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Legal and commercial consequences from the Indian perspective arising out of the *MV Ever Given* grounding in the Suez Canal

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1. On or about 23 March 2021 at 8 AM (local time) whilst the 20,000 TEU-class container ship - *MV Ever Given* **("Vessel")** had been traversing in a northbound direction in the Suez Canal she experienced bad weather caused by a sand storm and began drifting off course. On account of the heavy winds hitting the high-stacked containers on the deck of the Vessel, she began rotating clockwise. In light of the fact that the Vessel is almost 100 metres longer than the full width of the Suez Canal, her rotation firmly lodged her bow and stern on both sides of the Suez Canal, which resulted in the complete blocking of traffic. The 6-day blockage of the Suez Canal clogged the most vital artery of the international trade exacerbating the existing disruptions of worldwide supply chains caused by the COVID-19 pandemic. Whilst Indian law may have a very little connection with disputes among core stakeholders (barring the fact that all seafarers on board the Vessel were Indian nationals), the legal issues arising of the 2021 Suez Canal are likely to resonate among various players in the Indian shipping industry.

Brief Facts:

2. We understand from publicly available information that the Vessel was beneficially owned by a Japan based shipowner which was a subsidiary of Imabari shipyard, Japan where the Vessel had been assembled. Her Owners had let her out on a long-time charter with a large Taiwan based container shipping player and engaged a German ship management company to act as a ship manager. A leading Japanese and Dutch salvage provider had been immediately marshalled to the scene to undertake salvage operations. After, undertaking complex salvage operation which inter alia involved removing 20,000 MT tons of the sand and mud around the Vessels, deballasting the Vessel, towing and pushing the grounding vessel using 8 large tugboats the Vessel, dredging parts of the canal the Vessel had been successfully refloated at around 3 PM on 29 March 2021.

3. Presently there are a series of investigations being carried out by the Egyptian Suez Canal Authority, Panamanian Flag State Registry, the Shipmanagers, the Owners and the Charterers and thus we would be reluctant to speculate on the underlying cause of the grounding of the Vessel. There were initially unsubstantiated theories that the Vessel had experienced a blackout but we note that the Shipowners have rejected this factual assertion. At time of the incident Egypt is at the beginning of a season called the khamsin, a roughly 50-day period in which sporadic, powerful dust storms blow in from the Sahara. The nature of assistance provided by tugboats when the Vessel was traversing the Suez Canal would also have to be investigated.

The act of god/ peril of the sea defence in the context of future cargo claims?

4. Whilst there are no reported incidents of damage being caused to the cargo on board; given the fact that Owners have already declared General Average and the salvors would have a lien over the cargo on board the Vessel, the marine cargo underwriters of the cargo owners are likely to have furnished a General Average Bond to the Salvors as security for salvors claim for a reward for successfully salving the cargo. In the instant case, in light of the complexity of the salvage operation and the value of cargo on board the Vessel, the Salvors claim against the cargo owners in terms of their reward for successfully salving the cargo are likely to run into millions of dollars. We would imagine, Cargo interests are likely to bring recourse proceedings against their contractual counterparty i.e., the Carrier under the bills of lading in which they would be seeking an indemnity for their exposure of liability towards the Salvage for the claim for a salvage reward for successfully

salving the cargo laden on board the Vessel. Since the Charterer is a leading container shipping operator, we would imagine that the Charterers would have issued bills of lading in its capacity as Carrier and we would imagine that Charterers are likely to sue Owners under the Charterparty to indemnify themselves of their exposure towards cargo claims (who inturn are seeking an indemnity from Charterers for their exposure towards claims for salvage reward). It appears that presently Owners have commenced limitation proceedings before the English High Court to constitute a limitation fund. In an overwhelming majority of cases either the Hague Rules or the Hague Visby rules would govern cargo claims made under the bills of lading either by contractual incorporation or having the force of law.

