

SCA vs. Evergreen

ADSERO Writing Competition 2021 Winner

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Abstract

In this paper, we examine various legal aspects regarding the SCA vs. Evergreen matter, as if no settlement has been reached. Preliminarily, despite that Ever Given's owner and charterer are foreign entities, the Ismailia Economic Court is internationally and locally competent to examine the dispute. Since the ship is faced with a number of maritime claims, the Court duly ordered its conservatory seizure.

The parties may proceed to international commercial arbitration instead of litigation, as the subject-matter is arbitrable, and the SCA does not need to obtain the Prime Minister's prior-approval. In either proceeding, the Egyptian Cabinet cannot be forced to join this case, as it is regarded as a third-party. Moreover, Egyptian law shall govern the dispute, notably as the passage contract is governed by the Navigation Rules, an Egyptian law document. In accordance with these rules, Ever Given's owner and charterer waived their right to benefit of any limitation of liabilities. Therefore, the SCA is entitled to obtain full compensation for all damage, including its financial losses due to the Canal's obstruction.

Finally, the SCA cannot benefit of the insurance coverage made by the UK P&I Club, due to the "Pay to be paid" standard clause.

Keywords

Litigation; dispute resolution; maritime law; international law; damages

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Editorial note

This Case Note is the winning submission of the ADSERO¹ 2021 Writing Competition, which was open to students and young professionals. The ADSERO 2021 Writing Competition and its subsequent judgement of submissions was conducted independently, and therefore did not adhere to the Peer Review Policy of the Journal of Law in the Middle East by LexisNexis. The submissions were judged by three firm members, including Senior Associate Dalia Nagati, of Counsel Dr. Radwa Magdy and Junior Associate Abdullah Hosny.

In partnership with ADSERO, the Journal of Law in the Middle East by LexisNexis has chosen to republish the winning submission.

Introduction

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Preliminarily, despite that Ever Given's owner and charterer are foreign entities, the Ismailia Economic Court is internationally and locally competent to examine the dispute. And since the ship is faced with a number of maritime claims, the Court dully ordered its conservatory seizure.

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Table of abbreviations

CCPL	Egypt Law No. 13/1968 on Civil and Commercial Procedures, as amended.
Civil Code	Egypt Law No. 131/1948 on the Civil Law, as amended.
Club	United Kingdom Mutual Steam Ship Assurance Association Ltd., also known as UK Protection & Indemnity (P&I) Club.
Club's Rules	Club's Rules of 2021, accessed 18 July, https://www.ukpandi.com/-/media/files/uk-p-and-i-club/rules/2021/rulebook-2021---final.pdf
Cass.	Court of Cassation.
Dispute	SCA vs. Principals, regarding the Suez Canal obstruction.
EAL	Egypt Law No. 27/1994 on Arbitration, as amended.

¹ Adsero - Ragy Soliman & Partners is an Egyptian law firm. Full details may be found at their website, <https://www.adsero.me/>.

ECL	Egypt Law No. 120/2008 on the Economic Courts, as-amended.
ETL	Egypt Law No. 17/1999 on the Trade Law, as-amended.
Ever Given	MV Ever Given, a ULCS registered in Panama, with IMO No. 9709257.
Evergreen/Charterer	Evergreen Marine Corporation Limited., charterer of Ever Given.
JY	Judicial year.
LLMC	Convention on Limitation of Liability for Maritime Claims of 1976, accessed by Egypt through President Decree No. 150/1986.
Maritime Claim(s)	As defined by article 1.1 of-the Seizure Convention and article 60 of-the MTL.
MTL	Egypt Law No. 8/1990 on Maritime Trade, as-amended.
Navigation-Rules	Rules of Navigation of 2020, issued by the SCA's Circular No. 8/2020, https://www.suezcanal.gov.eg/English/Navigation/NavigationCirculars/Documents/Cir.8-2020/SC-Rules-of-Navigation(Circ.%208.2020).pdf .
Owner	Shoei Kisen Kaisha Limited., ultimate owner of Ever Given.
Principals	Charterer and Owner of Ever Given.
SCA	Suez Canal Authority, organized by the SCA Law.
SCA Law	Organisation of-the SCA Law No. 30/1975, as-amended.
Seizure Convention	International Convention Relating to the Arrest of Sea-Going Ships of 1952, accessed by Egypt through Egypt Law No. 135/1955.
TEU	Twenty-foot Equivalent Unit.
ULCS	Ultra-large containership.

Analysis

On 23 March 2021, the Egyptian Meteorological Authority warned of a heavy sandstorm hitting the country, with a rough impact over the maritime traffic. The SCA increased its precautionary measures across its six ports in Suez, South Sinai and Red Sea governorates.² However, transiting through the Suez Canal kept flowing without interruption.³

At 7:40 AM (GMT+2), on the said day, Ever Given, a ULCS of 400 metres long (as tall as the Empire State Building), with a width of 59 meters⁴ (nearly as wide as the International Cairo Stadium),⁵ and a capacity of 20,124 TEU,⁶ was going through the Suez Canal, heading to Rotterdam, Netherlands. It grounded in the

² Amal Abbas, "After Nuweiba: Closing Suez ports due to bad weather," *Al-Masry Al-Youm*, 23 March 2021, <https://www.almasryalyoum.com/news/details/2294706>

³ "Sandstorm hits Egypt, and strong warnings to citizens," *Al-Ain*, 23 March 2021, <https://al-ain.com/article/severe-dust-storm-egypt>

