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“EVER GIVEN”  
CBMU conference 30<sup>th</sup> November 2021

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# “EVER GIVEN”

## Agenda

- Facts of the case
- Claims made by the SCA
- Legal issues
- Next steps

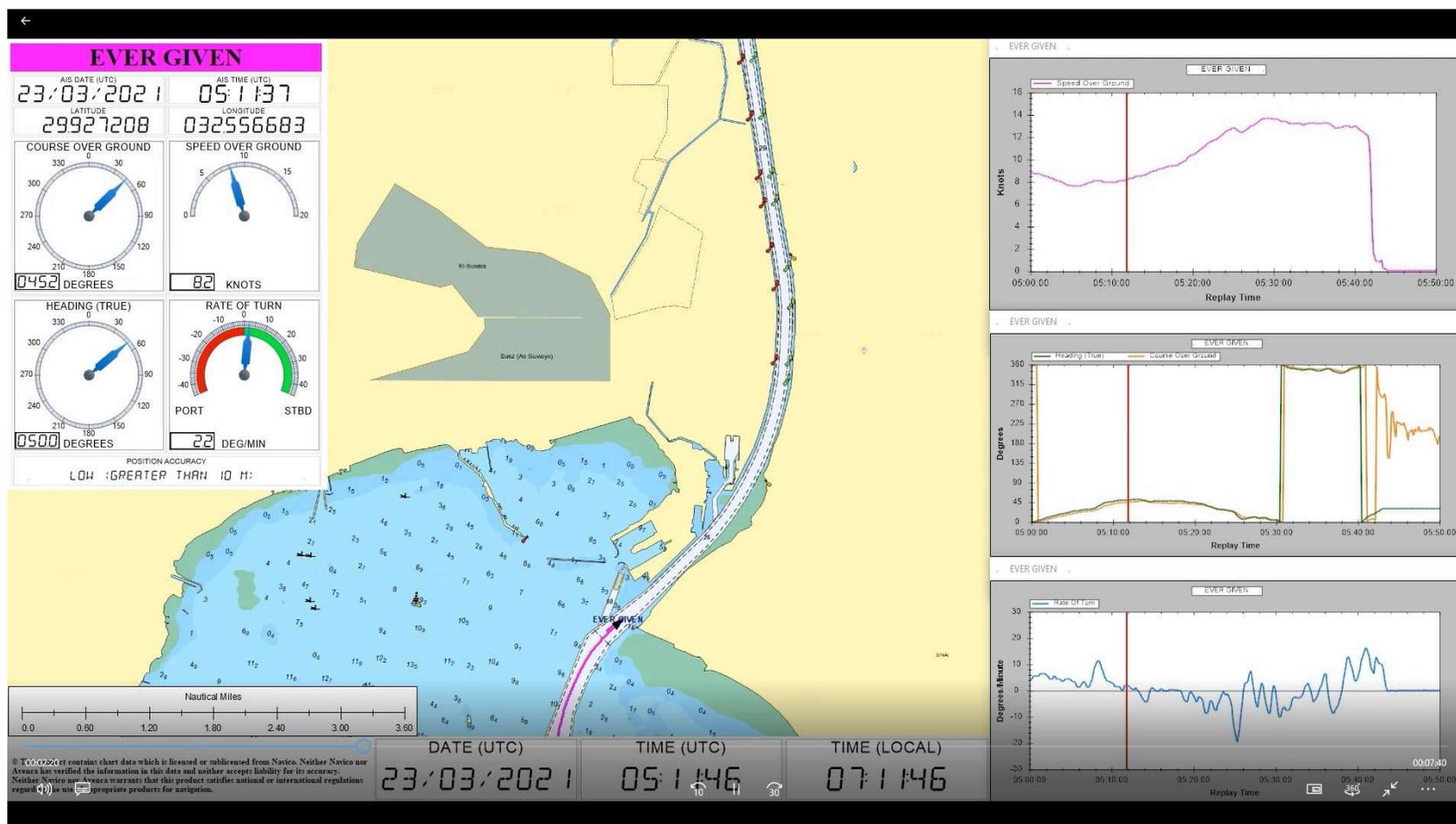


# Ship Details

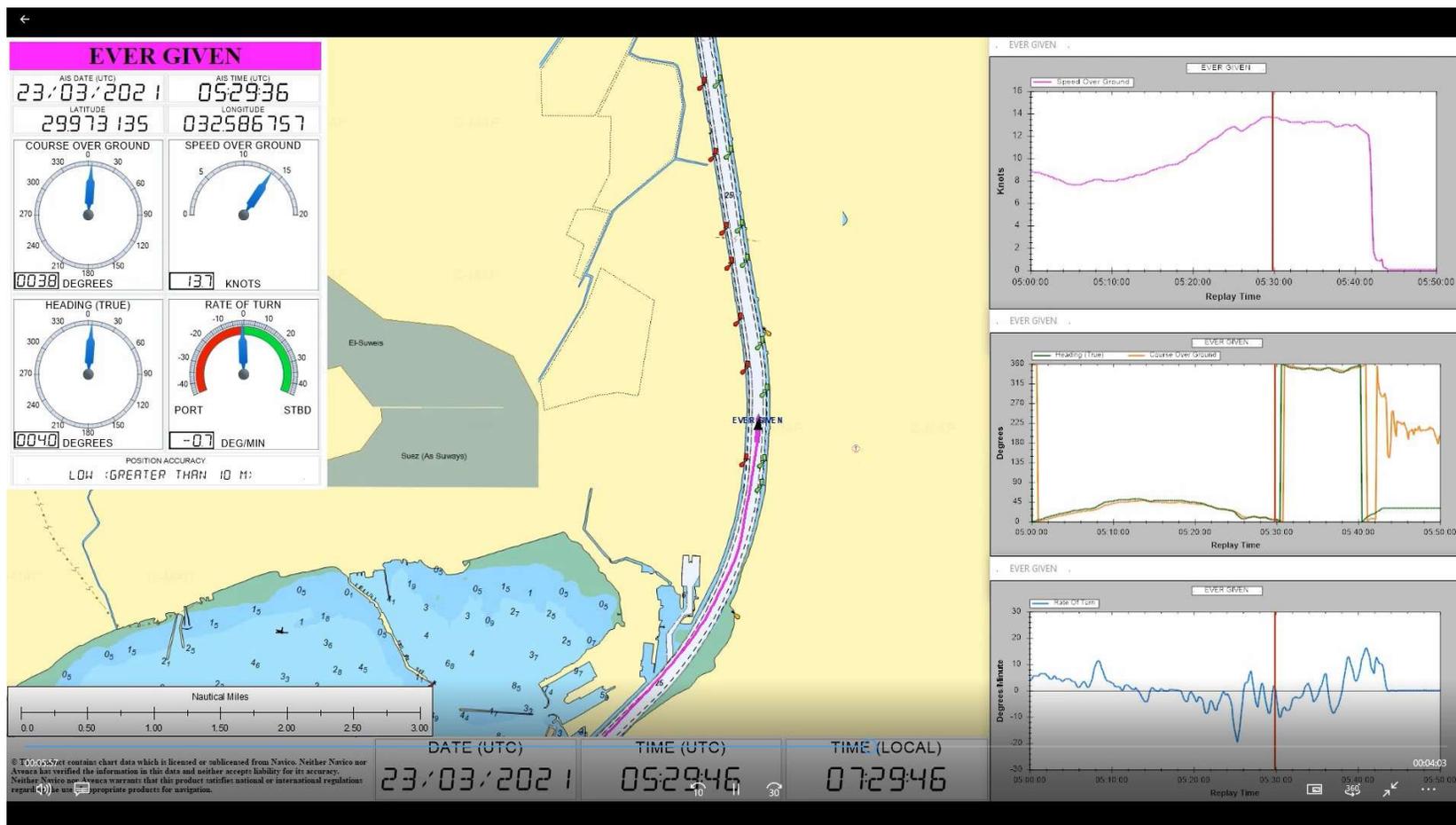


