

# THE ARREST

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## news

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### The Grounding of M.V. *Ever Given* in the Suez Canal – Beginning of the Legal voyage

By John Harris, Adv; Yoav Harris, Adv.

#### The grounding of the M.V. Ever Given in the Suez Canal

On the morning of 23 March 2021 the 399.94 meters long and 219079 gross tonnage massive containership *M/V Ever Given* was grounded while navigating under pilotage, through the Suez Canal.

When opened for navigation on 17<sup>th</sup> November 1869 as the first canal directly linking the Mediterranean to the Red sea, its depth was about 8 meters and the largest ship that could pass through the canal was 5,000 tones (DWT). In the year 2015, after completing the creating of a 35 km new parallel waterway (between km 60 to km 95 out of the total 172 km of the Canal) and deepening and widening the Great Bitter Lakes by-pass 27 km long) and the Ballah by-pass (10 km long) the Canal was capable to accommodate vessels up to 66 ft, draught and size of 240,00 tones (DWT). According to the publications of the Suez Canal Authority ("the **SCA**") the Canal is able to accommodate 100% of the fully loaded container ships fleet, 92.7% of the Bulk Carrier fleet and 61.2% of the Tankers Fleet<sup>1</sup>.

According to the above, although being fully loaded with rows of 8 containers piling from the deck to top, and carrying what could have reached a gross total weight of 219,079 tones, the *M/V Ever Given* was one of the 100% types and sizes of the container ships which could have been accommodated by the Canal, and have been passing through the Canal during the last five years.

However, unfortunately, on 23<sup>rd</sup> March 2021, after passing through the "parallel part" of the Canal, across the southern end of the Canal, the vessel lost its maneuvering ability and ran aground in the

waterway, blocking the waterway and becoming stuck in the mud and sand, with no ability to move. As a result, and due to the fact that the grounding took place in the "non-parallel" part of the Canal, the Canal was totally blocked, and no movement of vessels could take place- not from south to north and not from north to south. It has been published that a 'fleet' of 400 vessels were 'stuck'- waiting at both ends/entries of the Canal.

#### The re-floating and detention of the vessel

During the following days, after massive mud dredging and sand and silt removal from below the vessels' bows, and together with the powers of tug boats, finally, on the early morning of March 29 the vessel was re-floated and sailed to the Great Bitter Lake area. However although the vessels engines resumed their working positions, and there were no signs of leakage or contamination, and that the vessels under water and other inspections resulted in the conclusion that the vessel is suitable for onward passage to Port Said for further assessment before departing to Rotterdam<sup>2</sup>, the vessel did not receive a clearance to continue its voyage to the Netherlands, and the SCA has detained the vessel and initiated arrest procedures before the court of Ismailia City, claiming a compensation of US\$ 900 million.

According to the SCA's statements, this amount was comprised from the revenue lost, during the time that the vessel was immobilised which amounted to US\$ 12 -15 million a day, US\$ 300 million for "salvage bonus" and US\$ 300 for "loss of reputation". According to the courts' order the *Ever Given* will be held until the compensation amount is paid, according to the Egyptian Maritime Law.<sup>3</sup> The Insurer, UK P&I Club filed an appeal over the

<sup>1</sup>Publication on [www.suezcanal.gov.eg](http://www.suezcanal.gov.eg).

<sup>2</sup> Report on Greta Mohan at [www.indiatoday.in](http://www.indiatoday.in), April 15, 2021.

<sup>3</sup> Report on [www.dw.com](http://www.dw.com) "Egypt impounds Ever Given over Suez compensation claim".

detention of the vessel. The hearing on the appeal is scheduled for May 4<sup>th</sup>.<sup>4</sup>

### The sequence of events is still under ambiguity

Up to date, although almost more than 30 days have passed since the vessel ran aground, and although investigation should have taken place by the SCA officials immediately with the grounding and investigators were granted with full accesses to the Voyage Date Recorder, no formal report has been issued in relation to the sequence of events which led to the grounding.

### Captain Dado's explanation of navigation through the Canal

It is important to mention, that every vessel who asks to navigate through the Canal is required to declare to the SCA, under formal forms, its technical particulars and the cargo carried, together with other information related to the loading and discharging ports, mechanical situation, etc., and to present related documents. According to the SCA's Rules of Navigation, Article 6, (1) "**Pilotage is compulsory for all vessels, whatever their tonnage may be when entering, leaving moving changing berth of shifting on Canal water or Port Said and Suez harbors**". In these regards, it should be mentioned that According to Article VI 2 (a) of the Hague-Visby Rules, "**Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from...act neglect or default of the master, mariner, pilot...in the navigation or the management of the ship**". However, under English-law authorities, "**the mere fact that the pilot is in charge by compulsion of law does not "exonerate the master and the crew from the proper observance of their duty"..."it is the duty of the master to observe the conduct of the pilot and in the case of palpable incompetency...to interpose his authority for the preservation of the property of his employers**".<sup>5</sup>

According to Captain Herzl Dado, former Master of "Zim Integrated Shipping Services" who navigated through the Suez Canal on more than 100 voyages, "*The recommended speed of navigating in the Canal is 7.5 knots. If the vessel will move slower, it*

*will lose its steering capabilities. Usually in the case of a vessel of the size of the Ever Given two pilots board the vessel and stay through the passage through the Canal which takes about 10 hours*". In relation to the contention on behalf of the vessel that the grounding was caused due to strong wind and sand storms, Captain Dado explains: "*One must bear in mind that rows of 8 containers, piled all along 400 meters length of the vessel might operate as a huge sail when hit by wind and could effect the position of the vessel. In addition, wind storms also may influence the visibility. Therefore, under conditions of forecasted winds and sand storms it is preferable to have the bow thruster in a "stand by" position so it could be immediately operated and stabilise the vessel when hit by wind. In addition, the master should be on-guard and alert to maintain the vessels speed of 7.5 knots and to increase speed when required and if the vessel is slowed by the winds, in order to maintain its' maneuvering capabilities*".