⁴ "Ever Given," *Vessel Finder*, accessed 18 July 2021, <https://www.vesselfinder.com/vessels/EVER-GIVEN-IMO-9811000-MMSI-353136000>

⁵ "Main Football Stadium," *International Cairo Stadium*, accessed 18 July 2021, <http://www.cairo-stadium.org/Location.aspx?id=16>

⁶ "Vessel Particulars of Ever Given," *Shipment Link*, accessed 3 July 2021, https://www.shipmentlink.com/tvi1/jsp/TVI1_VesselParticulars.jsp

south end-of-the Suez Canal,⁷ halting all traffic in the Canal for more than 185 vessels, mostly bulk carriers, container ships, and oil and chemical tankers.⁸

Early media statements by the SCA officials and Evergreen, were estimating that the cause of-the incident was due to weather conditions causing a blackout.⁹ The SCA deployed two of its biggest dredgers and nine tugboats to float Ever Given, in an attempt to remove sand and water from beneath it and tug it to the course again.¹⁰

On 24 March 2021, the SCA declared that navigation through the Canal will continue without interruption. However, on the next day, it had to suspend the navigation until floating Ever Given, which obstructed the Canal due its size and location.¹¹

During this period, world-wide news reports were speculating the disastrous outcomes of-the Ever Given incident, and its impact over international trade, with daily loses estimated around USD 15 million incurred by the SCA.¹² The SCA kept monitoring the situation, and even cooperated with the leading Dutch company, SMIT Salvage. Thanks to SCA's plans and careful calculations, Ever Given had been finally floated on 29 March 2021, and navigation resumed in the Canal.¹³

On 1 April 2021, Admiral Rabie, the SCA's Chairman, declared that SCA will demand more than USD 1 billion as compensation for the losses and floating costs.¹⁴ Disagreements escalated between the parties due to the magnitude of-the amount, leading the President of-the First Instance Circuit of the Ismailia Economic Court, on 13 April 2021, upon the SCA's request, to issue order No. 26/2021 to seize Ever Given as a security, followed by another claim regarding the proof of debt.¹⁵ On 23 May 2021, the Court rejected all counter-attempts to annul the order, and proceeded with examining the Dispute.¹⁶

On 25 May 2021, after initially claiming approximately USD 916 million,¹⁷ the SCA slashed them to USD 550 million and showed its will to settle through requesting the delay of judicial procedures. At the same time, the SCA started to disclose some of its investigation results, conveying that Ever Given's grounding was due to a human error, and not just the weather conditions.¹⁸

⁷ Mike Schuler, "Grounded 'Mega Ship' Blocking Suez Canal in Both Directions," *gCaptain*, 23 March 2021, <https://gcaptain.com/grounded-mega-ship-blocking-suez-canal-in-both-directions/>

⁸ Salma El Wardany, Mirette Magdy and Jack Wittels (Bloomberg), "Grounded Mega Ship in Suez Canal Paralyzes Trade for Second Day," 24 March 2021, <https://gcaptain.com/grounded-mega-ship-in-suez-canal-paralyzes-trade-for-second-day/>

⁹ Ashraf Gehad, Ahmed El-Sheikh, "Ever Given's Grounding and Disruption of Navigation," *Masrawy*, 24 March 2021, https://www.masrawy.com/news/news_egypt/details/2021/3/24/1992790/%D8%AC%D9%86%D9%88%D8%AD-%D8%A5%D9%8A%D9%81%D8%B1-%D8%AC%D9%8A%D9%81%D9%86-%D9%88%D8%AA%D8%B9%D8%B7%D9%84-%D8%A7%D9%84%D9%85%D9%84%D8%A7%D8%AD%D8%A9-%D9%85%D8%A7%D8%B0%D8%A7-%D9%8A%D8%AD%D8%AF%D8%AB-%D9%81%D9%8A-%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D8%B5%D9%88%D8%B1-%D9%88%D8%AA%D8%AA%D8%A8%D8%B9-%D9%84%D8%AD%D8%B8%D9%8A

¹⁰ Amr El-Warwari, "Full Detail about the Stranded Ship in the Suez Canal," *Al-Watan*, 24 March 2021, <https://www.elwatannews.com/news/details/5394461>

¹¹ Amr El-Warwari, "SCA Declares Navigation Suspension," *Al-Watan*, 25 March 2021, <https://www.elwatannews.com/news/details/5395079>

¹² "Suez Canal Blockage | What happened? What are the losses? And when and how will it end?" *Daqaeq*, 28 March 2021, <https://daqaeq.net/suez-canal-blockage/>

¹³ "Egypt or Smit Salvage: Who's the main responsible of floating the ship and unblocking the canal?" *Daqaeq*, 30 March 2021, <https://daqaeq.net/free-ever-givin/>

¹⁴ "Suez Canal: Egypt seizes Ever Given and demands more than US\$ one billion as compensation," *BBC News Arabic*, 1 April 2021, <https://www.bbc.com/arabic/middleeast-56603122>

¹⁵ Al-Sayed Fouad, "Al-Mal publishes the details of the claims regarding the proof of debt and the validity of the conservatory seizure over Ever Given," *Al-Mal*, 23 May 2021, <https://almalnews.com/%D8%A7%D9%84%D9%85%D8%A7%D9%84-%D8%AA%D9%86%D8%B4%D8%B1-%D8%AA%D9%81%D8%A7%D8%B5%D9%8A%D9%84-%D8%AF%D8%B9%D9%88%D9%89-%D8%AB%D8%A8%D9%88%D8%AA-%D8%A7%D9%84%D8%AF%D9%8A%D9%86-%D9%88%D8%B5/>