5. One of the moot issues dispositive to the apportionment of liability among Owners, Charterers and Cargo Interests for claim of salvage reward with respect to successful salvage of the cargo laden on board the Vessel would be the whether the Owners/ Carriers would be able to exculpate themselves of liability by taking shelter under Article 4 (2) of the Hague Rules/ Hague-Visby Rules by contending that the loss or damage arise or resulted from "*Perils, dangers and accidents of the sea or other navigable waters"* or *"Act of God."* In the instant case, it *prima facie* appears that the grounding of the Vessel had some nexus with a sand storm which blew past the Vessel at the material point of time and if Owners/ Carriers can establish with evidence that the unforeseen sand storm was a fortuitous event leading to the incident and there was no negligence on the part of Owners/ Carriers attributable to them they would be able to exculpate themselves of liability. It should however be remembered that the mere fact of their being a sand storm in the vicinity of the Vessel would not itself immediately exonerate the Owners/ Carriers from liability and in order for the Peril of the Sea/ Act of God defence to apply it would be incumbent for them to establish that the bad weather of such extraordinary nature, force or power which cannot be guarded against by ordinary skill and prudence of the Master and other officers on board the Vessel and the intensity of the sand storm was not foreseeable. Parties may have to proffer evidence of the latest technology available in the shipping industry to demonstrate that in today's day and age ships are designed to withstand bad weather conditions and also to protect the cargo carried on board the vessel during the bad weather conditions even when traversing across canals.

6. Indian Courts have allowed carriers/ shipowners to take shelter under Article VI, Rule 2 of the Hague Rules. The Kerala High Court in the case of *Collis Line Private Ltd. v. New India Assurance Co. Ltd.* AIR 1982 Ker 127 whilst considering the scope of Article 4 (2) held as follows:

   > *"10. The primary burden of proving that the loss or damage occurred on account of an excepted cause falls squarely upon the carrier who seeks to exempt himself from liability. Once he has discharged that burden the onus would then shift to the cargo-owner to show that the carrier is not entitled to the benefit of the exception. The exceptions mentioned under Article IV will not be available to the shipowner if the cargo owner proves that the loss or damage has been caused by the negligence of the shipowner or that of his agent or servants except insofar as the shipowner is protected under Article IV Rule 2 (a) and (b). [Art. IV Rule 2 (b) reads: "(b) Fire, unless caused by the actual fault or privity of the carrier;"*

7. In *Steel Coils Inc v. M/V Lake Marion Et al.* 2003 AMC 1408 the US Court had taken the opinion that the mere fact that the ship experienced rough weather and extreme wind velocity did not constitute a peril of the sea for the shipowner to be able to exculpate himself of liability as in the particular facts of the case these weather conditions were foreseeable. In *Great China Metal Industries Co. Ltd v. Malaysian International Shipping Corp. Berhad*, 1997 AMC 769, the US Court expressed the opinion that the test of whether the shipowner can take shelter under the Act of God/ Peril of the Sea defence is whether a reasonable shipowner in similar circumstances would have foreseen that the voyage being undertaken involved a risk of injury to the cargo and if so, what it would have done in response to the risk by the exercise of skill and prudence.

8. In the instant case, one of the moot issues which will have to be examined is whether the sand storm and the gusting winds was foreseeable to the shipowner prior to the Vessel entering the Suez Canal and would an ordinary prudent shipowner in similar circumstances would have chosen to wait outside the Suez Canal until the passing of the sand storm. Media reports indicate that several ships had opted not to enter the Suez Canal on 23 March 2021 in light of the ensuing bad weather conditions.

Whether the Shipowner can be held liable in situations of the Pilots/ Canal Authorities negligence?

9. The International Group of P&I Clubs in its Report on P&I claims involving vessels under pilotage 1999-2019 **("IG P& I Club Report")** has stated that 25% of the worldwide grounding incidents over the last 20 years have occurred in the Suez Canal. Additionally, the IG P& I Club Report states that the largest groundings claim of US$64.9m, US$22.6m and US$21.2m were in the years 2003, 2006, and 2016 and two out of these three incidents related to accidents taking place in the Suez Canal.