“EVER GIVEN” ship particulars:

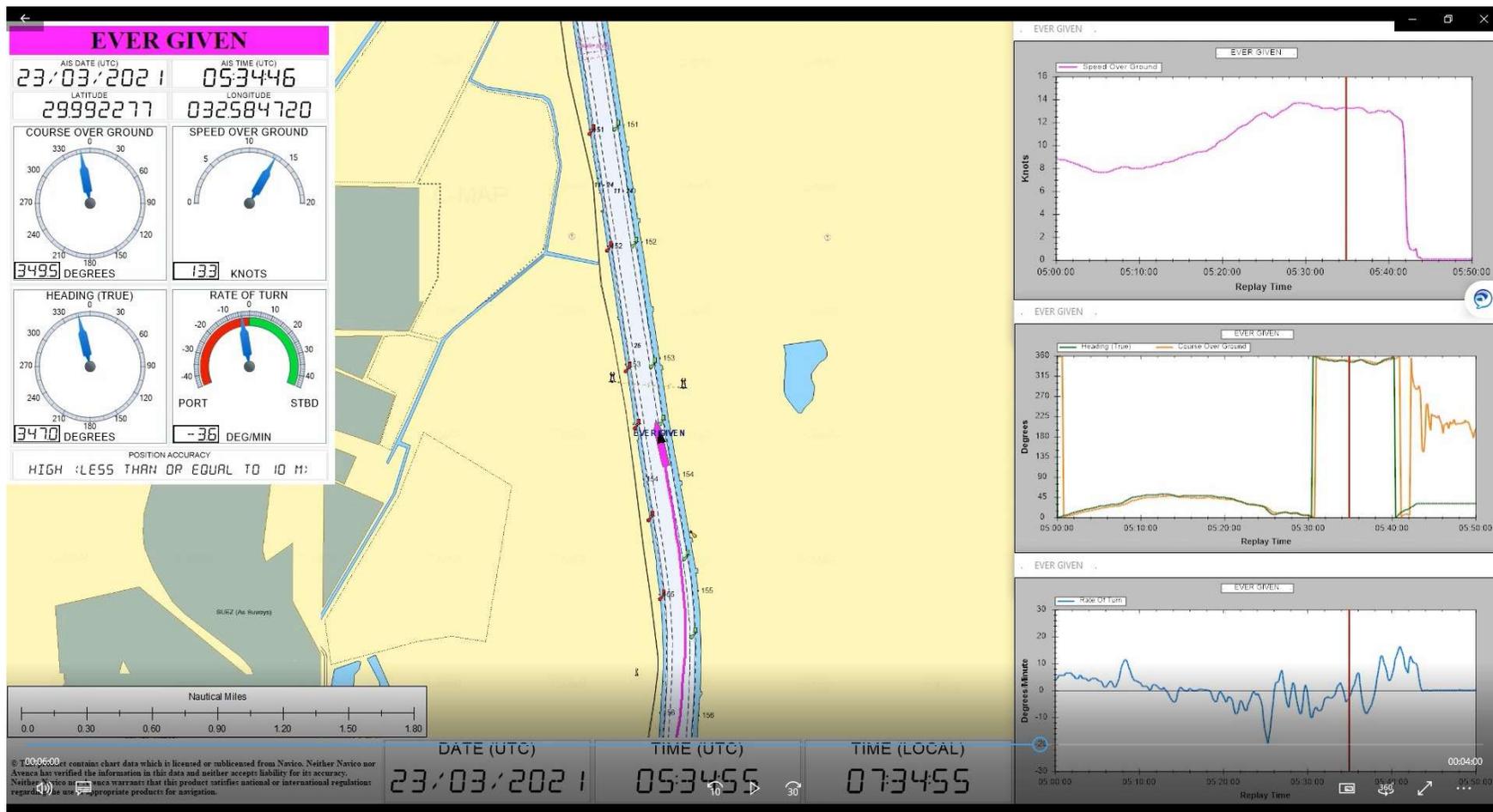
Vessel type:	Container ship
Voyage from/to:	Asia to Europe
Vessel IMO Number:	9811000
Built:	2018
Container Capacity:	20,000 TEU (18,300 TEU reported on board at the time of the grounding)
GRT:	217,612
Length Overall:	399.94m (1,312ft)
Breadth:	58.8m (193ft)
Draft (from AIS):	15.7m (51.5ft)