¹⁶ Ismailia Economic Court of Appeals' judgment regarding case No. 23 of JY 14, 23 May 2021, accessed 20 July 2021, <https://manshurat.org/node/72199>

¹⁷ "SCA's memorial regarding the owner of Ever Given's objection from its arrest order," *Manshurat*, accessed 20 July 2021, <https://manshurat.org/node/72265>

¹⁸ "Egypt determines the cause of the 'Ever Given' ship stranding in the Suez Canal," *Al-Arabiya*, 25 May 2021, <https://ara.tv/65tdk>

Negotiations carried on between the parties, and finally, after 107 days, a confidential compensation settlement has been concluded, freeing Ever Given from the Court's order, as it departed on 8 July 2021.¹⁹

In this paper, we will examine various legal aspects in relation with the Dispute, as if no progress has been reached since the conservatory seizure of Ever Given, regardless of its potential perspectives towards third parties.

1. Procedural issues

1.1 The international jurisdiction of the Egyptian judiciary

Determining the competent jurisdiction to examine the Maritime Claims is generally in accordance with the Seizure Convention, which gives jurisdiction to the State where the ship, flying the flag of a signatory State, is located.²⁰ But since Ever Given is a Panamanian ULCS,²¹ and Panama is a non-contracting State,²² the Egyptian judiciary will need to examine its international jurisdiction in accordance with its law,²³ through reviewing the foreign element to the case, (i.e., the nationality of-the parties), which is not an issue in regards to the SCA, the Egyptian public authority.

Regarding the Principals, Egyptian law only establishes how to determine a corporate's *lex societatis*,²⁴ regardless of its nationality; as the power to accord a nationality is an act of national sovereignty that should not be infringed by a foreign authority.²⁵ However, some of-the Egyptian doctrine suggests taking into consideration certain criteria to deduce the nationality of a juristic person, notably the nationality of-the shareholders, the management and/or employees, its incorporation papers, and the location of its facilities.²⁶

Except for Evergreen's²⁷ and Ever Given's²⁸ respective agents, the aforementioned criteria are mostly non-Egyptian in respect of-the Principals. Therefore, the foreign element in this case is established.

Consequently, we assert that the Egyptian judiciary is internationally competent to hear the Dispute, in accordance with both article 7 of the Seizure Convention and article 30 of-the CCPL, the international jurisdiction is established if any of-the following was located in Egypt:

- (i) a property (i.e., the arrested Ever Given);²⁹
- (ii) an obligation which has been created, performed or should have been performed (i.e., the Suez Canal passage contract);
- (iii) an elected residence of a foreign defendant who does not have a domicile or residence in Egypt. In accordance with article 144 of-the MTL, the ship's agent is considered as the operator's representative regarding filed claims against or by the latter in Egypt, and the

¹⁹ "After 107 days: Ever Given leaves the Suez Canal in a big ceremony," *Al-Ahram*, 7 July 2021, <https://gate.ahram.org.eg/News/2858747.aspx>

²⁰ Article 2 of the Seizure Convention.

²¹ Since Ever Given is registered at Panama, it cannot have more than one nationality, in accordance with articles 91 and 92 of the UN Convention on the Law of the Sea (UNCLOS)

²² Signatories of the Seizure Convention, *UN Treaty Collection*, accessed 17 July 2021, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba>

²³ Articles 7, paragraph 1, and 8, paragraph 2, of the Seizure Convention.

²⁴ Article 11 of the Civil Code.

²⁵ Dr. Fouad Riad and Dr. Samia Rashed, *International Private Law*, vol. 1, (Cairo, *Dar Al-Nahda*, 1971), p. 320.

²⁶ Dr. Ibrahim Ahmed, *International Private Law: Nationality & Law on Foreigners*, (Cairo, *Dar Al-Nahda*, 2006), pp. 45-52.

²⁷ "Egypt – Arabian Guld Marine Trading Company," *Evergreen Line*, accessed 11 July 2021, https://www.evergreen-line.com/tbo1/jsp/TBO1_GlobalInfo.jsp?en=n&Type=%27%27&Country=EG&CountryName=Egypt; *Maritime Transport Sector*, accessed 11 July 2021, <https://www.emdb.gov.eg/ar/directory/default/view/65?v=desc&agency=1>

²⁸ "Konouz for International Maritime Commerce and Navigation," *Maritime Transport Sector*, accessed 11 July 2021, <https://www.mts.gov.eg/ar/directory/default/view/236?v=desc&agency=1>

²⁹ Cass., case No. 145 of JY 62, 15 May 2000.

agent's domicile is considered to be the operator's. This representation remains limited to procedural aspects of the claim, as the liability in respect of the subject-matter remains on the operator.³⁰

1.2 The governing law of the Dispute

As the Egyptian judiciary is internationally competent, it shall proceed to determine the applicable law in accordance with the *lex fori*.³¹ Respectively, we conclude that Egyptian law shall be applicable over the seizure's validity³² and the merits of the Dispute.

To elaborate, the SCA-Evergreen relationship is based on a contract, and not just a material fact or another type of legal acts; as a contract is concluded when reciprocal considerations and obligations are agreed upon by the parties, without having them originally derived from either a statute or a tort.

Even if there was an imbalance between the parties leaving one of them in a "take it or leave it" type of deal (i.e., adhesion contracts), it does not deprive their relationship from being characterized as a contract, as this imbalance is the result of an economic reality (e.g., indispensable monopolised utilities) that does not defect the beneficiary's consent.³³ And in case of the Suez Canal, economic operators willingly take this route instead of other options (e.g., navigating around Cape Agulhas) for financial reasons.

