The Suez Canal, cargo groundings and strikes: A perfect storm for delays

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On March 23, 2021, the MS Ever Given ran aground in the Suez Canal. This incident blocked all traffic through the Canal for the better part of six days, and caused week-long delays for approximately 400 other vessels.

The Canal sees about 12 per cent of all annual global marine traffic and, as such, the accident caused ripple effects that will be felt in cargo trade around the world. It is estimated that every hour the Canal was closed caused an economic loss of approximately US$400 million. Some of the vessels trapped behind the MS Ever Given were bound for Canada, or carried containers which will or were eventually delivered to Canadian consignees, with considerable delay.

Ripple effects of delayed arrivals in European ports, as well as over-extension of transshipment facilities, mean that many of these vessels and containers will arrive in Canada several weeks after originally planned. In the normal course of business, carriers do not guarantee a specific delivery or discharge date. Delays are par for the course, and any prudent shipper or consignee knows to be flexible in this respect. Things are somewhat different, however, for perishable goods, where delays can have significant effects. Shippers may attempt to recoup part of their losses on the respective carriers.

At first glance unrelated, but highly relevant to this discussion of delays, is the recent strike at the Port of Montreal. On April 26, the 1100 longshoremen at the Port of Montreal stopped work altogether. Delays to regular movement of cargo passing through the Port of Montreal are almost a certainty. On top of the delays caused by Ever Given's accident, carriers as well as cargo interests appear to be stuck between a rock and a hard place with legal consequences.

This article examines the position of the parties (carriers and cargo interests) under Canadian law.

Application of the Hague-Visby Rules

The Hague-Visby Rules apply in Canada. These rules contain a generally accepted framework for the relationship between carriers and shippers. In relevant part, they

provide that neither the carrier nor the ship itself is liable for damages resulting from "perils, dangers and accidents of the sea."[1] In our opinion this is the correct way, from the perspective of the more than 400 delayed vessels, to construe the grounding of the MS Ever Given. Prudent carriers who took normal precautions to make their vessels seaworthy can hardly be blamed for the misfortunes of another ship. As such, the carriers of containers bound for Canada delayed by the accident may not be liable for damages resulting from this delay.

As to the delays caused by the Port of Montreal strike, the Hague Visby Rules may also exonerate the carriers. The rules provide that carriers will not be held liable for damages caused by "strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general."[2]

Moreover, the Hague Visby Rules also provide for both an Act of God[3] and a catch-all provision,[4] exempting the carrier from liability for "any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier."

However, the burden of proof for this exception lies with the carrier. The likelihood of success of such a defence depends on both the actual causes of the accident and the steps the carrier took to mitigate the delays incurred, or those that could be anticipated.

Once it became clear the blockage of the Suez Canal and the Port of Montreal strike would cause significant delays, it raises the question of whether vessels should have deviated from their planned routes. This argument is difficult to make for vessels already entering the Suez Canal or the St-Lawrence River by the time the MS Ever Given grounded, or the strike was announced.

Once a vessel enters the Suez Canal, it is not allowed to make a U-turn and sail back. The matter is more complex for vessels which had yet to enter the Canal. The question of whether to turn back and attempt to sail around Africa, rounding the Cape of Good Hope, must have been a difficult choice for many shipowners. The Cape route adds at least 14 days of sailing at increased risk and greater cost for the carrier.

With the benefit of hindsight, it is clear now that vessels at the entrance of the Suez Canal that turned around may have made the wrong choice. The MS Ever Given was pulled free in six days, meaning that changing routes would have added significant additional delay beyond the delays caused by the vessel's grounding. Moreover, in matters of changing routes to avoid bad weather, longstanding jurisprudence shows that courts are reluctant to intervene in any master's decision which is made on the spot and based on incomplete information. Generally it will not lead to carrier's liability for the losses incurred.[5] In this case, similar reasoning could be followed.

The effects of the strike at the Port of Montreal are more complex. The labour troubles had been ongoing for several months, giving carriers more time to make alternative plans in the event of a strike. On the other hand, diverting vessels to another port to avoid a strike could also lead to unexpected delays due to congestion, lack of truckers or space on trains. With multiple variables in play, it is likely that a court would conclude that as long as a carrier had a reasonable contingency plan in place, it would have met its obligations to properly care for and carry the cargo as it is obliged to do under the Hague-Visby Rules.

Important to note is that the one year time limit to file suit before the Canadian courts runs from the date of the actual delivery of the goods, rather than from the date when the goods were supposed to be delivered under the bill of lading,[6] a relevant consideration when cargo delivery is significantly delayed.

Cargo interests will likely not have recourse from their insurance providers for damages resulting from delays, as cargo insurance does not, under normal circumstances, cover this type of damages. Most cargo insurance policies incorporate the wording of the Institute Cargo Clauses published by Lloyd`s of London Underwriting, which explicitly excludes delays.[7] Damages caused by strikes are also explicitly excluded and will not trigger restitution of the losses to the cargo interests.[8] Of course, each insurance policy should be examined in detail and on its own merits.

Takeaways

The ripple effects from the grounding of the MS Ever Given in the Suez Canal and the labour dispute at the Port of Montreal will have significant financial consequences for Canadian carriers and cargo interests. In the months to come, we expect many cargo claims will be made. As delays and strikes are excluded under most cargo insurance policies, these claims will likely come directly from the shippers and consignees. Carriers will be called on to justify their actions in the face of these events and in light of their obligations, and corresponding defences, under the Hague-Visby Rules.

[1] Hague Visby Rules, Art IV(2)(c).

[2] Hague Visby Rules, Art IV(2)(j).

[3] Hague Visby Rules, Art IV(2)(d).

[4] Hague Visby Rules, Art IV(2)(q).

[5] “While we must conclude that the master would have met less adverse weather conditions by following the recommended route, it was nevertheless his privilege to select any route he thought best, and a mere error in judgment on this issue does not give rise to a divided damage application as applied to the facts of this case.” Georgia Pacific Corp. v. M/S Marilyn,[1972] 1 Lloyd’s Rep. 418 at p. 424.

[6] Hague Visby Rules, Art III(6);

[7] Art 4.5: Loss damage or expense caused by delay, even though the delay be caused by a risk insured against.

[8] rt 7: In no case shall this insurance cover loss damage or expense 7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions 7.2 resulting from strikes, lockouts, labour disturbances, riots or civil commotions.

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