often incorporated into time charterparties.

In addition, a grounding – or indeed any casualty causing delay to the voyage – is likely to give rise to a claim by the charterer that the ship is "off hire" under the relevant clause of the charterparty. The dispute resolution provisions in charterparties tend to be arbitration clauses, often providing for arbitration under LMAA Terms.

Demise or Bareboat Charter

Often used as a financing instrument, a bareboat charterparty effectively hands all responsibility for the ship over to the charterer, who becomes its quasi-owner for most purposes. It is a term of the frequently-used BARECON form of demise charter that the owner is not to contribute in GA

and there is no such thing as “off hire” under a bareboat charter. That usually precludes any dispute under the demise charter from a casualty like this, unless the vessel is so badly damaged as to bring the charterparty to an end. Disputes are usually subject to arbitration.

Insurance

The insurance contracts potentially engaged by a casualty of this sort are also numerous. The ship will have hull and machinery cover (insuring physical damage and risks, with cover for GA and salvage), P&I cover (insuring liabilities), freight demurrage and defence (legal expenses insurance) and loss of hire cover. A time charterer of the vessel will almost certainly carry its own P&I and FD&D cover. The cargo will typically be insured as well. Cargo insurance policies almost invariably cover GA and salvage charges, but not always loss, damage or expense caused by delay.

Many marine insurance policies still contain court jurisdiction clauses. However, the position is changing with P&I cover. There is an increasing trend for coverage disputes to be subject to tiered dispute resolution clauses, with arbitration the final step.

Even if subject to arbitration, disputes between insurer and insured will not be determined concurrently with the shipping claims but in separate arbitrations. The terms on which those are to be conducted, if not specified in the policy, often involve submission to institutional rules such as those of the ICC and LCIA. As mentioned above, the new joinder and consolidation provisions of the ICC and LCIA Rules may prove useful in managing disputes arising from this casualty, although they remain less flexible than the LMAA equivalent.

Concluding Remarks

The “EVER GIVEN”, at the time of writing, is still detained in the Great Bitter Lake. As time goes on, the likelihood grows that her detention will give rise to even more serious claims than the original grounding. If, for example, its owners pay an extortionate sum for its release, they might seek to recover that in GA. More prosaically, the longer the goods on board are delayed, the greater the risk of damage to perishable cargoes, to say nothing of other claims for losses caused by delay.

Shipping’s 15 minutes of fame may have a long tail in terms of the disputes that follow.

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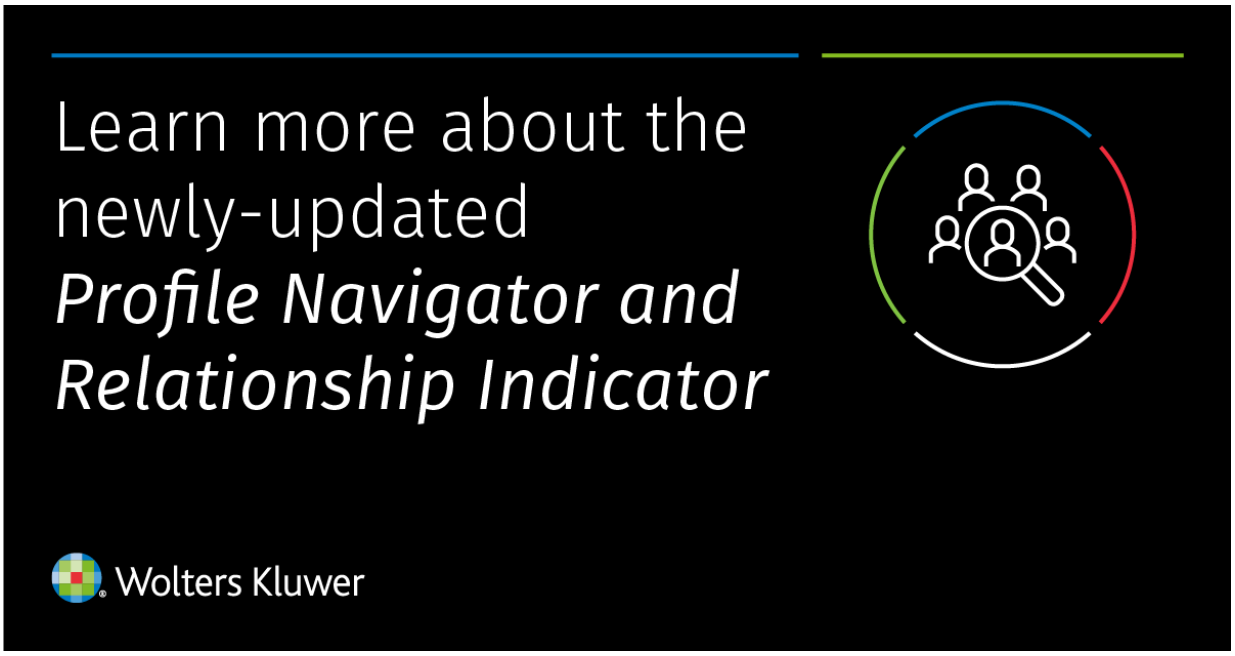

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