Trends and Developments

Contributed by Harris & Co. Maritime Law Office

The Haifa Maritime Court

Located at the strategic meeting point between Europe, Asia and Africa, and governing the ports of Haifa, Ashdod and Eilat, the Haifa Maritime Court is an honourable and efficient jurisdiction under which to effect maritime lien and litigate maritime in rem claims, and other marine matters.

The Court will decide on claims and arrest application filed also by entities incorporated in countries which do not have formal full diplomatic relations with Israel. Bunker suppliers incorporated for example at one of the Persian Golf countries can recover from an un-paying vessel being bunkered else-where in the world when calling at Haifa or any Israeli Port.

The court's historical roots and tradition have resulted in two sets of rules governing its authority and made it one of the rare courts authorised to act as a prize court.

In the following we will look at the Haifa Maritime Court's historical rules and modern-day powers, as well as its position on owners' liability in constituting a maritime lien.

Two sets of rules governing the Maritime Court's authority

The Israeli Maritime Law is in fact a legacy of the British Mandate for Palestine, which was officially valid from 1923 to 1948. By a King's Order-in-Council dated 2 February 1937, the Supreme Court of Jerusalem was constituted as a Maritime Court under the Colonial Courts of Admiralty Act, 1890 (the Colonial Act). On the date the Colonial Act was enacted, the relevant acts of admiralty in force were the Admiralty Court Acts of 1840 and 1861. Accordingly, these continue to apply to the Israeli Haifa Maritime Court's jurisdiction to this day.

Following the termination of the British Mandate and the establishment of the State of Israel in 1948, Israel enacted the Admiralty Court Act in 1952. This is merely an administrative act transferring all the authorities of the Supreme Court of Jerusalem (to act as a Maritime Court) to the Haifa District Court, which has acted as a Maritime Court ever since.

The act also states that, when deciding on an appeal on judgments of the (now established) Haifa Maritime Court, the Supreme Court will have (in addition to its authorities as an appeal court) all the authorities of the Maritime Court. The act, however, does not deal with the jurisdiction and the authority of the court itself.

When enacting the Israeli Shipping Act of 1960, the Israeli legislature included specific chapters on mortgages and liens adopting the continental lien regime of the Brussels Convention of 1926, preferring this regime to that of English law.

The result was that the Israeli Maritime Court (which is the Haifa District Court) has two non-identical sets of rules related to maritime liens. To add to this ambiguity, there were relatively few cases dealt with by the Supreme Court (in appeals from the Maritime Court's judgments). Accordingly, besides a correspondingly low number of Supreme Court judgments relating to

the basic principles, there were no Supreme Court precedents covering all aspects of maritime liens.

A maritime lien is a substantive right

In this regard, the main Supreme Court judgment relating to maritime liens is that rendered in the matter of *MV Nadia S*. The Court held that a maritime lien is a substantive right rather than a procedural right (and in this regard diverged from the majority opinion in the English judgment in the matter of the *Halcyon Isle*) attaching to the ship and following the res into the hands of third parties, and is determined according to the lex causae.

This judgment was rendered on 5 July 1990, after more than 28 years, during which time, and until recently, the Supreme Court has dealt with barely one or two matters relating to maritime liens.

Accordingly, Israeli maritime law has developed on an empirical basis in judgments rendered by the Maritime Court. These judgments have the status of District Court judgments and are considered to be persuasive, but do not constitute binding precedents.

Lately, however, given the fact that the Maritime Court has rendered judgments in matters not previously dealt with, and due to Supreme Court appeals, Israeli maritime law is heading towards greater certainty.

Only the contractual supplier is recognised as a necessaries lien

The first in this line of judgments is the matter of *MV Emmanuel Tomasus* (2012), where it was held that only the contractual supplier was entitled to a maritime lien for the supply of necessaries, so the actual physical supplier was not entitled to recover its debt from the arrest and sale of the supplied vessel. The claimants filed an appeal before the Supreme Court, but withdrew the appeal at the hearing after the court advised that it did not intend to intervene in the Maritime Court's judgment.

Charges paid at foreign ports also constitute the lien for general port charges

In the matter of *MV Mirage 1*, the Haifa Maritime Court held that the lien for 'general port charges' included port charges paid by the agent (for the vessel) at a foreign port.

Cargo claims and Underwriters.

Under the Order of Carriage of Goods In Sea e as amended in 1992, The Israeli law as adopted the Hague-Visby Rules which will apply to any Bill of Lading (B/L) which governs the sea carriage of cargo either from any Israeli port; or from any port of a country which is a party to either the Hague or the Hague Visby Rules.

In a Supreme Court judgement in the matter of civil appeal 7779/09 *HDI Vs. Orl*, it was held that the quantities stated in the B/L are prima facia evidence not only towards the Owner but also towards the underwriter insuring the cargo in marine insurance. In a Supreme Court's

decision in civil appeal 7195/18 *Fhya Vs. Millobar* (2018) it was held that if a claim filed within one year after the discharge of the cargo- was filed by a claimant which had no title to sue, the one year time limit (of Article III (6) of the Hague-Visby Rules) will not be "cut" and a later amendment of the claim (after one year) -by adding an additional claimant with title to sue, will not be allowed (due to time-bar).

