

Case Comment - *The Ever Given*: A Reminder to Ensure Intention in Contract Formation

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After making headlines worldwide in March 2021 there's been little discussion of *Ever Given*, the 399 meter long, 199,489 DWT container vessel of 20,388 TEU capacity that grounded in the Suez Canal and brought one of the world's busiest maritime trade routes to a halt. The recent decision of the England and Wales Court of Appeal in *The Ever Given (Salvage Claim)* [2024] EWCA 260 has brought the *Ever Given* back into the foray and provides a valuable reminder to those engaged in the maritime industry to ensure the certainty of terms in their service contracts, and the intention of each party to the contract to be bound by them.

Facts: The owners of the *Ever Given* sought salvage assistance from SMIT Salvage B.V. to free the vessel from the banks of the Suez after the grounding. The owners and SMIT were aware of the typical contract templates for salvage operations (such as WRECKHIRE and Lloyd's Open Form) and agreed on several other elements of the salvage through email exchanges. SMIT presented two offers outlining certain terms and conditions for the salvage, with the owners making a counteroffer but only in respect of remuneration for the salvage services. SMIT responded to the counter-offer and noted "we shall follow up with the drafting of the contract", but those remaining terms, including remuneration, were never agreed. SMIT ultimately deployed a salvage team and arranged for two tugs (with 285 and 155 metric-ton bollard pulls) to assist in the refloating, and the vessel was successfully refloated almost a week after the grounding.

In the months that followed the refloating, a dispute arose as to whether SMIT's services were provided pursuant to a contract formed in those email exchanges (which would limit SMIT's remuneration to whatever value was agreed in that contract) or whether the services were in the nature of salvage under the International Convention on Salvage, 1989 and/or commonlaw, which would allow for SMIT to be remunerated up to the value of the salvaged property. SMIT then brought a lawsuit against the owners claiming there was no contract, with the owners arguing that the SMIT's services were subject to a pre-existing contract (ie. the email exchanges).

Decision of the Courts: The High Court reviewed the email exchanges found that although there was agreement between the owners and SMIT on several points of the salvage operation, the parties were still negotiating the terms of the contract at the time the vessel was refloated on 29 March 2021, including the terms of remuneration for SMIT's services. This meant, according to the High Court, that there was no contract for salvage services by the date the vessel was refloated, and SMIT's remuneration was not capped by a term of the alleged contract. The owners appealed to the England and Wales Court of Appeal, which affirmed the High Court's decision that there was no contract between the owners and SMIT, and found that the agreement on the remuneration was only part of a larger negotiation towards a binding contract which was never actually reached.

Impact: Although a foreign case, the *Ever Given* decision is a reminder of how easily terms of an agreement can get overlooked in the frenzy of communication during time sensitive events. Contract formation is highly factual, and our domestic Courts will typically employ the same considerations as the Courts in the *Ever Given* did to determine the intention of each party during contract formation and whether they intended to be bound by those terms. It is therefore important,

for both specialized and standard contracts, that time and consideration is spent to ensure that no ambiguity arises on the central elements of the agreement, and that each party's interests are addressed, protected and drafted adequately into the four corners of the document.