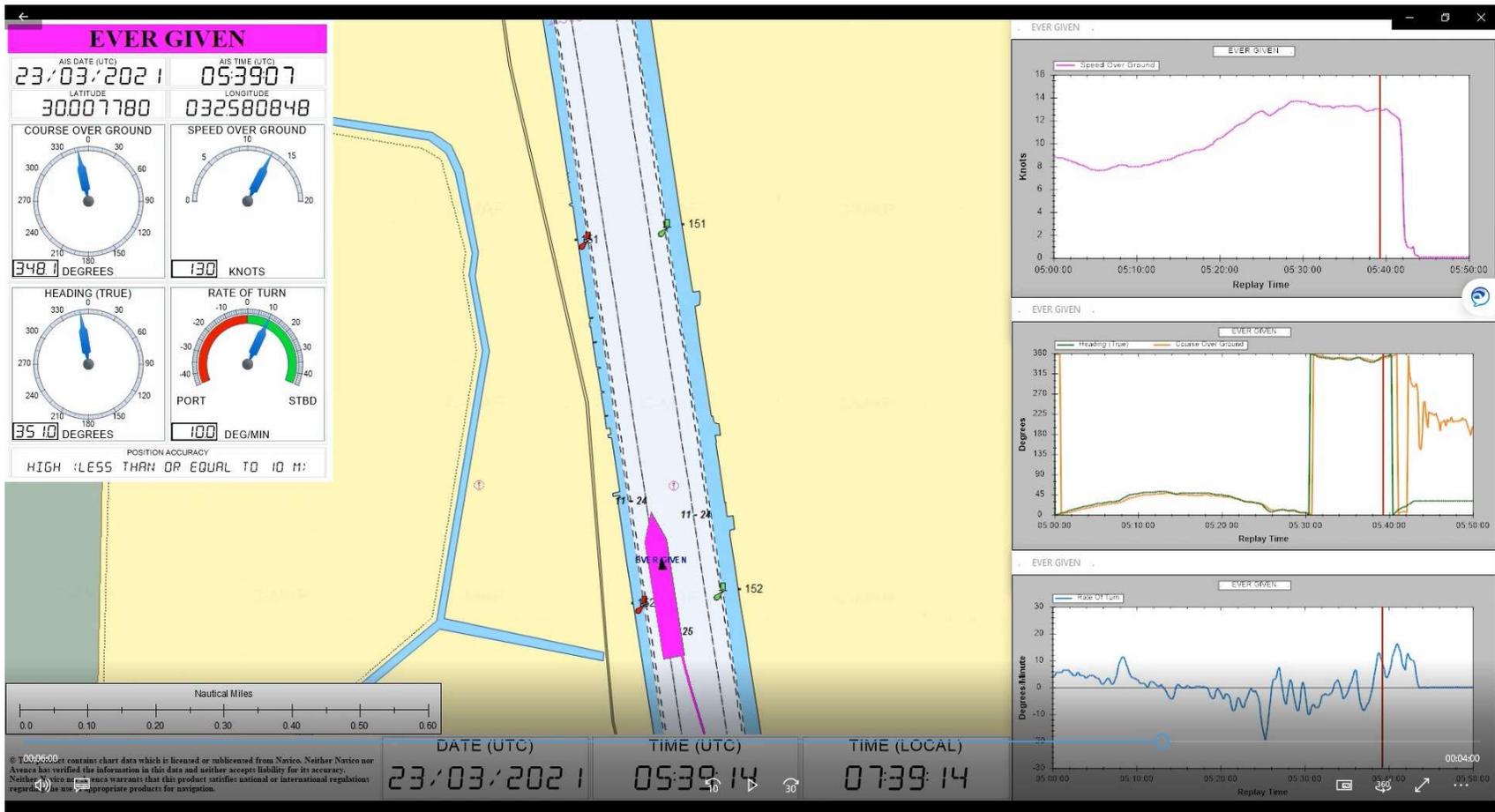
The “EVER GIVEN” entered the Suez Canal from the Red Sea at around 05:12 GMT proceeding northbound at 8.2 knots with two Pilots onboard.