10. Traditionally, the role of a pilot has been more to that of a consultant, using his local experience and practical knowledge of the canal to give advice, for instance on how to manoeuvre the vessel or what course to steer rather than taking actual charge of the ship. It is theoretically possible for the Master of the Vessel to refuse to comply with the guidance and opinion offered by the Pilot albeit for all practical purposes this is seldom the case. In the instant case it would have been incumbent for the Master of the Vessel to have passed on information to the two pilots appointed by the Egyptian Suez Canal Authority relating to the steering capability and performance of the Vessel, whilst it would have been the duty of the two pilots to communicate to the Master about the local conditions in the Suez Canals. The Suez Canal has a compulsory pilotage regime and the Vessel at the time of the grounding had two pilots on board. We understand under Egyptian law and pursuant to the by rules of the Suez Canal Authority, Owners are responsible for negligence of pilots. Under Indian law a shipowner is only "answerable" for the acts of pilot and not always "liable" for the acts of the pilot. Section 31(2) of the Indian Port Trust Act, 1908 provides *"the owner or master of a vessel which is by that sub- section required to have a pilot, harbour- master or assistant of the port- officer or harbour- master on board,* ***shall be answerable*** *for any loss or damage caused by the vessel or by any fault of the navigation of the vessel, in the same manner as he would have been if he had not been so required by that sub- section."* The Court of First Instance of the Calcutta High Court in the case of *South India Shipping Corporation Ltd. v. The Board of Trustees for the Port of Calcutta* 1997 SCC OnLine Cal. 133 expressed the opinion that the term "answerable" under section 31(2) of the Indian Port Trust Act, 1908 need not mean "liable" and made the below observations:

> *"According to the interpretation sought to be given to the sub-section, by counsel for the defendant, it would appear that the word "answerable" was used to mean liable, and as if the two words were interchangeable. The legislators in their wisdom preferred that the owner of the vessel in those circumstances should be given the opportunity to answer in relation to the incident and not made liable without any hearing. No doubt, upon very careful consideration of the justice of the matter, they chose to use the word "answerable" and not liable, which they very well could have, had they thought it appropriate. The contention of the defendant, forcefully argued by its counsel, that the owner of the vessel which caused any damage to any property of the defendant must accept liability for the incident and undertake to pay for all repairs in respect to such damage, would appear to me to have swept away many an 'its' and 'buts', which on proper consideration would render the contention into a sail out of which all the wind has been taken out.*
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> *For reasons, I hold that during the process of berthing the vessel was under the guidance and in the change of the berthing master, who was a duly authorised employee of the defendant, and that the accident occurred due to the lack of proper care and Inadequate expertise of the berthing-master coupled with the archaic communication system which was both inaudible and unseeable by the berthing master as also the tugs, then prevalent in the Haldla Dock Complex."*

11. The aforesaid judgment of the First Instance of the Calcutta High Court had been reversed by the Appeal Court of the Calcutta High Court vide Order dated 27 October 2006 in APD No. 338 of 1997 in the matter of *Port of Calcutta v. South India Shipping Corp. Ltd.* Eventually, this judgment was subsequently reversed by the Supreme Court of India on appeal in the case of *Essar Shipping Limited. v. Board of Trustees for the Port of Calcutta* (2019) 4 SCC 432 restoring the judgment of the Court of First Instance of *South India Shipping Corporation Ltd. v. The Board of Trustees for the Port of Calcutta* 1997 SCC OnLine Cal. 133. In light of the same, the law laid down by the Court of

First Instance had the approval of the Supreme Court of India and accordingly the same would be binding upon all courts in India. The Kerala High Court vide order dated 7 December 2018 in CRP. No. 880 of 2018 in the matter of the *Board of Trustees, Cochin Port Trust v. Shipping Corporation of India* held that a shipowner's lawsuit against the port for negligence of the pilot cannot be summarily dismissed in light of the section 31(2) of the Indian Port Trust Act, 1908. US Courts have taken the view that port authorities who charge fee for pilotage services are subject to *"implied warranty of workmanlike service to provide skilled, expert, and professional pilotage services'* per *United States v. Emery H. Joyce* 511 F.2d 1127. We understand that enacted a domestic legislation which imposes liability on pilots up to a maximum of One Million Euros and requires compulsory insurance to cover such an exposure to liability.