Therefore, SCA-Evergreen's connection is based on a passage contract, with its terms and conditions detailed in the Navigation-Rules,³⁴ which state in its first article that vessels have to comply with all laws, orders, and regulations issued by the Egyptian Government.

Subsequently, the main branch of Egyptian law governing this contract is the MTL. Thus, economic courts have an exclusive jurisdiction over all disputes in relation with the MTL, including the validity of the conservatory seizure.³⁵

1.3 The arbitrability of the Dispute

Concerning the arbitrability of the Dispute, it is generally admitted under the EAL that parties to an international³⁶ commercial dispute have the possibility of electing any law as their *lex arbitri*.³⁷

However, even if the EAL would not be chosen as the *lex arbitri*, some of its public policy rules remain applicable, especially if it eventually became the *lex executionis*. Two sets of requirements must be respected: (1) the arbitrability of the subject matter of the dispute, and (2) the capacity of the parties to enter into an arbitration agreement.

³⁰ Cass., case No. 2429 of JY 69, 26 February 2002.

³¹ Article 10 of the Civil Code.

³² Article 6 of the Seizure Convention.

³³ Dr. Abd El-Razzak El-Sanhuri, *Al-Wasit in the New Civil Code*, vol. 1, *Sources of Obligation*, (Lebanon, *Dar Ehya' El-Turath*, 1952) p. 229-230.

³⁴ Article 1, paragraph 1, of the Navigation Rules (p. 4).

³⁵ Article 6, point 13, of the ECL.

³⁶ The internationality of a dispute is determined when it falls under several cases, including: (i) when the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement, and (ii) when the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in Egypt or abroad (article 3 of the EAL).

³⁷ Cass., case No. 450 of JY 40, 5 May 1975.

A dispute is arbitrable under the EAL when in consideration of conciliable disposable rights,³⁸ without contradicting public policy nor morals.³⁹ Most importantly, the subject matter should be related to a legal economic connection⁴⁰ (i.e., the passage contract).⁴¹

Regarding the capacity requirement, the Principals' capacity is generally determined in accordance with their respective *lex societatis*; therefore, for the sake of our analysis, we will assume that the Principals do have the required capacity. As for the SCA, we confirm that it does have the capacity to conclude a submission agreement regarding the Dispute, without the need to obtain the competent minister's prior approval (i.e., the Prime Minister).

For instance, article 1, paragraph 2, of the ELA explicitly draws a distinction between private law contracts and administrative contracts, as resorting to arbitration in respect of the latter requires the approval of the competent minister or the official assuming his powers in regards to public juristic persons, and delegation of powers in this respect is prohibited. Accordingly, the key point to determine the SCA's capacity is through determining the nature of its contract with Evergreen.

When speaking of the nature of contracts concluded by the economic public authorities, it is incontestable that contracts in relation with the administration and management of the economic public utilities, when containing exorbitant clauses, are of an administrative nature (e.g., concession agreements).⁴² The State Council, in its advisory opinion of 1997,⁴³ further justified the rationale behind rejecting the arbitrability of administrative contracts without the approval of a competent official, as their subject matter is related to a public interest, and not just a private interest (e.g., all acts in relation with maritime navigation are commercial acts).⁴⁴

Additionally, SCA's property is not public, but it is a private property governed by private law, and therefore disposable.⁴⁵ And the SCA's goal is to make profits in first place, that it is why its gains are not perceived as mere tolls (i.e., reduced fees in exchange for public services), but rather as a commercial consideration in exchange for transiting through the Suez Canal (i.e., passage contract),⁴⁶ similar to other authorities managing economic utilities.⁴⁷

1.4 The joinder of the Egyptian Cabinet to the Dispute

A question may arise over the joinder of the Egyptian Cabinet, which cannot be forced to join to this case whatsoever was the resolution mechanism.

In the context of litigation, article 117 of the CCPL granted to the parties the possibility to bring a third-party to the case if the latter was a person whom was possible to be involved in the first place.⁴⁸ However, the link between the Cabinet and the Dispute cannot be established, since the SCA is a public authority with an independent legal personality.⁴⁹ And even if the SCA is affiliated to the Cabinet, this affiliation is generally

³⁸ Article 11 of the EAL; article 551 of the Civil Code, stating that financial interests are conciliable.

³⁹ Article 135 of the Civil Code.

⁴⁰ Article 2 of the EAL; Dr. Fathi Waly, *Arbitration Law in Theory & Practice*, 1st ed. (Alexandria: *Dar Al-Maarif*, 2007), pp. 121-129.

⁴¹ Dr. Atef Mohamed, *Arbitration in Maritime Disputes*, (Cairo, *Dar Al-Nahda*, 2004), pp. 77-82.

⁴² Cass., cases No. 1964 and 1968 of JY 91, 8 July 2021, the recent judgment which annulled an ICC award rendered against Damietta Port; Dr. Soliam Al-Tamawi, *General Principles of Administrative Contracts*, 5th ed. (Cairo, Ain-Shams University Press, 1991), pp. 53-106.

⁴³ State Council, advisory opinion No. 60 issued on 22 February 1997, case No. 54/1/339. This opinion echoed in subsequent case laws; by way of illustration, kindly refer to: State Council, cases No. 30952 and 31314 of JY 56, 14 September 2010; Cairo Court of Appeal, case No. 8 of JY 127, 15 April 2014.