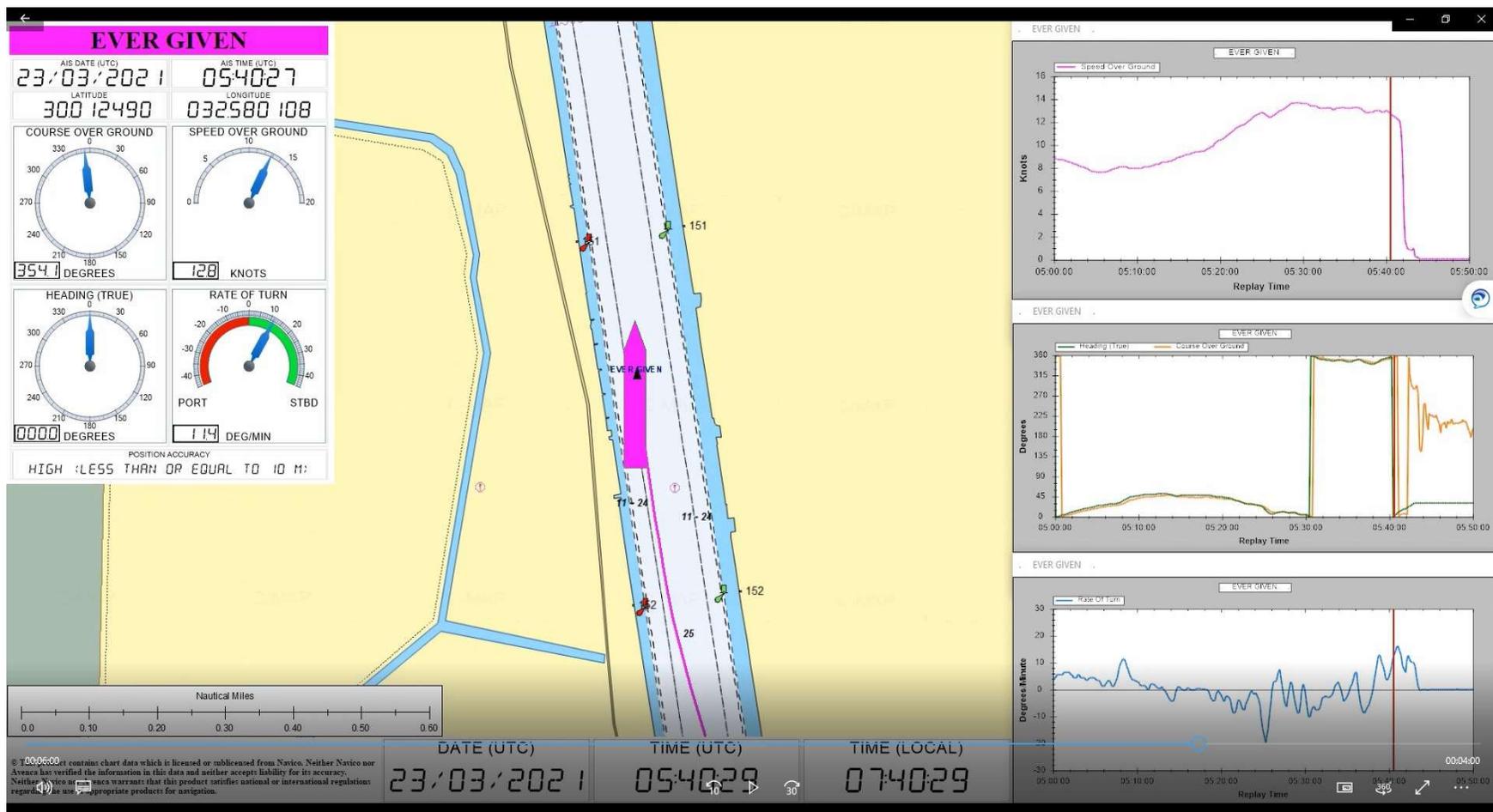
The “EVER GIVEN” appears to have initially passed close to the port hand bank at the apex of the bend in the canal, and at about 05:30 GMT, AIS records the speed over the ground at 13.7 knots.



At around 05:35 GMT, the vessel is proceeding at 13.3 knots and still close to the starboard hand bank with the rate of turn to port increasing.