In a decision handed in Civil Claim 35583-11-18 relating to the *MV "Chrysopigi*", the Haifa Maritime Judge, honorable R. Sokol held, that a foreign marine insurer, has title to sue under the insurer rights which has been subrogated to him, even if the foreign Insurer is not listed in the Israeli Insurance Supervisor's list as an Insurer active in Israel and subject to the Supervisors' supervision. Under this decision the court has given effect to the Israeli legislators wording and meaning when excluding the marine insurance from supervision and other liabilities according to the Insurance Agreement Act of 1982.

Sistership arrests

In the matter of MV *Huriye Ana* (2017), the Maritime Court held that Israeli law did not allow for a sistership arrest, as no such authority is mentioned either in the Admiralty Acts of 1840 and 1861 or in the Israeli Shipping Act of 1960. Furthermore, Israel is not a signatory party to any of the conventions allowing such an arrest (for example, the Brussels Convention 1952 and the Geneva Convention 1999). Until this judgment was rendered in May 2017, the Haifa Maritime Court did order sistership arrests, accepting an arrest application filed ex parte, and even ordered the arrest of MV Huriye Ana itself. Those matters were settled, however, and before the 2017 case no Maritime Court judgment was reached.

The requirement for owners' liability

The maritime lien "*springs into existence the moment the circumstances give birth to it*" [1] and like an unseen demon "*attaches itself to the res and subtracts from the Owner's property in the vessel*" [2]. Owners and other creditors may assume it lies somewhere holding its quiet possession on the vessel but they will not see it until it appears in a claim in rem carried into effect in a legal process.

The question of whether the maritime lien requires owners' personal liability seems to be viewed differently by European civil admiralty law (rooted in Rhodian Sea Law [3], Roles of Oleron [4], Consolato del Mare Laws of Visby and the Ordonnance de La Marine of 1861) and by English common law, which imported the concept of maritime lien through the Doctors' Commons.

It seems that while under English law "*a proper maritime lien must have its root in personal liability of the owner*" (*The Castlegate (1893)*), no such a requirement appears in the European maritime lien regime, at least according to the Brussels Convention of 1926, which was adopted by the Israeli legislature when enacting the Israeli Shipping Act of 1960.

In *MV Ellen Hudig* (2004), the Haifa Maritime Court denied a maritime lien for "indemnities for loss of or damage to the cargo or baggage". This was because alleged damages to the cargo (being additional expenses related to its discharge from the arrested vessel in Haifa and additional freight paid to another vessel to complete its intended voyage to Singapore)

resulted from the vessel's arrest due to a claim filed by the crew for unpaid wages and the owners' subsequent appearance before a Belgian court under bankruptcy proceedings within the following ten days – and therefore (according to the court's view) did not fall under the owners' personal liability.

Ever since, the *Ellen Hudig* matter has been cited by the Haifa Maritime Court as an authority establishing the need to show owners' liability in order to recognise a maritime lien.

Accordingly, in the matter of *MV Nissos Rodos* (2016) the Maritime Court cited MV *Ellen Hudig*, insofar as the local ship agent was not entitled to a maritime lien for port dues paid by the agent for the vessel. It was reasoned that the agent had no agreement with the owners, there was no personal liability on behalf of the owner to pay the agent and, due to the fact that a maritime lien requires personal liability on behalf of the owner, the agent had no maritime lien. The appeal filed by the agent before the Supreme Court was withdrawn after the court advised that it did not intend to intervene in the Haifa Maritime Court's judgment.

In the matter of *MV Captain Hurry* (2016), the Haifa Maritime Court dismissed a bunker supplier's claim due to res judicata. The owners had filed a declaratory claim before a German court seeking a declaration that they were not liable to pay the supplier and that the supplier did not have a maritime lien, which was successful.

The supplier's arguments before the Haifa Maritime Court were that the proceedings concerned the enforcement of a maritime lien and, as such, did not require an owner's personal liability. The Haifa Maritime Court examined the German judgment and, after being convinced that the court held that no liability was imposed on the owners towards the bunker supplier and that all contractual relations took place between the bunker supplier and the charterer only, dismissed the claim.

In MV Captain Hurry, however, the Haifa Maritime Court also mentioned that the maritime liens differed each other, whereby some intended to secure voluntarily liabilities and others to secure liabilities under law. For example, the court added, it was obvious that a lien for salvage existed even if the owner was not liable for the circumstances that led the vessel to distress. How will these findings affect further court cases dealing with maritime liens and owners' liabilities? Answers will be provided in future judgments**.**