⁴⁴ Article 6 of the ETL.

⁴⁵ Article 10 of the SCA Law.

⁴⁶ Dr. Zeinab Hussein, *Principles of Public Finance*, (Alexandria, *Dar Al-Gami'a Al-Gadeeda*, 2006), pp. 109-116.

⁴⁷ Dr. Mohamed Sherif, *Adhesion Contracts*, (Cairo, *Dar Al-Nahda*, 2006), pp. 56, 60-63.

⁴⁸ Dr. Ahmed Meliguy, *A Comprehensive Commentary on the Procedural Law*, 8th ed., vol. 3, (Cairo, Egyptian Judges' Club, 2010), p. 11.

⁴⁹ Article 2 of the SCA Law.

limited to administrative supervision, without being under its control.⁵⁰ Thus, a counter-evidence should be submitted to prove that the Cabinet was materially involved in the Dispute.⁵¹

As in the context of arbitration, if we drew an analogy with mother companies and their affiliates, it is required in such a context that the affiliate would have been playing a part in executing the obligations of the former in order to be forced to join the arbitration proceedings.⁵² Either that, or to obtain the consent of the parties, and of the relevant third-party too, to bring the latter to the case;⁵³ as submission agreement is a consensual contract,⁵⁴ and forced arbitration is unconstitutional.⁵⁵ Hence, bringing the Cabinet to arbitration requires its consent.

1.5 The legal grounds of the conservatory seizure

There are two types of seizure over ships: the executory seizure, subsequent to rendering an executory verdict (e.g., courts' judgments and orders),⁵⁶ and the conservatory seizure, ordered by a court with the sole goal to guarantee the creditor's claimed rights until reaching either a final verdict⁵⁷ or a settlement agreement.⁵⁸

The conservatory seizure is applicable even if the ship was ready to sail.⁵⁹ Readiness of a ULCS to sail is prior to or after being loaded with containers, which, in our interpretation, may allow for the inclusion of the cargo itself, especially if there was a risk upon the creditor to lose a significant guarantee of his rights.⁶⁰ As Ever Given's capacity equals 20,124 TEU, requiring the SCA to unload this massive amount of cargo in order to seize only the ship would result in a significant loss of time and money, not only for the SCA, but also for the Principals and the whole chain of supply depending on Ever Given.

As examined earlier, the Egyptian judiciary is internationally competent to order the seizure of Ever Given in respect of Maritime Claims; the pertinent Maritime Claims in our case are: (1) loss of life; (2) salvage, (3) towage, and (4) damage caused by the ship.

A seizure order must be obtained from the appropriate judicial authority;⁶¹ in this case, the president of the competent first instance court or his equivalent,⁶² who happens to be a class (A) judge of an equivalent ranking, selected by the General Assembly of the Ismailia Economic Court,⁶³ the locally competent jurisdiction since the ship falls in its circuit.⁶⁴ This condition has been duly fulfilled.

This order must be followed with a claim filed by the creditor before the First Instance Circuit of the Ismailia Economic Court during the following eight days since delivering the seizure, otherwise the seizure shall be considered as null and void.⁶⁵ The SCA filed its claim in due time.

⁵⁰ Dr. Soliam Al-Tamawi, *General Principals of Administrative Law*, vol. 2, *The Theory of Public Utilities & Public Administration's Workers*, (Cairo, *Dar Al-Fikr Al-Arabi*, 2014), p. 60.

⁵¹ Judge Ahmed Mahmoud, *Maritime Case Laws*, 4th ed., (Alexandria, *Dar Al-Maarif*, 2007), pp. 379-385; State Council, case No. 1719 of JY 34, 23 March 1991: "The administrative liability is established upon three elements; an error, a damage and causation."

⁵² Cass., cases No. 4729 and 4730 of JY 72, 22 June 2004.

⁵³ State Council, case No. 7595 of JY 81, 13 February 2014.

⁵⁴ Cass., cases No. 6529 and 6530 of JY 62, 12 January 2000.

⁵⁵ Constitutional Court, case No. 380 of JY 23, 11 May 2003.

⁵⁶ Articles 67-77 of the MTL.

⁵⁷ Article 59 and 61 of the MTL; Cass., case No. 8810 of JY 64, 26 November 2001.

⁵⁸ Article 8 of the ECL.

⁵⁹ Article 3 of the Seizure Convention and article 59 of the MTL.

⁶⁰ Article 316 of the CCPL; kindly note that the provisions of the CCPL are applicable over the economic courts' procedures, unless it contradicts the special provisions of the ECL, as stated by the latter's fourth article of issuance.

⁶¹ Article 4 of the Seizure Convention.

⁶² Article 59 of the MTL.

⁶³ Article 7 bis of the ECL.

⁶⁴ Articles 55 and 59 of the CCPL; Minister of Justice's decree No. 8603/2008, as amended.

⁶⁵ Article 65 of the MTL.

Finally, the seizure can be elevated if a sufficient warranty or guarantee was offered,⁶⁶ but Evergreen refused to, as it considered that the amount requested by the SCA (USD 200 million) was grossly estimated.⁶⁷

2. Legal liabilities of the SCA and the Principals

2.1 The non-limitation of the Principals' liabilities

Preliminarily, when addressing the merits of the Dispute, it should be reminded that the terms and conditions of the passage contract are the Navigation-Rules, considered as the law of the Canal.⁶⁸ The Navigation Rules are binding upon the Principals and Ever Given's master by the sole fact of using the Canal,⁶⁹ prevailing over non-public policy norms.⁷⁰

Furthermore, Egypt is a signatory of the LLMC, with its rules incorporated in the MTL, and both instruments state that the limitation of liability is an option for the Principals in regards to enumerated claims.⁷¹ Consequently, such an option can be waived,⁷² which happened in the SCA-Evergreen passage contract, as article 4, paragraph 3, of the Navigation-Rules states that the Principals "are responsible without option to release themselves from responsibility by 'Limited Liability'."

