

Disclosure of IMO's Marine Incident Reports in Arbitral/Court's Proceedings By Yoav Harris, Harris & Co. Maritime Law Office (Israel)

IMO's publications on the reporting of marine incident investigations which are published under the topic "lessons learned" regularly include "why did it happen" highlights such as "lack of a detailed passage plan", "lack of knowledge or understanding of the limitation of the anchoring system". However, the reports themselves are not published. Can or should these reports be disclosed in legal or arbitral proceedings taking place between owners and cargo receivers or others? Do cargo receivers have a right of standing to demand the reports and on what grounds? In this article we will present these topics and the importance of the Haifa District Court decision in these regards, handed down in relation to the marine incident of the M/V Diana.

The Voyage

M/V Diana departed Dunkerque port on 2nd January 2018 carrying cargo of steel coils intended for Israeli receivers and Turkish receivers. On the following day while navigating through the English Channel heading west, according to the AIS records, the vessel seemed to have navigated in an unclear way and reduced its speed to one knot only. On 9th January 2018 the vessel called at Gibraltar Port and thereafter departed towards Haifa Port. On 16th January 2018 it arrived at Haifa port and released its right anchor. On 18th January, due to expected adverse weather conditions, most of the vessels which called at Haifa port navigated towards the west in order to get away from the Haifa Bay shore which is in the east. The M/V Diana remained in its position.

The Marine Incident

During the period beginning on 18 January 2018 at 13:50 and until 19th January at 16:10 the vessel started drifting towards the east, reducing its speed to only one knot, and suffered continued engine shut downs while confronting the adverse weather. Eventually at 16:10 the vessels' Master advised Haifa Port's RCC that the vessel had touched ground and called for assistance. The vessel finally came to a stop about 250 meters from the Haifa shore, where the depth of the water was only 4 metres .

As a result of the vessel's grounding, sea water penetrated the cargo holds, oil pipe lines were damaged and the steel coils were contaminated with mixtures of chlorides and oil. The vessel remained "stuck" at its above-mentioned position for a few days. The steel coil cargoes were discharged from the vessel by barges, and thereafter the vessel was towed to a platform at Haifa Port and underwent necessary operations and preparations to make it fit to be towed to a shipyard in Turkey.

Owners' and Cargo Receivers mutual claims Owners declared "General Average" and following a claim *in rem* and arrest application filed by the Turkish cargo receivers and underwriters, on 16th February 2018 the Haifa Maritime Court arrested the vessel. Up to that date, a claim and arrest on behalf of the Israeli cargo receivers that was filed on 1st February 2018 was pending. However, on 15th February 2018 this claim was settled with the Owners and the arrest order issued on 1st February in their claim, was set aside.

The Owner's club provided a LOU securing the Turkish cargo receivers' and underwriters' claim (claimed amount US\$ 3.8 M). Accordingly, the arrest order was lifted and the vessel went under final preparations for departing Haifa port by towage.

The Administration's Investigation

Following Articles 99 and 100 of the Israeli regulation of Ports Safety (Vessels) 1982, and the IMO's Code for The Investigation of Marine Casualties and Incidents^{2,3}, The Israeli Shipping and Ports Administration of the Ministry of Transportation (the "Administration") conducted an investigation of the incident. The Administration's officials took statements from the chief engineer and master, viewed the RCC communication and documents, and at the end of the process, issued a Report detailing the sequence of events and causes of the incident having the statements, communications and other documents annexed.

² International Maritime Organization, CODE FOR THE INVESTIGATION OF MARINE CASUALTIES AND INCIDENTS, Resolution A. 849 (20). Adopted on 27 November 1997, (the "Code").

According to IMO's publications, [://www.imo.org/en/OurWork/MSAS/Casualties/Pages/Default.aspx](http://www.imo.org/en/OurWork/MSAS/Casualties/Pages/Default.aspx), the Code amalgamated and expanded the individual resolutions relating to each local administrations' liability to conduct investigations into casualties

occurring to ships such as SOLAS regulation I/21 and MARPOL articles 8 and 12, or the United Nations Convention on the Law of the Sea (UNCLOS), article 94 paragraph 7: "Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation." Resolution A.884 (21) provided Amendments to the Code adopted in November 1999 and provided guidelines for the investigation of human factors.

3 According to the Code "Marine Casualty" includes, inter alia, "loss or abandonment of a ship", "material damage to a ship". "Serious Marine Casualty" means a casualty which involves "structural damage rendering the ship unseaworthy, such as penetration of the hull underwater...", or "a break down necessitating towage or shore assistance".

"Marine Incident" means, "an occurrence being caused by, or in connection with, the operation of a ship by which the ship or any person is imperiled, or as a result of which serious damage to the ship or structure or the environment might be caused".

The Application for the examination of the Chief Engineer:

Meanwhile, prior to the expected departure to the vessel, the Turkish cargo receivers and their underwriters filed an Application asking the Haifa Maritime Court, following Article 96 of the Admiralty Court rules to summon the chief engineer for an examination, before he left the country with the vessel and most likely would disappear and would not attend Court/Arbitration when the Hearings would take place. The Owners objected to the Application, arguing, inter alia, that the Israeli Shipping and Port's Administration (of the Israeli Ministry of Transportation) had probably conducted an Investigation and surely that the claimants would require the Authority's Report which could provide evidence on the facts related to the incident. Eventually the Court held that the Chief Engineer answer, in a written statement, the questions referred to by the Claimants and would not undergo an examination before the Court at this stage. On 18th February 2018 a written statement on behalf of the chief engineer was provided. On the following day, 19th February, the vessel departed Haifa Port by towage.

Due to an arbitration clause incorporated in the bills of lading the matter was referred to London Arbitration.