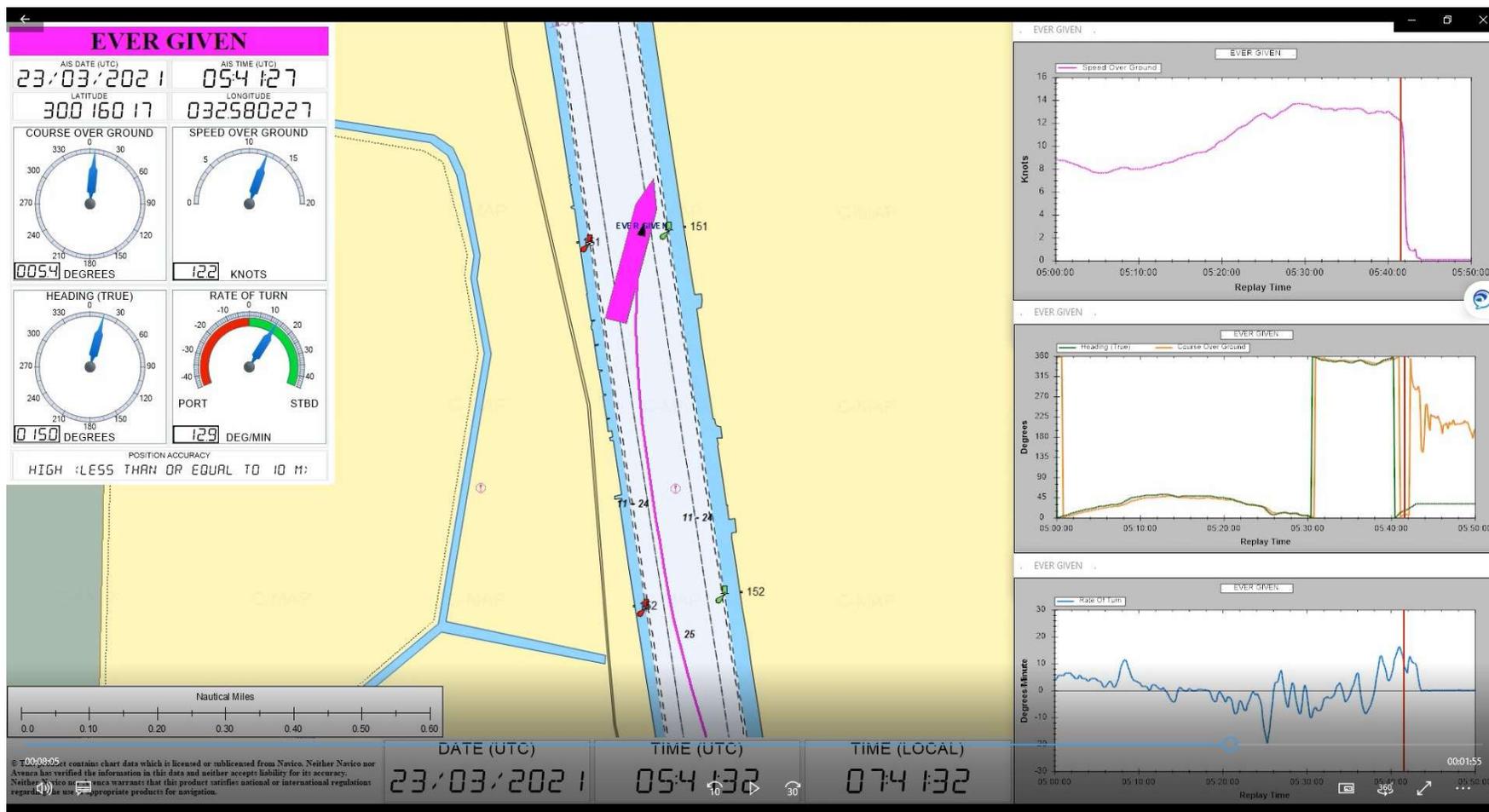


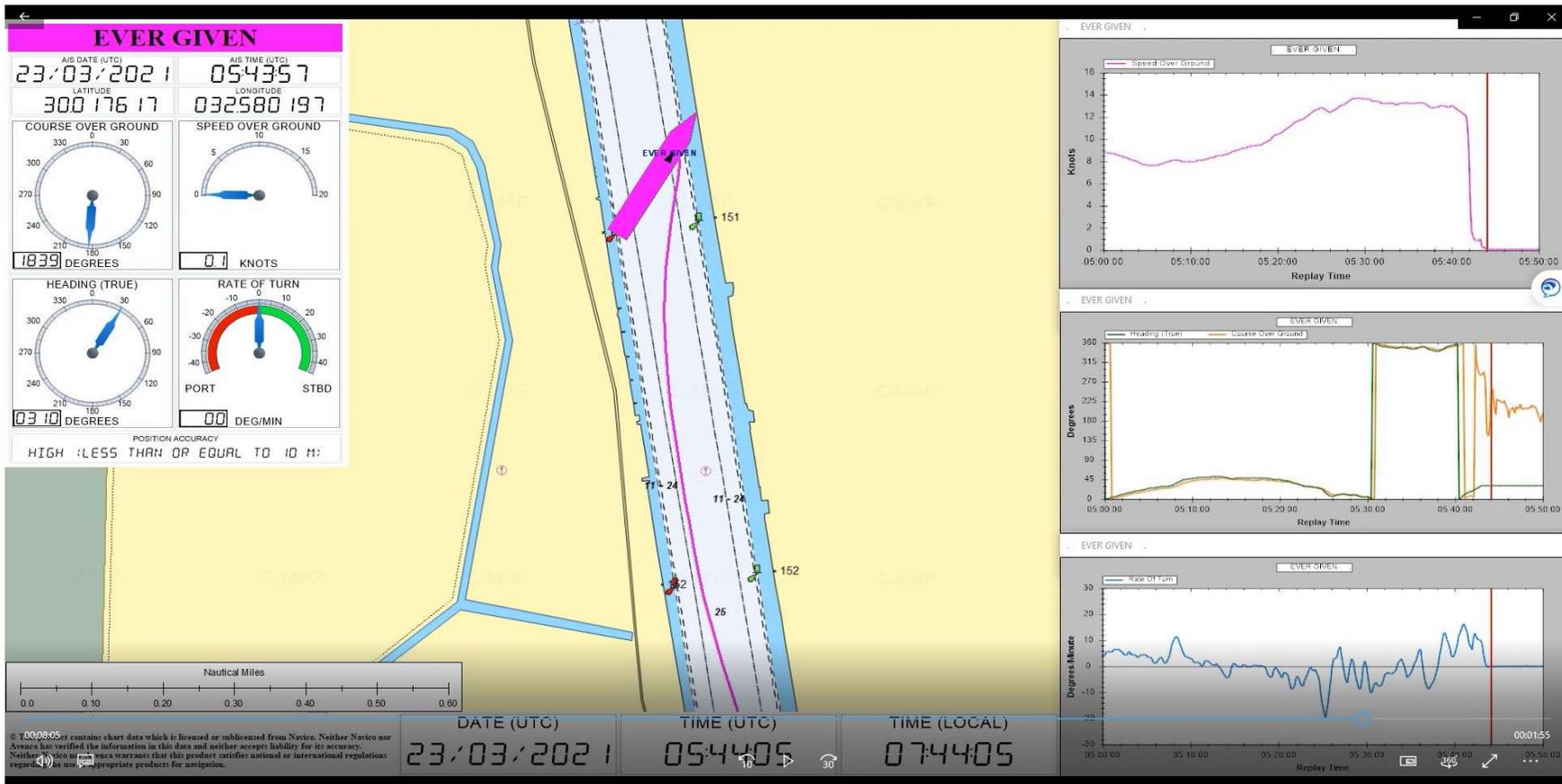
At about 05:39 GMT the "EVER GIVEN" has converged with the port hand bank of the Canal, at KM-152, and now has a rate of turn to starboard of about 10 degrees per minute.



At about 05:40 GMT with the vessel's rate of turn to starboard still increasing, the "EVER GIVEN" is heading towards the starboard hand bank near KM-151 at a speed over the ground of 12.8 knots.







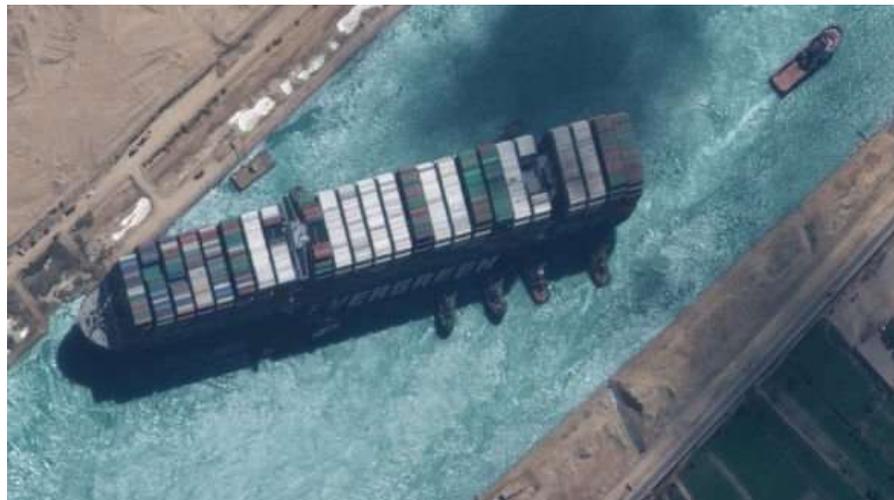
Moments later, the “EVER GIVEN” comes to rest with the bow of the “EVER GIVEN” hard aground at an acute angle to the starboard hand bank. The port quarter of the vessel was also probably lightly aground on the opposite bank, obstructing the full width of the waterway.

The “EVER GIVEN” was successfully refloated on 29 March at 13:05 GMT by combined efforts of the Suez Canal Authority (“SCA”), contractors Smit Salvage and Boskalis.