Accordingly, the Principals shall not benefit of any limitation of liability in respect of the damage to the Canal itself, physical injuries (i.e., the death of an SCA's personnel),⁷³ and material damage (i.e., the drowning of an SCA's boat),⁷⁴ and the claimed compensation shall be evaluated in proportion with the damage.⁷⁵

Furthermore, we need to examine the compensation claims regarding the financial losses incurred by the SCA, caused by the obstruction of the Canal for six consecutive days. In addition to the non-limitation of the Principals' liability in this regard, it has been estimated that daily losses due to obstruction accounted for USD 15 million, accruing to USD 90 million in six days. This figure can be close to the truth, as the average weekly revenues during the last five years ranged between USD 94 million (at the lowest) and USD 111 million (at the highest), according to the Central Bank of Egypt's data.⁷⁶

⁶⁶ Article 5 of the Seizure Convention, and article 63 of the MTL.

⁶⁷ Mohamed Muhammadin and Moaaz Abd Al-Aziz, "An Egyptian court orders the continued detention of the ship Ever Given in the Suez Canal," *Reuters*, 23 May 2021, <https://www.reuters.com/article/egypt-suez-as3-idARAKCN2D40A9>

⁶⁸ Minister for Foreign Affairs of Egypt, "Declaration on Suez Canal and the arrangements for its operation – Letter addressed to the President of the Security Council," *UN Digital Library*, 24 April 1957, p. 3 <https://digitallibrary.un.org/record/574836?ln=en>; Al-Sayed Falah, "Suez Canal: The Navigation Rules constitute the legal references to the SCA's rights and obligations," *Al-Youm 7*, 5 June 2021, <https://www.youm7.com/story/2021/6/5/%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D9%84%D8%A7%D8%A6%D8%AD%D8%A9-%D8%A7%D9%84%D9%85%D9%84%D8%A7%D8%AD%D8%A9-%D9%87%D9%8A-%D8%A7%D9%84%D9%85%D8%B1%D8%AC%D8%B9%D9%8A%D8%A9-%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%D9%8A%D8%A9-%D9%84%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D9%82%D9%86%D8%A7%D8%A9-%D9%88%D8%A7%D9%84%D8%AA%D8%B2%D8%A7%D9%85%D8%A7%D8%AA%D9%87%D8%A7/5343838>

⁶⁹ Article 1, paragraph 3, of the Navigation Rules (p. 4).

⁷⁰ Article 147 of the Civil Code.

⁷¹ Article 1.1 of the LLMC; article 81 of the MTL.

⁷² Dr. Mohamed Bahgat, *Al-Wasit in Maritime Trade Law*, 7th ed., vol. 1, (Cairo, *Dar Al-Nahda*, 2014), pp. 308-311.

⁷³ Even though the MTL did not explicitly mention death, "physical injury" can be understood to be inclusive of this damage, as it is explicitly mentioned in article 2, paragraphs 1.a, of the LLMC, kindly refer to: *Ibid.*, pp. 294-295.

⁷⁴ "SCA unveils latest updates over Ever Given," *Sky News Arabic*, 25 May 2021, <https://www.skynewsarabia.com/business/1439858-%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D8%AA%D9%83%D8%B4%D9%81-%D8%A7%D9%93%D8%AE%D8%B1-%D8%AA%D8%B7%D9%88%D8%B1%D8%A7%D8%AA-%D8%A7%D9%95%D9%8A%D9%81%D8%B1-%D8%BA%D9%8A%D9%81%D9%86-%D9%88%D8%AC%D8%AF%D9%84-%D8%A7%D9%84%D8%AA%D8%B9%D9%88%D9%8A%D8%B6%D8%A7%D8%AA>

⁷⁵ Cass., case No. 5 of JY 16, 17 April 1947.

⁷⁶ Moustafa Eid, "How much is the Suez Canal's weekly revenue during the last five years? (infographic)," *Masrawy*, 28 Mars 2021, https://www.masrawy.com/news/news_economy/details/2021/3/28/1995053/%D9%83%D9%85-

Moreover, arguing that the SCA does not deserve this amount since its revenues hit a record in the fiscal year 2020-2021 despite the obstruction⁷⁷ is not a solid claim, as this increase can be due to other factors (e.g., causation link between COVID-19's precautionary measures and e-commerce, leading to an increase in international shipping).⁷⁸

2.2 Categorisation of the parties' responsibilities

The Navigation-Rules detail the responsibilities of both sides, in specific and basket clauses (e.g., article 4). We can identify a clear emphasis over the strict liability of the master and the Principals; as article 4, paragraph 2, states that the Principals are responsible of any "damage" (defined as physical and environmental damage) and "consequential loss" (defined as "any losses caused to the vessel or floating unit herself, SCA properties or personnel or the obstruction of navigation in the Canal water").