The Authority to Act as Prize Court

On October 2012 the small vessel M/V Estelle which carried cement to Gaza strip, ignored the Israeli's Navy message to its Owners that humanitarian aid carried on the vessel should be transferred to Gaza through land passage, breached the Naval Blockade imposed on the coast of Gaza (which was found legal after examined by a tribunal nominated by the Security Council [5]) and awakened the question of question of the authority of a Maritime Court to act as a Prize Court almost for the first time after the end f World War II. This question, was never dealt before by the Haifa Maritime Court through over 80 years since it was established (then at the Supreme Court in Jerusalem) in 1937. Due to the fact that under the Colonial Act of 1890, unless being dully authorized, a colonial court of admiralty was not allowed to exercise any jurisdiction under the Naval Prize Act. The Haifa Maritime Court had to decide if such authorities were given to Maritime Court established in Palestine back in 1937. On the one hand, on 10 October 1939 the High Lord Admiral of the United Kingdom gave an Order to the senior judge of the Supreme Court of Palestine ordering that "**when an announcement is made in Palestine stating a war has commenced between her majesty and any foreign**

country, to pay attention to all kind of captures and prizes of all kinds of ships, vessels…to rule over them, to judge and to confiscate them according to the Law of Admiralty and Regulations as will be in force in them time". On the other hand no such formal announcement was found, but in fact it was not disputed that a war was commenced. The Haifa Maritime Court held, in the MV Estelle (2013) that a specialized price court is in compliance with the traditional law's requirements and with the need for maters of Prize to be dealt promptly and with the experience and knowledge and authority of the maritime court to give immediate orders regarding the management of captured vessels, its crew, it cargo interests and claims. Therefore, the Haifa Maritime Court, held that it is authorized to act as a prize court. In the specific matter of MV Estelle, due to the Israeli navy 10 months delay in the filing of proceedings after the capture of the vessel, the Court denied the confiscation of the vessel and ordered on its release. Later, in the matters of MV Marianne (2016) and MV Zaytouna-Oliva (2019) (all small vessels related to the same owners of the MV Estelle who tried to breach the Naval Blockade imposed on Gaza Shore) the Maritime Court ordered on the confiscation and judicial sale of the vessels and ordered that the amount received from the sales will be transferred to the State of Israel. Currently, the matter of MV Freedom is now being dealt (another small vessel related to the same owners which attempt to breach the blockade). The matter in dispute there is, the Navy/ Israeli army should have kept records of its inland transferring the cargo that was on the vessel, after captured to the Palestinian Representative at Gaza and if the lack of such a document has an influence on the confiscation and judicial sale of the vessel.

The Capture of Vessel under the "Marine Cold War".

Unlike the State of Israel which bases the acts of its capture of blockade running vessels on the traditional law and the Haifa Maritime Court authorities, what seems to be a British-American cooperation took a different approach when capturing the Iranian tanker then named Grace 1 in July 2019. The justification for the capture of this tanker by British commandos off the shore of Gibraltar was its intended violation of Council Regulation (Eu) No. 36/2012 imposing sanctions against Syria due the continuing violation of civil rights by the Syrian government. The Grace 1 was carrying oil intended for the "Baniyas Refinery Company" which was listed in the 2014 extended sanctions as part of the Syrian Ministry of Petroleum, and its capture was upheld by the Court of Gibraltar. However, not being sufficently aware of the fact that British and associated tankers have no choice but to navigate next to the "Lion's Den" and the Hormouz strait, soon after the Grace 1 incident, the British tanker *Stena Impero* was captured by the Iranian authorities while navigating to Saudi Arabia.

The capture itself was explained by the Iranian authorities as due to the tankers' ***"crossing a route other than the shipping lane in the strait of Hormuz, switching off its transponders and not paying attention to Iran's warning when it was seized by the Revolutionary Guards, forces"***.

As a result, soon after the Gibraltar Court was satisfied with an Iranian commitment that the Grace 1 will not deliver its fuel to the Syrian refinery and released the tanker (which soon after changed its name, switched off its tracking devices near Iskenderun, and probably delivered its USD 140 million worth of cargo to the Syrian refinery). A few weeks later the *Stena* was released from its Iranian detention.

The capture and release of the "Stena" were followed also by "un-explained" explosions and other damage to Iranian, Marshal Island and Panamanian tankers navigating the Saudi Arabian and Persian Gulfs. Due to the recent escalation between the U.S and Iran, the Maritime (Cold) War does not seem to be at an end.

John Harris, Adv., Yoav Harris, Adv.

Harris & Co. Maritime Law Office

[1] D. R. Thomas “Maritime Liens”, 1980, page 13; foot note 75 (Dr. Lushington in *The Marry Ann* (1865)).

[2] Thomas, page 22; Foot note 35 *The Veritas*.

[3] Prof William Tetley, Q. C. “MARITIME LIEN IN THE CONFLICT OF LAWS”; 2002, pages 1-7.

[4] According to Neil Hutton (“The Origin, Development, and future of Maritime Liens and the Action in Rem, 28, Tul. Mar. L.J. 81, 112 (2003)), presenting William McFee’s research (The Law of The Sea 64 (1950)), in 1149, Eleanor of Aquitaine who spent two years in Jerusalem (1147 to 1149) brought a copy of a maritime code named the *Assozes of Jerusalem, Livre des Assies des Bourgeois,* back to Oleron and ordered it to be incorporated into the laws of her court.

[5] The "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident", page 44, paragraph 81