# Weather Conditions

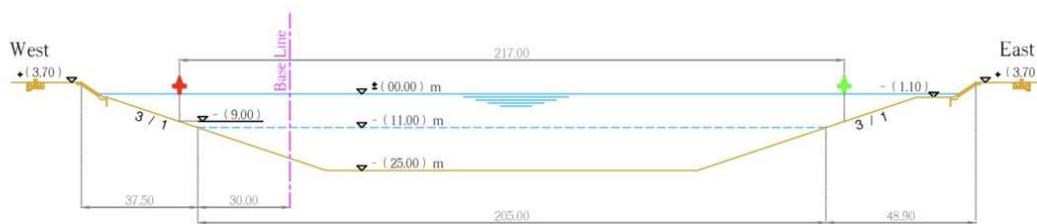
- On 23 March 2020 the *Suez Canal Authority (SCA)* announced that the ship had lost the ability to steer amid high winds and a dust storm. Since then, the SCA's executive has said that winds were not responsible.
- *Evergreen Marine Corp* said on the same day that the ship “was suspected of being hit by a sudden strong wind, causing the hull to deviate from the waterway and accidentally hit the bottom”.
- *Lloyd's List* determined that winds at the time of the accident were approximately 30 kts but say navigation rules permitted a vessel this size to sail under such conditions.

However, the “EVER GIVEN” was in a convoy and no other ships before or after it were affected in the same way. Furthermore, Containerships this size routinely transit the canal without incident.



# Suez Canal

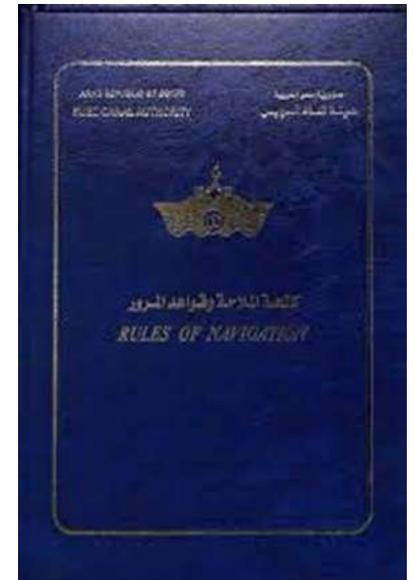
- In 2020, on average, more than 50 vessels transited the canal every day.
- Typically it saves 8-10 days passage time for fast container vessels (over 20 knots), compared to a voyage around the Cape of Good Hope, going to/from Northern Europe.
- “EVER GIVEN” grounded at KM 151 (South of the Bitter Lake).
- The bathymetry of the canal (illustrated right) shows that the navigable width of the canal (see cross section) is not the width of the canal visible to the naked eye.



Cross Section at Km 149.400 - 153.524

# Rules of Navigation

- There are specific rules for navigating through the Suez Canal aptly called the “Rules of Navigation”.
- These are drafted/published by the Suez Canal Authority (“SCA”). The August 2015 edition was in force at the time of the casualty.
- Article 1 of these rules make transit through the Suez Canal permissible to vessels of all nations subject to compliance with the following:
  - SCA Rules of Navigation and any applicable circulars.
  - International Convention for the Safety of Life at Sea (SOLAS).
  - International Maritime Dangerous Goods Code (IMDG Code), if carrying dangerous cargo.
  - International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).
  - International Regulations for Preventing Collisions at Sea (COLREGS).
  - All laws, orders, and regulations issued by the Egyptian Government.
- But, the SCA reserves the right to refuse access to the canal water where vessels may be “*considered as dangerous or troublesome to navigation in the Canal*”.
- “*By the sole fact of using the Suez Canal water, Masters and Owners of vessels bind themselves to accept all the conditions of the present Rules of Navigation with which they acknowledge being acquainted with...*”





# Rules Impact on Liability

Evergreen have hinted that the fault lies with the two Egyptian canal pilots.

However, the Rules of Navigation say:

- Vessel held “wholly” responsible for damages and consequential loss caused directly or indirectly by the vessel “*unless otherwise proved by evidence that this damage was not made on purpose, or by mistake or negligence*” (Article 4(1)).
- Vessel’s owners and/or operators are responsible “*without option to release themselves from responsibility by limited liability*”
- Vessel indemnifies the SCA in respect of any claim “whatsoever” made by a third party (Article 4(4)).
- Vessel waives the right to claim against the SCA (Article 4(5)).
- Owners and/or operators “bind themselves responsible for any mistakes resulting from Pilot advice (Article 4(7)).

Furthermore, Article 80 of the Egyptian Maritime Law specifies that the owners and operators of a vessel bear civil liability for errors of the Master, crew, Pilot and any other person in the service of the vessel, whenever committed by them during the performance of their duties.



# “EVER GIVEN”

## 1989 International Convention on Salvage

Egypt is a party to the 1989 International Convention on Salvage.

Absent settlement, key points:

- a) Master has authority to sign a salvage contract on behalf of all the property (Article 6(2)). Theory is that the master is the agent of necessity at a time of peril.
- b) Salvors operate on no cure no pay terms (Article 12), with some environmental protection carve-outs (e.g. Article 14).
- c) Final salvage award will balance all the criteria set out in Article 13.
  1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:
    - a. the **salved value** of the vessel and other property;
    - b. the skill and efforts of the salvors in preventing or minimizing damage to the environment;
    - c. the measure of success obtained by the salvor;
    - d. the nature and degree of the **danger**;
    - e. the skill and efforts of the salvors in salvaging the vessel, other property and life;
    - f. the **time used and expenses** and losses **incurred** by the salvors;
    - g. the risk of liability and other risks run by the salvors or their equipment;
    - h. the promptness of the services rendered;
    - i. the availability and use of vessels or other equipment intended for salvage operations;
    - j. the state of readiness and efficiency of the salvor's equipment and the value thereof.





# “EVER GIVEN”

## 1989 International Convention on Salvage

- d) In this case Egyptian Courts would determine the “common law” salvage reward (claimed at \$277m plus \$300m “salvage bonus”).
- e) Incidentally, local legislation requires ship to pay for unsuccessful salvage operations.
- f) Maritime lien arises as a result of the salvage claim and gives a right to arrest property.  
(1952 Brussels Arrest Convention, also adopted into local law in Egypt).