In respect of the SCA's responsibilities, although all vessels have the right to transit the Suez Canal,⁷⁹ the SCA retains a prerogative to delay the transit through the Canal for all vessels in a number of situations (e.g., investigations, complaints, security reasons), without having its liability engaged.⁸⁰

As for the Principals' and master's responsibilities, they are numerous. Beginning with transiting the Canal in a bad weather (applicable to our case; *supra*, paragraph 1), the Navigation-Rules advise against such a conduct. However, if the master opted to transit, he will be notified that his transit will be at his own responsibility.⁸¹ Surely, taking the decision to postpone is difficult, as the master finds himself compelled to transit, regardless of the weather, in order to avoid significant financial losses for the operator.⁸²

Additionally, even if some experts convey the responsibility of the SCA's pilots of the obstruction⁸³ (noting that pilotage is compulsory in the Suez Canal),⁸⁴ pilots are exempted from any liability, as it totally falls on the master and the Principals, since the pilots' role is purely advisory, whether they were giving orders directly,⁸⁵ or the mistake resulted from their advice.⁸⁶

2.3 The SCA's efforts between towage and salvage regimes

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⁷⁷ "Record revenues at the Suez Canal," *Enterprise*, 12 July 2021, <https://enterprise.press/stories/2021/07/12/record-revenues-at-the-suez-canal-47194/>

⁷⁸ By way of illustration, kindly watch this audio-visual report: "How Maersk Dominates the Global Shipping Industry," *CNBC*, YouTube, 13 July 2021, <https://youtu.be/9-IEcZOa4rg>

⁷⁹ Article 1 of the Constantinople Convention of 1888; Minister for Foreign Affairs of Egypt, "Declaration on Suez Canal and the arrangements for its operation – Letter addressed to the President of the Security Council," *UN Digital Library*, 24 April 1957, p. 2, <https://digitallibrary.un.org/record/574836?ln=en>; article 1, paragraph 1, of the Navigation Rules.

⁸⁰ Article 5, paragraphs 1 and 3, of the Navigation Rules (p. 5-6).

⁸¹ Article 9, H, 1, e, 1, of the Navigation Rules (p. 21).

⁸² Kit Chellel, Matthew Campbell and K Oanh Ha, "BIG READ: Six days in Suez: The inside story of the ship that broke global trade," *Business Live*, 29 June 2021, <https://www.businesslive.co.za/bd/life/2021-06-29-six-days-in-suez-the-inside-story-of-the-ship-that-broke-global-trade/>

⁸³ Gunter Schütze, "'Ever Given' - A Precedent? (Part 1)," *LinkedIn*, 25 April 2021, https://www.linkedin.com/pulse/Ever-Given-precedent-part-1-gunter-sch%C3%Bctze/?trk=public_profile_article_view

⁸⁴ Article 6, paragraph 1, of the Navigation Rules (p. 6); article 282 of the MTL.

⁸⁵ Article 11, A and D, of the Navigation Rules (p. 26), articles 286-290 of the MTL.

⁸⁶ Article 4, paragraph 7 of the Navigation Rules (p. 5); Constitutional Court, case No. 25 of JY 28, 7 November 2010, affirming that such provisions do not violate Sharia principles of justice and fairness.

Finally, it is argued that the SCA does not deserve a remuneration in exchange of its services in floating Ever Given,⁸⁷ as these efforts do not qualify as a “salvage” entitling the SCA to a generous reward,⁸⁸ but rather as a “towage.”

This argument is based on the obligatory nature of conducting the floating operation in respect of the SCA, as the latter’s efforts were not deliberate, but were only for the sake of honouring an already existing agreement between the SCA and Evergreen.⁸⁹ Especially when taking into consideration that the participation of any third-party in the floating operation without the SCA’s approval is prohibited.⁹⁰

Also, the Navigation-Rules state that when a vessel stops in the Canal itself in consequence of an accident other than collision, engine troubles, auxiliary and steering gear troubles, its towing shall be free of charges⁹¹ until the ships is afloat.⁹²

Lastly, and most importantly, the advocates of this argument assert that Ever Given was never in a perilous situation endangering the survival of its crew or itself, a condition precedent to be entitled to a salvage reward.⁹³

In our assessment, we do agree that, under normal circumstances, the SCA’s efforts would have been characterized merely as towage conducted in execution of its contract with Evergreen. However, as testified by the global media, this incident was one of a kind.⁹⁴

Furthermore, article 308 of-the MTL⁹⁵ endorses that towage operations transform into salvage, once these operations are of an exceptional scope that does not normally fall under a standard towage contract.⁹⁶ Egyptian case laws did not specify what qualifies as an “exceptional scope” to transform towage into salvage, but we can have some insights from the recent developments in French law.

Firstly, a towage contract is normally a commutative contract, but once the existence and limits of an obligation and its effects for one party or for both become unknown, the contract turns into an aleatory contract, transforming towage into salvage.⁹⁷ ⁹⁸ Accordingly, we realized that the SCA allowed for the flow of navigation to continue in parallel with the floating operation, in accordance with its early expectations; but due to how difficult and unforeseen the situation was, it had to halt the transit until further notice, with many predicted that the obstruction would extend for weeks.

⁸⁷ “Memorial of Ever Given’s owners,” *Manshurat*, accessed 20 July 2021, pp. 12-17, <https://manshurat.org/node/72266>

⁸⁸ Article 13 of the International Convention on Salvage of 1989 states several criteria to determine the reward’s value, including the salvaged value of the vessel, the skill and efforts of the salvors in preventing or minimizing damage to the environment, the time used and expenses and losses incurred by the salvors, and the risk of liability and other risks run by the salvors or their equipment; this convention applies in case of judicial proceedings regarding salvation matters in a State party’s jurisdiction, according to its second article; this convention is signed by Egypt, *Un Treaty Collection*, accessed 20 July 2021, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3&clang=_en

⁸⁹ It is worth noting that this assistance is imposed by the SCA upon “vessels whose machinery is/ or becomes disabled, or having bad steering, or which is liable to becoming unmanageable for any reason,” according to article 57, paragraph 2, of the Navigation Rules (p. 59); Dr. Iman Al-Gameel, *Maritime Assistance*, (Alexandria, *Dar Al-Gami’a Al-Gadeeda*, 2011), pp. 53-54.