Potential Claims for pure economic loss/ business interruption losses.

12. The Suez Canal Authority earns an average daily revenue of approximately USD 15 Million and a 6-day blockage of the Suez Canal would straight away lead to a loss of USD 90 Million. We understand that the Suez Canal Authority has already lodged a formal claim of USD 1 Billion and various stakeholders related to the incident are currently negotiating on how best to resolve the current issue on mutually favourable terms. We are however not sure how the Egyptian Suez Canal Authority has quantified its losses to be USD 1 Billion. Additionally, it has been reported in the media that there could be potential claims from other ships and cargo interests (whose cargo has been placed on other ships) as a result of losses arising from the delay.

13. As a general rule in a strict liability regime, in the absence of negligence on the part of Defendant claims for business interruption losses and/or pure economic losses cannot be awarded. We are of the opinion that as a matter of policy pure economic loss should not be allowed because as a result of the 6-day blockage of the Suez Canal arising out of the grounding of the Vessel almost all supply chains across the world would have been disrupted and there are likely to be thousands of importers and exporters and shipowners all across the globe who are likely to be affected by the same.

14. In a hypothetical scenario of a tort claimant suing the Owners of the Vessel before an Indian Court, the tort claimant would have to establish the following:

    a. The Owners of the Vessel owed a duty of care towards the tort claimant. There should exist between the Owners of the Vessel and the tort claimant a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose such a duty of care owed by the Owners of the Vessel to the tort Claimant.

    b. The loss which the tort claimant was claiming was foreseeable to the Owner of the Vessel and was not remote.

    c. The claim of the tort claimant against the Owners of the Vessel is not a claim for pure economic loss independent of physical damage; and

    d. there was a causal connection between the grounding of the Vessel in the Suez Canal and the loss suffered by the tort claimant. There should not be any intervening factors i.e., *novus actus interveniens* which can be regarded as breaking the causal connection between the wrong and the damage.

15. The Bombay High Court in the recent case of *Finolex Industries Ltd v MV Kew Bridge* 2014 (4) ABR 639 **("Kew Bridge Judgment")** dealt with substantially similar circumstances. In this case, the vessel *MV Kew Bridge* grounded at a channel in the approach to the Ratnagiri Port resulting in the inability of the Plaintiff to use its captive jetty which resulted in the Plaintiff sustaining business interruption losses. The Bombay High Court rejected the claim of the Plaintiffs with the below observations:

    "44. In this case, the Defendant Vessel had come to Ranpur Bay to discharge a cargo of LPG to the account of BPCL in the Captive jetty. Bad weather caused her to drift when she was being berthed, and she ran aground 1.5/1.6 kms from the jetty. The plaintiff is carrying on business of manufacture of PVC resin at a plant which is further inside from the Port. It will not be reasonable or fair or just to

impose upon the defendant duty of care to the plaintiff because like the plaintiff there will be multitude persons who would have been remotely affected not as a rule by way of physical damage to them or their property but by putting them to inconvenience and sometimes economic loss. If claims for such loss were permitted there would be no end to claims. Some might be genuine, some might be inflated or even false. In such cases, it is also not rightly capable of proof or easily checked and in my view this claim for economic loss for the plaintiff, independent of physical damage is not payable. I am inclined to follow the principles laid down by Lord Denning in the "Spartan Steel"

16. The Kew Bridge Judgment laid down a number of propositions of law which squarely applies to the instant case:

a. The common law rule of strict liability i.e., liability without fault of the Defendant as laid down in the celebrated case of *Rylands v. Fletcher* and the principles of "Absolute Liability" as laid down by the Indian Supreme Court of India would apply only in cases involving when the tortfeasor was engaged in a hazardous and inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas. In the *Kew Bridge* ruling, the court while dealing with a similar scenario quite explicitly noted that strict liability is only applicable if someone is harmed and cannot be stretched to pure economic losses and that too where it is independent of physical damage.

b. As a matter of public policy of India, claims in tort for pure economic loss in the absence of physical damage to the property of the claimant are not recoverable;