# The SCA's Claims



- The SCA quantified their total claims at \$916m.
- Of that sum, the SCA claimed \$300m as compensation for "loss of reputation". Such a claim, as well as a claim for the physical damage to the canal as a result of the grounding and any loss of revenue from the blockage of the canal, are P&I exposures and are outside the scope of GA.
- However, claims for salvage (put forward at \$577m) will be claimed in General Average.
- We expect a global settlement was reached, there will no doubt be a debate about the precise apportionment, and hence what is claimable in GA.
- Actual salvage operation was only six days and on the SCA's doorstep. Smit also assisted (and their security was estimated at circa \$30m).
- In contrast to the SCA's salvage demand of \$577m, the "MAERSK HONAM", a three month service involving fire and over 20m Euros out of pocket expenses resulted in a security demand of circa \$100m.
- If this salvage was on LOF terms the settlement would be very much less.

# The SCA's Claims

- For the claim for "loss of reputation" and damage to/blockage of the canal, the P&I Club would typically provide a P&I letter of undertaking and once that security was in place, the vessel would depart.
- Subsequently the final liability would be decided by a court, or settlement negotiated, and the security would guarantee payment.
- However, we understand that the SCA would not accept a UK P&I Club LOU in this case. We have seen previous cases where an immediate cash settlement was required.
- On a practical level, whilst the P&I Club are exposed to any legal liability for fines or physical damage to the canal, they are not obliged to fund salvage contributions. Their role is that of a liability insurer, and salvage contributions will fall to property insurers.



# The SCA's Claims

- The Hull and Machinery insurers cover the proportion of the salvage legally due from ship.
- Cargo insurers in principle cover the salvage exposure due from cargo, but this had practical difficulties, on which more below. However, there was a very real "funding gap" in respect of the sums being claimed in salvage against cargo.
- Unless the shipowners (perhaps with the other shipping lines that are involved) were willing to fund salvage for cargo in the first instance, and pursue recovery of it in GA, there would be a practical problem in settling any (reasonable) salvage claim.
- We have seen cases where the shipowners in similar situations in Suez have agreed to fund the salvage settlement and pursue recovery in GA, but the sheer scale of the salvage claim in this case (perhaps of the order of \$400-500m for cargo's proportion of the salvage) would require major funding which is likely to be beyond the appetite of the Owners/lines involved (as well as being unreasonable in a GA context).



# Egyptian litigation

- Arrest proceedings in Ismailia Court.
- SCA are the largest revenue generator in Egypt (no tourism), the largest local employer and this is their local court.
- Procedural challenge to arrest brought by Owners failed.
- Ultimately the SCA had a claim and have followed local legal process to detain ship and cargo (although quantum is excessive).
- We were preparing a formal challenge to the arrest by some cargo interests (we represented \$130m+ of cargo).



# Salvage and GA Claims

- In principle ship and cargo would contribute to salvage (and GA) pro-rata to the value of the property.
- There is a distinction in timing. Contributions in salvage are assessed based on the value of property at the time salvage services terminate. Contributions in GA are assessed when the voyage ends, either at the destination port, or short of the destination port if the voyage ends prematurely.
- Precise property values were not known. We estimated the ship value is \$120-150m. Based on our experience of other large container ship cases, cargo may be around \$6-700m.
- On that basis, cargo would be approximately 80% of the overall value and would be exposed to approximately 80% of the GA and salvage claims.
- Even though ship interests funded all of the salvage settlement, this will be claimed in General Average.



# General Average

- Any GA expenditure must be reasonable. Substantial scope for debate as to what would be a reasonable figure to settle the salvage claim.
- The salvage claim is subject to Egyptian law, we have retained an Egyptian lawyer to advise as required.
- It was clearly unreasonable to settle the claims at the figures put forward, it very likely exceeded the value of the salvaged property.
- It could, in theory, have been possible for Owners to call for cargo to fund the salvage contributions by requesting a payment on account to be made.
- It seemed very unlikely that enough of the cargo interests would pay the salvage to resolve the problem. Of course, if money was paid and the cargo still did not move, that will be a wasted expense.



# General Average

- It did not seem practical to us for the SCA or Owners to separate the cargo such that if some cargo paid salvage, that cargo could be discharged and on-carried.
- It seemed very unlikely the SCA would permit the vessel and cargo to leave Egyptian waters, as the ship and cargo is arrested.
- The above was hypothetical because it is clear to us that the SCA had to reduce their demands, and it would not have been reasonable to settle their claims for salvage at this level.





# General Average Claim

- In light of the scale of the "funding gap" becoming clear, and the subsequent arrest of the vessel, we considered whether Owners could require a payment on account, in order to fund a salvage settlement.
- Our view is that they could not do so under the terms of the GA security as presently worded, for at least two reasons.
- The first is that there is no right to GA contributions at all until the voyage is completed. The second is that the payment on account request would be subject to any defences cargo may have to the GA claim, specifically any unseaworthiness defence and also the question of reasonableness.
- However, provision of GA security in the form requested did not mean that Owners were barred from asking for funding to settle the salvage claim, outside the scope of the GA.



# GA Defence

- Owners will no doubt claim the grounding was caused by an “error of navigation”, which is an exclusion under the Hague/Hague-Visby Rules (Article IV Rule 2a).
- If that is the sole cause, then cargo will have to pay GA claims.
- In order to defend the GA claim, cargo will have to show that there was causative unseaworthiness.
- That causative unseaworthiness would have to be present because of a failure by Owners to exercise due diligence.
- In that scenario cargo would have a defence to the GA claim brought by shipowners.
- Essentially equivalent to actionable fault /breach of the seaworthiness obligations under Article III Rule 1) of the Hague/Hague-Visby Rules.
- Unseaworthiness can be found in many forms, e.g.
  - Mechanical unseaworthiness.
  - Inadequate documents e.g. out of date charts, inadequate passage plan (“CMA CGM LIBRA”)
  - Human unseaworthiness e.g. incompetent (not merely negligent) crew/no proper emergency plan (“EURASIAN DREAM”)
- If there are positive losses, e.g. damaged cargo, then cargo will recover if there is the same causative unseaworthiness
- But Owners will claim the protection of global limitation (and package/weight limit, if applicable)

# Coverage

- Typical marine cargo policies cover physical loss/damage to cargo, as well as loss of the adventure.
- Very little of the cargo on board suffered physical loss/damage.
  - Some perishable good deteriorated.
  - Some seasonal goods on board had a limited shelf life/window for sale.
- No loss of the adventure as Vessel and cargo released upon settlement with the SCA.