⁹⁰ Article 59, paragraphs 3 and 4 of the Navigation Rules (p. 62).

⁹¹ Article 103, C, 2, d of the Navigation Rules (p. 193).

⁹² Article 59, paragraph 5, of the Navigation Rules (p. 62).

⁹³ Dr. Iman Al-Gameel, *Maritime Assistance*, (Alexandria, *Dar Al-Gami’a Al-Gadeeda*, 2011), pp. 22-25.

⁹⁴ Mostafa Salem et al., “Dislodging the huge ship blocking the Suez Canal could take ‘days to weeks,’ as the traffic jam builds,” *CNN*, 26 March 2021, <https://edition.cnn.com/2021/03/25/middleeast/suez-canal-ship-blockage-intl-hnk/index.html>

⁹⁵ Please note that the MTL (articles 302-316) incorporated all the provisions of Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea of 1910, as amended by the 1967 Protocol, without any alteration, kindly refer to: Dr. Iman Al-Gameel, *Maritime Assistance*, p. 15.

⁹⁶ Dr. Iman Al-Gameel, *Maritime Assistance*, pp. 89-92.

⁹⁷ Prof. Gaël Piette, “Remorquage,” *Répertoire de droit commercial* (January 2017), Dalloz étudiants, paragraphs 21-24 accessed 20 July 2021 (restricted access; reference available upon request).

⁹⁸ Kindly note that the Egyptian judiciary has the power to characterize the contract in accordance with its true nature, regardless of its given designation by the parties (Cass., case No. 15487 of JY 77, 26 October 2008).

Secondly, in a similar case before the Paris Court of Appeal,⁹⁹ where a ship was grounded, the Court judged that the conducted efforts in the case were characterized as a salvage and not as a towage, stating that even if the ship existed in a harbour zone, the ship is considered in a risk as long as it was no longer afloat, or lost its manoeuvrability and was unable to adjust its situation by its own means, which was indisputable in the grounding of Ever Given.

3. Insurance law perspectives of the Dispute

In the limits of what is publicly disclosed, Ever Given is insured by the Club for “certain third-party liabilities that might arise from an incident such as this - including, for example, damage caused to infrastructure or claims for obstruction. The vessel itself and its cargo will have been insured separately.”¹⁰⁰

We cannot be certain of any further information; however, we can take as guidance the Club’s Rules for the insurance policies the Club offers, noting that it explicitly states that they can be altered in the final agreement.¹⁰¹ Therefore, the following analysis is based on the presumption that the Club’s Rules constitute the terms and conditions of the Club’s agreement with the Owner, in the limits of our knowledge of foreign laws.

On these terms, is it possible for the SCA to benefit of the Club’s insurance? Aside of the discernible economic benefits of providing further solvency, what we are concerned of are the legal implications of this coverage.

As a reminder, insurance contracts, as any contract, only create effects between its parties, without creating any obligations nor rights to a third-party, unless the applicable law (i.e., English law)¹⁰² otherwise provides (i.e., the direct-action suits).

Even if the Club had an effective role negotiating damages with the SCA, it does not mean that it would be directly liable to pay the compensation. In order to avoid direct-action suits, it is common between P&I clubs to stipulate the “pay to be paid” principle, which means that in order for the insured party to recover his indemnity, it is a condition precedent that he would pay all of his dues, not only to the P&I club he is affiliated to, but also in respect of third-party liabilities;¹⁰³ and the Club is no exception.¹⁰⁴

This principal of antiquity, as much as it is beneficial for the marine insurance industry, is contested by many of the international literature, as it creates a hardship upon injured parties, who will not be able to directly file a claim against the insurer unless the insured party pays its dues.

According to the Club’s Rules, there is a possibility for a third-party to proceed with arbitration against the Club, but only upon its directors’ approval.¹⁰⁵ The likelihood of success is subject to an experienced local counsel’s assessment.

⁹⁹ Paris Court of Appeal, second chamber, 15/07715, 3 November 2016, https://www.legifrance.gouv.fr/juri/id/JURITEXT000033354298?init=true&page=1&query=15%2F07715&searchField=ALL&tab_selection=all

¹⁰⁰ “Ever Given” Media Statement,” *UK P&I Club*, accessed 18 July 2021, <https://www.ukpandi.com/news-and-resources/press-release-articles/2021/Ever-Given---media-statement/>

¹⁰¹ Rule 1.3 of the Club’s Rules (p. 8).

¹⁰² Rule 42 of the Club’s Rules (p. 97).

¹⁰³ By way of illustration: Prof. Philippe Delebecque, *Droit maritime*, 14th ed, Précis, (Paris, Dalloz, 2020), pp. 1006-1008; Pat Saraceni, “PI Clubs Pay to be paid versus direct action,” *Clifford Chance*, published 30 August 2017, https://www.cliffordchance.com/briefings/2017/08/pi_clubs_pay_to_bepaidversusdirectaction.html

¹⁰⁴ Rule 5.a of the Club’s Rules (p. 34).

¹⁰⁵ Rule 40 of the Club’s Rules (pp. 93-94).