The Application for the disclosure of the Report under the Freedom of Information Act

Against the above background, Turkish cargo receivers and underwriters, through their local attorney, applied to

the head of the Freedom of Information department at the Authority and asked for a copy of the Report in order to make use of it in the arbitral proceedings taking place in London.

Following Owner's objection to have the Report enclosed as requested, the Authority released only a blanked out copy of the Report (meaning a copy of the report where parts of it were blanked out) and without any of its annexes, which included, inter alia the written records of the RCC communication which took place between the vessel and Haifa Port RCC throughout the above mentioned period of 18-19th January 2018 and the statements of the RCC operators.

The Petition before the Haifa District Court

The Turkish Cargo Receivers and their Underwriters filed a petition before the Haifa Maritime Court asking it to order the Authority to disclose the Report in full (reinstating the parts that had been blanked out) and its annexes (the "Application"). The Application was grounded both on the Israeli Freedom of Information Act-1998 and the Arbitration Act- 1968. The Respondents to the Petition were the Administration and Owners. After the Court's Hearing and following the Court's observations, the Turkish Cargo Receivers and Underwriters narrowed the Application to the disclosure of the RCC communications and the RCC's operators statements, having all rights reserved to apply for a full disclosure of the Report following and according to the disclosure of documents and arbitral decisions in regard to the Report as would be decided in the future Arbitration which had not reached the disclosure of documents and summoning of witnesses and the provision of documents, at that stage.

The Haifa District Court's decision acknowledging the Cargo Receivers right of standing

Under the above-mentioned background, the Haifa District Court decided the Application. One of the main issues and principles dealt with by the Court was whether a foreign claimant has a "right of standing" to receive information following the Freedom of Information Act. Clause 1 of the Act declares that "*any Israeli citizen or resident has the right to receive information from a public authority*", which indicates, that allegedly the right for information is granted only to an Israeli citizen or resident.

However, Clause 12 of the Act orders that: "*The orders of this Act will apply also to an information petitioner which is not an Israeli citizen or resident in relation to information about its rights in Israel.*" Accordingly, the Court had to examine whether the Turkish cargo receivers and the underwriters can be considered as "*having rights in Israel*". The Court held, that the expression "*about its rights in Israel*" should be interpreted broadly and should include not only personal information collected by the authorities, but also the information about a foreigner's assets in Israel or assets he had in Israel at the time of the collecting of information, and should include information related to entitlements and claimable entitlements related to the period when the foreigner was in Israel or information collected in relation to a claim related to its assets, when he was in Israel.

In the current matter, the Court held that the required information was collected in Israel in relation to a marine incident which took place in the Israeli territorial waters at Haifa Port. The collected information concerns the reasons for the damage caused to M/V Diana and the steel coils carried by the M/V Diana, meaning the Applicant's assets.

The information relates to the Applicants' claimable rights which arose in Israel in relation to an incident which took place in Israel. The Court also mentioned that the claim *in rem* and arrest proceedings took place in Israel and that there is no doubt that the Israeli Courts have authority to hear the claim and that only due to an arbitration clause the claim is to be heard in London. Obviously, if the claim would have been handled before an Israeli Court, the Applicants would have had the standing required from the Administration regarding the collected information required for the execution of their claimed rights (subject to the exceptions by Law), and the fact that the transfer of the proceedings to London should not derogate from their rights to obtain the collected information which is required to materialize their rights which arose in Israel.

The Court also added that the right to receive information can be established by other fields of law and also information which is not listed in the Freedom of Information Act as compulsory information, can also be obtained.

Court's rejection of the Administrations' and Owner's objections

After establishing the Applicants' right of standing, the Court rejected the objections of the Administration to disclose the RCC communication and statements which were based on the Administration's argument that in order to achieve future co-operation in future investigations of marine incidents, the information should not be disclosed. The Court held that it does not see how the disclosure of communications which took place in real time concerning a distressed vessel, which are recorded as a matter of routine - regardless of the existence or non-existence of a future investigation, will disrupt the Administration's investigations.

On the contrary, the Court held, that the disclosure of the full information on a marine incident will help vessel's crew and personnel to learn about the circumstances of the incident and how to avoid such marine incidents in the future.

The Court also denied Owners' objection to disclose the RCC communications and held that it did not find any reasons as to why the disclosure would cause damage to the crew or to the Owners. After viewing the communication and asserting that they do not include any personal private information of either the crew or the RCC operator, the Court held that the RCC communication and RCC operators' statements will be disclosed and made an order of costs ordering both the Administration and Owners to pay the Applicants costs. **Observations:**

It should be mentioned that under the Israeli Arbitration Act, clauses 13, 16 and 39, the Courts are authorized to provide assisting orders such as the summoning of witnesses in an arbitration and/or to enforce orders issued by an Arbitrator. These powers apply also to an arbitration taking place abroad.

Accordingly, an Arbitral award ordering the disclosure of documents and information held by an Israeli authority can be enforced by an Israeli Court. According to clause 13 (c) of the Israeli Arbitration such an Authority has the right to oppose such an order, and the Court will have to decide such an objection.

The Haifa District Court's decision, which was handed down by the Haifa Maritime Court Judge, Vice President,

the Honourable Judge Mr. Ron Sokol, is a clear recognition of the rights of cargo receivers or others who suffered losses and damages as a result of a marine incident, to receive information collected by an authorized authority while conducting an investigation and issuing a report on the reasons which cause the incident.

The manner in which this right of standing would be materialised and confronted by objections and exception on behalf of the authorities and owners should emerge in future Applications of this nature.

Folio No. 67484-03-19 **HDI GLOBAL ANTWERP and Others Vs. State of Israel and Owners of the M/V Diana**, Haifa District Court.



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