# Likely coverage issues

- Could the cargo have been a CTL or an ATL?
- What are the operating perils? Are they risks insured against?
- Relevance of the delay exclusion to forwarding charges claims.
- Do the limits of liability in a policy apply to GA contributions?
- Cover for loss of market claims.



# Could the cargo have been a CTL or ATL?

- Cargo may be a CTL if it is unlikely to be recovered within a reasonable time.
  - Objective determination of a “reasonable time” based on many factors, including the type of cargo.
- Alternatively, the cargo may be an ATL if the insured is irretrievably deprived of the cargo.
  - The threshold test was not reached because owners reached a settlement with the SCA and GA/salvage security was provided.



# What are the operating perils?

- Initial grounding appears to fall within the scope of all risks cover.
- Whether the subsequent arrest is a peril insured against is less clear.
  - Lawful/unlawful arrest?
  - Ordinary judicial process?
  - Seizure an excluded peril?
  - Exercise of a salvors' lien typically a risk insured against.



# What are the operating perils?

- Are there one or more operating perils that proximately cause loss?
- What if the cargo was abandoned?
  - *ICS v British Traders* case law.



# Delay Exclusion and Forwarding Charges

- Exclusion unlikely to apply as the insured transit was not terminated as a result of an insured risk and steps taken by insureds to forward goods were not to prevent a loss of the adventure.





# Do the limits of liability in a policy apply to GA contributions?

- Most policies contain a Limits of Liability clause with various sub-limits for certain claims e.g. per conveyance.
  - Applicable to PA losses.
- It is rare for claims for GA contributions/salvage charges to be capped within a policy.
- Underwriters should not be required to provide a GA contribution for cargo that suffers PA loss/damage.



# Cover for loss of market claims

- Marine cargo policies do not traditionally cover loss of market/pure economic loss claims.
- Policy wording should be checked to ensure that there are no unusual/unexpected extensions to cover.



# “EVER GIVEN”

## Claims Subject to Limitation

“EVER GIVEN” – no oil pollution or wreck removal

Property related losses e.g.

1. Claims for sums paid by cargo in salvage (theoretical)
2. Transshipment costs
3. Perishable goods and/or total loss claims
4. Canal damage suffered by the Suez Canal Authority (SCA)
5. Consequential losses claimed by the SCA
6. Claims under the charter
7. Claims from blocked vessels?
8. Claims from vessels that deviated?



**N.B.** “EVER GIVEN” cannot limit vs SCA due to SCA rules

# “EVER GIVEN” Limitation of Liability for Maritime Claims 1996 Protocol to 76 LLMC

- Limitation fund being opened in London
- Owners commenced limitation proceedings and will seek a limitation decree
- Fund can be constituted in England with a P&I Club LOU
- (ATLANTIK CONFIDENCE [2014] EWCA Civ 217)
- Constituting a fund is not an admission of liability



# “EVER GIVEN”

## Jurisdiction for limitation proceedings

- Jurisdiction arising from the location of the incident, arrest, service or domicile
- Evergreen bs/l subject to English law
- Charter probably English law
- Only need one claim to “anchor” England as a location for the fund



# “EVER GIVEN” Limitation of Liability for Maritime Claims 1996 Protocol to 76 LLMC

- “EVER GIVEN” still vulnerable to attack e.g. Egypt (1976 LLMC), China (local law) or possibly future ports of call
- Credit provisions in the fund for claims settled outside the fund (Article 12(2))
- “EVER GIVEN” will claim credit in the London fund for sums paid in Egypt e.g. for canal bank damage
- Claims ultimately submitted to the Fund and paid pro-rata once liability determined (and error of navigation defence hopefully overcome)
- Recovery claims against NVOCCs – not parties who can limit under the Convention



# Causation and Next Steps



- In terms of the cause of the casualty, this is being investigated by the Panamanian flag state and also the SCA.
- We are making our own enquiries as well, with support from our in-house master mariners and drawing on our experience of other Suez casualties.
- Carriers and Owners will raise an error of navigation defence if they are faced with declination of GA and/or claims for reimbursement of any losses.
- To overcome the error of navigation defence, there will need to be a breach of the contract of carriage (causative unseaworthiness arising due to the failure to exercise due diligence before and at the commencement of the voyage).
- For cargo losses, Owners/carriers will direct claimants to the limitation fund in London which would permit them to limit their liability.
- Limitation fund is designed to provide protection “against the world” for property damage claims.
- Owners, charterers and slot charterers will be able to limit even if they are liable and the error of navigation defence could be overcome (and it is too early to say whether it will be overcome).

# Next Steps

- If thousands of claims needed to be lodged in the limitation fund and/or pursued against contractual carriers (particularly NVOCCs as they can't limit) then this would be a major exercise because of the volume of claims. We have a large team.
- If the delay extended significantly there was a risk that the contracts of carriage may be abandoned or carriers may argue that they are frustrated.
- There are specific and/or complex questions regarding coverage under cargo policies in this case, and the cargo coverage specialists in our team have been advising clients on these issues.
- Total exposure for cargo very substantial, GA estimated at 23% which is over \$200m just for cargo. Additionally, many delay/uninsured losses faced by cargo interests.





# Future impact

- Unprecedented case which has caught the attention of the world and provoked much discussion.
- Another reminder of the fragility of supply chains and importance of shipping.
- Highlights the concentration of risk on large container vessels.
- Statistical risk on paper is modest, an everyday transit, but in practice a substantial exposure for insurers that is difficult to model.
- What is that exposure? \$150m? \$900m?
- Will insurers re-assess expectations arising from casualties in Suez?
- Will the SCA act differently next time?



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440

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1,800

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4,000

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