



Legal Lessons Learned the Last Time the Suez Canal Closed

Recent political developments in Egypt could affect the Suez Canal and have far-reaching implications for the global shipping industry. It is a good time to refresh memories about what happened to contracts the last time the canal closed.

One of the most important shipping passages in the world, the Suez Canal provides a crucial shortcut from the Mediterranean Sea to the Red Sea and Indian Ocean. Opened to shipping traffic in 1869, the canal provides a vital service to global trade by allowing commercial ships to avoid longer and costlier voyages around Africa. Today, around 8 percent^[1] of global seaborne trade moves through the canal, which includes 3 percent^[2] of the gross domestic product of the United States.

The recent political developments in Egypt and striking by Suez Canal workers has brought renewed attention to the 120-mile waterway. The Suez Canal is no stranger to political turmoil, having been closed twice for extended periods in the last century due to hostilities in the region. First, from October 1956 to April 1957 the Suez Canal was blocked to shipping following the invasion of the Eastern Sinai by Israel, and later by the French and British occupation of the canal. The second period the Suez Canal was closed to shipping was from June 1967 to June 1975, due to the Israeli-Egyptian War. The result was a severe disruption to commercial shipping. As would be expected, the

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closings resulted in extensive charter party litigation. Much of the litigation dealt directly with the issue of allocation of additional costs involved in making the longer, more costly voyage around Africa's Cape of Good Hope. [3] Given the current high cost of bunker (fuel) oil and the spreading reach of pirates, the additional costs associated with a voyage around the Cape are very high.

Were the Suez Canal to close again, even for a short period of time, its impact would be far ranging and felt throughout the entire global shipping industry. A survey of the key cases and arbitrations resulting from past Suez Canal closings reveals that certain legal issues likely would arise if the Suez Canal were closed again.

Effect on Maritime Contracts

A central concern would be the frustration of existing shipping and charter party contracts, and whether a closure of the Suez Canal would indeed render those contracts unable to be performed. The basic principles of frustration of maritime contracts were set forth in *Transatlantic Financing Corp. v. United States*, [4] which has been applied by US courts in shipping disputes that involved a closure of the Suez Canal. US and UK courts have routinely held that where vessels were not trapped, but were merely required to seek an alternate route around the Suez Canal, the charter party was not frustrated and the shipowner was required to perform the contract. [5] Generally, the closing of the Suez Canal in 1956 was held not to be sufficient reason to frustrate a charter party for vessels that had to take the longer, more costly voyage around the Cape of Good Hope.

UK courts apply an even stricter standard than US courts. In *Ocean Tramp Tankers Corp. v. V/O Sovfracht*, the Court of Appeal failed to find frustration when the canal closing forced the vessel around the Cape of Good Hope on a voyage from the Black Sea to India. [6] Similarly, in *Tsakiroglou & Co. v. Noble & Thorl, G.m.b.H.*, the House of Lords found no frustration even though the canal closure caused costs to double. [7] UK cases tend to focus on whether the canal closure would render performance under the charter party "fundamentally" or "radically" different, while US cases and arbitrations focus more on whether the canal closure made performance "extremely and unreasonably" more expensive. [8]

Case law indicates, that if a canal closure were to occur, shipowners could be required to perform existing contracts, and might not be entitled to additional freight

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or hire in making a deviation around the Cape of Good Hope.^[9] In some case, courts have found that the parties were relieved of their duties under the charter party because of a broadly worded war clause or exceptions clause contained in the agreement.^[10] However, the current situation in Egypt does not presently involve hostilities with other nations, a key factor in past closings of the canal. As such, breakdown clauses, exceptions clauses, and war clauses in charter parties would likely not relieve performance under the charter. Of course, a final determination would depend upon the specific events giving rise to a closure, along with the precise charter party and language used in the agreements. But the real lesson for owners and charterers is now is the to review clauses that allocate risks for a canal closure.

Increased Exposure to Piracy

Another issue to be considered in the event of a Suez Canal closure is piracy. The marine insurance market already charges increased premiums for travel through the Gulf of Aden and the Suez Canal.^[11] A canal closure would force ships to transit the vastly larger and less protected waters of the Indian Ocean off the East Coast of Africa and likely increase exposure to piracy. Shipowners could be forced to pay even higher marine insurance premiums, as well as face increased security costs.

In summary, a closure of the Suez Canal could have far-reaching and costly implications for the global shipping industry. With our unique global footprint, Squire Sanders can assist our maritime clients by offering seamless representation from country to country. If you would like to learn more about our maritime practice, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this Alert.

[1] See <http://www.bloomberg.com/news/2011-01-31/egypt-s-suez-canal-carrying-8-of-world-trade-remains-open-amid-violence.html>.

[2] See <http://www.businessinsider.com/suez-choke-hold-on-world-shipping-2011-2>.

[3] Braden Vandeventer, *Admiralty Law Institute: Symposium on Charter Parties: Analysis of Basic Provisions of Voyage and Time Charter Parties*, 49 Tul. L. Rev. 806 (May 1975).

[4] 363 F.2d 312, 315 (D.C. Cir. 1966).

[5] *Glidden Co. v. Hellenic Lines*, 275 F.2d 253, 257 (2d Cir. 1960); *The Eugenia*, [1964] 2 Q.B. 226, 240-41; *The Captain George K.*, [1970] 2 Lloyd's Rep. 21, 32-33; *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319-20 (D.C. Cir. 1966); *American Trading & Prod. Corp. v. Shell Int'l Marine*, 453 F.2d 939, 942-44 (2d Cir. 1972).

[6] [1963] 2 Lloyd's List L.R. 381 (C.A.).

[7] [1961] 1 Lloyd's List L.R. 329 (H.L.).

[8] *See generally American Trading & Prod. Corp. v. Shell Int'l Marine*, 453 F.2d 939, 942-44 (2d Cir. 1972) (Voyage charter case, where it was held that a 31-percent increase in cost to the vessel due to the closing of the Suez Canal did not satisfy the requirements of commercial impracticality, i.e., "that performance is rendered impossible if it can only be accomplished with extreme and unreasonable difficulty, expense, injury or loss."); *In the Matter of Travel Sales Int'l, Inc.*, 1977 A.M.C. 81 (N.Y. Arb. 1976) ; *In the Matter of M. Golodetz & Co. (M/V Olympic Pearl)*, SMA No. 1017 (1976) and footnote 5 *supra*.

[9] *Id.*

[10] *Navios Corp. v. The Ulyssess II*, 161 F. Supp. 932 (D. Md. 1958) , *aff'd*, 260 F.2d 959 (4th Cir. 1958) (The hostilities which broke out between Egypt, the UK and France, resulting in the seizure of the Suez Canal were held to be "war" allowing the ship owner to cancel.).

[11] John W. Miller, *Piracy Causes Changes in Routes, Insurance*, Wall St. J., Apr. 9, 2009, at A10.

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