Marine Masters Maritime Law consultancy

EVER GIVEN

I guess all the readers have seen the images of the EVER GIVEN blocking the Suez Canal, where attempts of refloating involve digging machines freeing a large bulbous bow from the sand it is sitting on. By the looks of it, the solution for the problem and the refloating of the ship might take more than just a few hours and consequently, people in the Maritime industry are starting to contemplate the 'what if' and the 'who-is-going-to-pay' scenarios on the back of the enormous loss caused by the delay of ships waiting to pass the Suez Canal from either side.

Below is a small analysis of the contractual and legal forces at play. It is only meant to provide some guidance on the legal matters at hand. It also provides some handles on which legal matters and solutions could be, possibly, at play in the event the Suez Canal remains blocked for a longer period.

Which contract applies?

When dealing with Maritime Contracts it is when a dispute arises always important to remember that there is on almost all occasions not 'just' a Charter Party contract at work.
From a shipowner point of view, there also is a Bill of Lading which, possibly, describes a whole different set of contractual relations with regards to the shipowner in particular and which rights and obligations, possibly, are way outside the scope of the Charter Party itself. For this Circular we will focus on the charter party and leave any Bill of lading related issues, like for example delay damages claimed by cargo interests, aside.

'In English law the contract is what is agreed in the contract!'

If the parties have agreed on for example a force majeure clause it is very well possible delays like the one in the Suez Canal can be part of that clause. Force Majeure clauses come in many shapes and sizes, so it is important to check the actual clause in the contract and the relation of this clause to the rest of the contract. The same applies to the wording of any General Exception clause present.

'Stay at Suez or go via the Cape of Good Hope'

The delays and lineups on both sides of the Suez Canal will be costing in the 'Billions' each day. Shipowners, Charterers and cargo owners will be facing damages due to the waiting. Next to the question of who needs to pay those damages, there will be also the question of how to minimize those damages. Sailing around the Cape of Good hope might be an option but this is adding substantial time to the voyage and on some occasions, such deviation might contractually be not even allowed. For any tanker from Asia towards Europe the addition of 11 days of steaming time is the equivalent of a lot of waiting time.

If you stay…

If it is decided that waiting is the best option, the first question in absence of a specific 'Suez Canal Clause'(which will place any waiting time within the scope of laytime/demurrage), will be whether the occurred delay falls under some kind of 'detention' Detention seems to be a rather 'dirty word' in the

industry but it is only the collective name for all damages for breach of the c/p contract measured in time loss for situations which are not covered by laytime. Detention however requires some element of ' *an obstacle created by the charterer* '[1] and this makes the success of any detention claim rather unlikely.
The second option would be a Force Majeure clause or an extensively and widely drawn up ' Act of God provision' in the charter party. It is difficult to guide on whether such a clause would apply because it is much depending on the exact wording of such a clause and the cooperation of clauses together with the rest of the Charter Party. To answer this question requires a case by case study, for which we are happy to assist.

.. or if you go…

There is also a possibility that the contract is considered frustrated by the Suez event. The common law doctrine of Frustration is a 'tricky one' and this has been an extensively discussed matter in English Law. For charterparties, it is best to go back a couple of years and see what cases existed in the 1960s and 1970s when the Suez Canal, albeit for different reasons has been blocked on several occasions. These cases however mainly focus on whether deviating the ship via the Cape of Good Hope would render the voyage performed in a fundamentally different way (as opposed to 'radically' different way) from what was initially the idea when agreeing to the charter party (and the fact that such a voyage would cost significantly more and takes a lot longer than via Suez). THE EUGENIA[1964][2] (amongst a number of other cases[3]) seems to hand good guidance on this matter and accordingly, in such a scenario the contract is not frustrated unless the carried cargo is a perishable one or if the route via the Suez Canal is the only route permitted under the agreed charterparty (and that the route is, therefore, a fundamental key element of the initial agreement). So yes, the contract could be frustrated but it requires that the wordings used 'tick several rather specific boxes', especially since courts intend to interpret any 'open ends' in the most narrow, literal way.

Deviation

Deviation is nothing but the unjustified departure from the voyage agreed. THE EUGENIA case above already clear that in the case of going via Cape of Good hope does not leave the contract frustrated, a few specific situations excepted. Can the charterparty be considered 'frustrated' if the ship stays and waits for the canal to re-open? This of course opens from a commercial perspective also a big can of worms as it would force all parties back to the negotiation table, and likely not in the best moods, ..but still…remember that it is unlikely that the shipowner is entitled to additional freight if taking the longer and more expensive Cape of good Hope route.