17. In the case of *Petitions of Kinsman Transit Co* 388 F.2d 8212, 1968 AMC 293 (2d Cir. 1968), in dealing with a case wherein a grounded ship had disrupted transportation across a river recognised that whilst the shipowner in that case could have potentially foreseen the possibility of parties having to incur additional expenses because of the need to find alternate routes of transportation or substitutes for goods delayed as a result of the blockage of the river these categories of losses were too tenuous and remote to permit recovery. In the case of *In re Oriental Republic of Uruguay Limitation Process (Presidente Rivera)* 821 F. Supp. 934, 1993 AMC 783 (D. Del. 1993), the US Court rejected the below claims of a terminal operator for losses arising out of the canal/ river traffic being closed for several hours by coming to a finding that these losses stemmed out of contractual duties and not from damages arising from its property rights in the dock:

    a. Claims for demurrage charges for delays in the shipment of crude oil to its terminal while the river was closed to traffic;

    b. Claims for demurrage charges resulting from delay in cargo discharge due to the unavailability of the pier while the damaged vessel was docked at its terminal and;

    c. Claims for demurrage charges economic losses in connection with the re-routing and change in delivery of shipments of its oil resulting from the unavailability of the dock.

Apprehensions expressed by Indian seafarer unions

18. Over the last decade, the Suez Canal has gained the nickname among Indian seafarers as the "Marlboro Canal" in light of the habit of pilots appointed by the Suez Canal Authority collecting boxes of cigarettes ostensibly as a gesture of goodwill from the Master (for the sake of good order we are not insinuating that this was the case here)! It appears from media reports that the Suez Canal Authority have denied liability and alleged that purported negligence of the shipowner and seafarers on board the Vessel led to the incident.

19. Indian seafarers' unions have already expressed apprehension on the fact that the seafarers have not been allowed to leave Egypt on the pretext that the Suez Canal Authority is carrying out an inquiry into the grounding of the Vessel in light of the previous criminal prosecution of two Indian seafarers in the *Hebi Spirit* incident in South Korea. The most egregious act was the one undertaken by the Pakistani authorities after the Tasman Spirit incident of 2003 at the Karachi Port, wherein the detention of seafarers had been used as a bargaining chip by the Pakistani Authorities to claim compensation in excess of USD 1 Billion when there was able evidence of contributory negligence on the part of authorities of the Karachi Port Trust in failing to dredge the channel leading to the

Karachi Port. Given the stakes involved i.e., USD 1 Billion, Indian Seafarers Unions have expressed reasonable and justifiable doubts on whether a fair, independent and impartial enquiry would be undertaken by the Egyptian Suez Canal Authority or whether they would cover their back and make the Indian seafarers scapegoats for the same.

20. Needless, to say we genuinely hope that the aforesaid apprehensions expressed by Indian seafarer unions are unfounded and for the avoidance of doubt we express no opinion on the aforesaid apprehensions of the Indian seafarer unions.

Conclusions:

21. Over the last few years there has been a general consensus in policy circles in the Indian Government on the need to exponentially develop the potential of Inland water navigation in India in light of the fact that the transportation of cargo/ goods through inland waterways in India is a miscue fraction in comparison to China, USA and Europe. In the latter half of 2018, the ship *MV RN Tagore* steamed between the Indian city of Varanasi to Calcutta carrying 16 containers of cargo. The Indian Government is developing the National Waterway 1 between Allahabad/ Prayagraj to Haldia a 1,620 KM/ 874 nautical miles canal which passes through the Indian states of Uttar Pradesh, Bihar, Jharkhad and West Bengal in which cargo ships of 1,500 DWT to 2,000 DWT can steam. The issues that have arisen as a result of the 6-day blockage of the Suez Canal out of the grounding of the Vessel would be further amplified in the context of inland water transportation. Additionally, even as on date Indian Courts are dealing with issues relating to business interruption of ports as a result of many casualties relating to the blockage of channels leading to the port. We are presently not commenting on these issues as we are presently involved in some of these cases and the matter is sub judice.

22. For the sake of good order we would like to reiterate that we are not in this article making any value judgment on the liability of any party but merely seek to highlight certain issues which finds considerable resonance in the Indian context.

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