According to Captain Dado, although the vessels navigate through the Canal are under compulsory pilotage, "*at the end of the day a good Master will not rely only on the pilots who boarded its vessel and should be on guard and alerted to take the required steps to keep the safety of the vessel even under pilotage*".



*navigating through the Suez Canal. Photos by Captain Herzl Dado.*

### The Legal aspects of General Average

The actual facts which led to the grounding of the M.V. Ever Given have not been yet published, but one of the legal aspects which is already present, is the question of general average and salvage.

The General Average is an exception to the common principle that a marine adventure is an adventure concerning three interests: the interest in the ship, those in the cargo and those in freight

<sup>4</sup> Report on [www.marinelink.com](http://www.marinelink.com), "Ever Given Insurer Appeals Detention by Egypt", April 23, 2021.

<sup>5</sup> Charles, Lord Tenterden, "**Merchant Ships & Seaman**", fourteenth edition, page 3, citing Dr. Lushington on *The Diana* (1862) and *The Duke of Manchester* (1846).

remaining to be paid on the cargo and that any loss sustained by one of them must generally be borne by that interest itself; it lies where it has fallen. It is a particular average.

But, when in order to avert a danger which threatens the whole adventure some interest is sacrificed (like throwing overboard of cargo, or the cutting away of masts for safety in a storm) the loss is imposed on upon all for whose benefit the sacrifice has been made, in proportion to their saved values. It is a general average. Derived from the ancient law of Rhodes and adopted in the Digest of Justinian.<sup>6</sup>

When effectual assistance is given to the ship and cargo in time of danger by "strangers" to the ship, they become entitled to salvage payment or rewards<sup>7</sup> and can enforce that right against the property which is saved. In practice, salvage (such as towage of a vessel out of a position of danger) is treated as a general average loss or expenditure<sup>8</sup>. Also, a payment for captors to induce them to give up the ship and cargo is a considered as a general average loss.<sup>9</sup>

Accordingly, it might well be, that the salvage efforts to re-float the stuck vessel would be considered as 'Salvage' entitling the salvors to enforce their rights for salvage on the property salvaged – being the vessel and the 220,000 tons of cargo, and accordingly the salvage payments should be borne both by the owners of the vessel and the cargo interests. If and as much that the SCA's demand for US\$ 900 million is not founded in either facts or law, the payment or deposit of such an amount with in the Ismailia court in order to have the vessel released from its detention, might also argued to be a "ransom payment" which should also be included as a general average sacrifice or expenditure.

On the other hand, if and as much that the grounding was a result of the vessel's unseaworthiness or for not being manned properly with competent crew at the beginning of the voyage (as required under Art 3 (1) of the Hague-Visby Rules) the Owners would either be barred or not entitled for

general average contribution from the cargo interests, because as the wrongdoer, the owner would be under the obligation to use every means to repair the natural consequences of his wrongful act. He cannot be permitted to claim recompense for services rendered or indemnity for losses sustained by him under his duty to salve.

### Additional cases of unfortunate grounding recently

The grounding of the M.V. Ever Given, is not the only grounding which took place recently. On April 27 it was reported that a Norwegian -flagged *Mv Tirranna* a 760-foot car carrier ran aground in the Chesapeake Bay<sup>10</sup>. On Monday 19 April, *the M/V Lct-Cebu Great* Ocean, which was carrying nickel ore ran aground in Surigao del Norte Province after its anchor broke while taking shelter from rough seas causing it to drift until it ran aground. Unfortunately, and most sadly, four crew members lost their lives, and a search for nine others was still continuing according to a report issued on April 21, while seven have been rescued.<sup>11</sup>

### Summation

The marine voyage continues to be a risky adventure with a myriad of consequences on crew's lives and on the local and even the global economy and law.

The matter of M/V Ever Given if in fact at its beginning, and should be followed.

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<sup>6</sup> Carver's "Carriage By Sea", Thirteenth Edition, volume 2, Chapter 14, pages 966-967.

<sup>7</sup> Salvage is a recognized lien, for example under the International Convention on Arrest of Ships Geneva 1999, Article 1, (1) (c) a claim arising out of "salvage operations or any salvage agreement" is a maritime claim.". Under the International Convention on Salvage 1989, Article 20, "Nothing in this Convention shall affect the salvor's maritime lien under any international lien or national law".

<sup>8</sup> Carver's "Carriage By Sea", pages 1004, 1005.

<sup>9</sup> Carver's "Carriage By Sea", page 1006, foot note 99, referring to Per Bowen L. J. in *Svendsen V. Wallace*, (1884).

<sup>10</sup> Report on [www.marinelink.com](http://www.marinelink.com), "Car Carrier Grounds Near Cape Charles", April 27, 2021.

<sup>11</sup> Report of Karen Lema, on [www.marinelink.com](http://www.marinelink.com), "Cargo Ship Grounding in Philippines: Four Crew Dead, 9 Missing", April 21, 2021.