Back to the basics

For the application and interpretation of the Law, there is a suitable answer, or more, for every question asked: Things concerning Law are therefore never black & white. It also means that one can find support for each counter opinion to an opinion.
A chartering professional occupies himself with the task of getting ships from A to B at an agreed price. The unavoidable complications are part of that process about words and liabilities are often not helpful.
Personally, I always consider when assisting a client to solve any complications, that it is important to take a step back and look at what a charterparty is for: It is to bring goods from A to B at price X, at a certain point in time within a certain amount of time. The complexity of any charterparty lies within the 'what-if's and, in my opinion, this is also where they can become complicated because the parties to the contract have, next to different interests, different expectations of that contract.
In my experience Law professionals often have a less simplified perspective, which is no better or worse, but just a statement of fact.

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[1] Samuel Crawford Hogarth&Others v. Cory Brothers&Co LTD91926) 25L1 L Rep 464(pc)

[2] Ocean Tramp Tankers Corp.v.V/O Sofracht (The Eugenia) [1964] 2 Q.B. 226(C.A.)

[3] See also: Tsakiroglou&Co v. Noblee&Throl, GmbH [1961],

So, as a '*contract guy*' I always try to focus on the 'big picture'. In my opinion this is where in many cases there is a good compromise to be found to avoid escalation and proceedings in any form and to prevent contractual issues from occurring.
The responsibilities and risk for the sea voyage are for the shipowner (with some specifically excluded exceptions) and for a timely loading and discharging as well as providing the cargo lies with the charterer, of course together with the payment of a 'consideration' for the services rendered by the shipowner called 'Freight'. What happens en route is, therefore, special provisions stating otherwise, that the risk of the shipowner. This is also explicitly stated at the beginning of most voyage charter standard printed forms one way or the other.

What if ..

If I would be, hypothetically given COVID19 restrictions, sitting in a pub end 2020 with some shipping/chartering professionals and the 'what if' question on what is now a fact of life would pop up: '*What if the Suez Canal became blocked by a large oil tanker or container vessel?*' I think nobody would counter that question with 'wait a minute, *are you crazy? That is very very unlikely this can happen'*, because everybody would consider that a genuine *'what if possibility'*.
This means that I think that the risk of an event of the Suez being blocked for a certain amount of time is foreseeable. The English courts held in the case of THE SEA ANGEL[4], that a degree of foreseeability excluded the fact that an event (in this case an arrest of the ship by the port authorities) could be considered a *frustrating* event. In the case of a ship waiting to pass a blocked Suez Canal I, personally, think that such an event is also a *foreseeable one* and that therefore a charterparty contract cannot be frustrated.

Delays

It goes without any question that delays will occur for already fixed contracts and a multitude of ships for reasons of the blocked Suez Canal will not meet their required laydays/cancelling dates. Possibly this could generate some pressure on the shipping markets, with some opportunities as a result. The correct interpretation of whether a ship can be cancelled or not will be very important. Wrongful cancellation might result in wrongfully refusing the performance of the charter party and such 'reputation' can mean that the contractual counterpart can terminate the chart party AND still claim damages. When in any doubt, please do not hesitate to contact us for guidance.

The future

It is, especially in the world of tanker chartering, quite common to include a 'special waiting time' clause for a specific landmark, port, event or to prevent an event from happening. A good example of this is the well known and much in use 'Bosporus clauses' which limit the amount of waiting time for the account of the owners. On some occasions, these clauses are/were also fixed for the time involved and the risk involved in passing the Suez Canal. An abundance of such clauses will likely appear during future contract negotiations. If excluding the risk of a passage that is part of the sea passage is successful remains to be seen and will for a large extent depend on the state of the market. Whether to accept such clauses or not also is a commercial decision. We are however more than happy to assist in a wording that is satisfactory for the involved parties and which is not over-or under describing the intended target of such a clause.

So there you have it… most likely some interesting times ahead. I hope this circular gives some insight into the 'legal & contractual forces at play' for the present Suez issues. The basic answer to all questions on the matter is to check what has been specifically agreed in the contract and escalation, as usual, needs to be considered wisely.

Contact or comments

If you have any comments or questions with regards to this circular letter or other matters of law or chartering practices, please do not hesitate to contact me at :

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[4] The 'Sea Angel' (2007) 2 LLR 517