

## Ever Given, claims and cover implications from a charterer's perspective

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Ivan Serracin, Assistant Vice President, Claims, Lawyer at insurer Skuld has written on the claims and cover implications for charterers as a result of ULCV Ever Given grounding in the Suez Canal, blocking it for six days, and then being held in Great Bitter Lake (along with its container cargo) while the owner and the Suez Canal Authority negotiated a settlement.

Serracin said that this event gave rise to numerous questions regarding the factors leading up to the grounding. Skuld's charterer clients had shown great interest in the potential impact on P&I and FDD cover and third-party claims in cases involving prolonged delay following a casualty or due to detention of the vessel.

Skuld laid out the default legal positions under English law, with particular focus to vessel delay and cargo claims in accordance with unamended NYPE 1946, Shelltime 4, Gencon charterparties and Congenbill bill of lading.

### **Time charterparty**

Serracin observed that, under a standard time charterparty, a vessel would not be off hire for delay waiting to transit the Suez Canal. Consequently, *the vessel would remain on hire throughout the delay and the charterer would continue paying hire.*

Standard off hire clauses, such as clause 15 of the NYPE form or clause 21 of the Shelltime 4 form, would not entitle the charterer to put the vessel off hire where time lost resulted from an external impediment (similar to the Canal closure) but the vessel remained fully efficient.

The charterer would remain obliged to pay hire, fuel, and other usual operational expenses, such as pilotage and agency fees.

Serracin said that it was possible that a particular charterparty might have additional off hire provisions which would entitle the charterer to put the vessel off hire. However, the provision would need to be relatively unusual to have this effect.

Charterers could consider cost-effective options to prevent extensive delays, such as ordering an alternative route to the vessel, he wrote.

Under a standard time charterparty, the Canal closure or congestion resulting from earlier delay, would not constitute breach by either party. However:

- The delay might put the charterer in breach of other obligations. For instance, the delay might result in the maximum charter period being exceeded, for which the charterer was likely to be responsible under the NYPE form, even when the delay was beyond his control (with damages *prima facie* being the difference between the charter rate and any higher market rate for the excess period). Under a Shelltime 4 form the position would be different since that form contains a standard clause allowing the charterer to complete the final voyage.
- If the delay resulted in cargo claims resulting from the delay itself, or due to cargo deterioration, that might lead to liability. However, this would depend on the nature of the claim and the charterparty terms. This situation could give rise to relatively complicated disputes. For example, where the ICA was incorporated in the charterparty and cargo deteriorated from a combination of inherent vice and delay.
- If the vessel had to transit the Canal to be delivered to service, charterers normally would have a cancellation right if the laycan was not met, owners bearing this time and expenses resulting from getting the vessel to the agreed delivery place. Charterers potentially had rights to claim damages if the vessel was delivered late, whether or not the charter was cancelled, although that claim would be unlikely to succeed provided the owner exercised reasonable diligence to deliver by the cancelling date.

## **Voyage charterparties**

Under a standard voyage charterparty, owners would not be not entitled to additional freight, demurrage or compensation for delay waiting to transit the Canal.

Additional provisions entitling the owner to payment in those circumstances might have been agreed; for example, a guaranteed transit time. However, that would be unusual. The Canal closure or congestion due to an earlier closure, would not result in breach by either party. However:

- The delay might put the owner in breach of obligations to the next charterer. However, that would be subject to the next charterparty terms. For example, if the vessel was already fixed under a Gencon 1976 form when the delay occurred, delaying the completion of the laden leg of the current charterparty, owners would be in breach of the next charter if the delay prevents the vessel from arriving by the agreed ready or cancelling date. In similar circumstances, if the vessel's next charter was on the Gencon 1994 form, where the obligation was to set out only after completion of prior commitments, there would be no breach.

- If the delay resulted in cargo claims caused by the delay itself or due to cargo deterioration, this might lead to liability, depending on the nature of the claim and the charterparty terms. For instance, the charterer might be obliged to indemnify the owner if the owner was liable under a bill of lading which imposed more onerous obligations than the voyage charterparty, which might contain wide exclusions as per the unamended Gencon form.

## **Delivery of cargo / Bill of Lading**

P&I usually covers the assured's liabilities for damage to or loss of cargo according to the Hague Rules, or the Hamburg Rules when these apply by compulsory law. Therefore, it was unlikely that liability towards cargo interests would arise for natural cargo deterioration resulting from delay caused by the Canal closure, or for failing to deliver on time.

Under a standard B/L subject to the Hague or Hague-Visby Rules, the carrier generally should not be liable for delay caused by the Canal closure or by congestion resulting from such closure, on the basis that there was no breach of obligations under Articles II or III and that responsibility would be excluded under Article IV Rule 2. However, in certain jurisdictions unmeritorious cargo claims might succeed. For example, if a cargo of soybeans deteriorated in part due to its inherent condition (if loaded with a high moisture content) and in part due to the delay, that claim may be difficult to defend in some jurisdictions.

## **Conclusion**

Serracin warned that charterparty terms could be exceptionally complex. He said that charterers "should carefully consider the clauses agreed in their contracts, especially those related to payment of hire or freight and vessel delays resulting in liability for possible cargo damage or cargo deterioration".

<https://www.skuld.com/topics/legal/pi-and-defence/the-ever-given-claims-and-cover-implications-from-a-charterers-perspective/>