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The Naval Prize Before The Haifa Maritime Court

By John & Yoav Harris, John Harris & Co. and Doron Tikotzki & Co.

Almost 80 years after it has been established in 1937 by the King's Council as a Court of Admiralty in Palestine, the Israeli Supreme Court attended to a unique matter which was not dealt with before: The Naval Prize (of the M/V Estelle). This small vessel which carried cement to Gaza strip has wakened the question of a Maritime Court as a Prize Court for the first time after the ending of World War II (at least in the western world).

On October 2012 the M/V Estelle ignored Israel's massage to its owners that humanitarian aid carried on the vessel will be transferred through land passage, and reached the restricted area of the Naval Blockade imposed on the coast of Gaza. The vessel was taken over by the Israeli Navy who navigated it to Ashdod Port. The passengers were questioned and released and the cargo was discharged and forwarded to the Palestinian Authority and to UNRWA. But, as opposed to previous incidents where the vessels were returned to their owners, the M/V Estelle was held by the Israeli Army and after 10 months of detention the State of Israel applied to the Haifa Maritime Court ("HMC") and requested it to exercise its authority as a Prize Court under the (English) Naval Prize Act of 1864 and to order confiscation of the vessel (FolioNo 26861-08-13).

According to the traditional law, all merchant ships, whether enemy or neutral, may be stopped, visited and searched. An enemy cargo on board enemy merchant ships can always be seized and captured as a prize. Neutral cargo on board an enemy merchant vessel can be seized if it is contraband, or if the vessel is a blockade runner or actively resists visit and search. Enemy's property, whether vessels or goods is liable to capture and, subject to a decision of a prize court, to condemnation. Although the act of capture itself takes place at sea it should be confirmed by a Judgement of a Prize Court where the owners and the cargo interests can bring their allegations before a specialized Court. The Prize Court does not only rule on the validity of the capture itself but also gives orders in relation to the management of the Vessel, its crew and cargo, according to the principle that the property of private persons must not be converted without due process of law. Hence, under clause 16 of the Naval Prize Act 1864 – **"Every ship taken as a prize and brought into port within the jurisdiction of a Prize Court,**

shall forthwith and without bulk broken, be delivered to the marshal of the Court." (Wolff Heintschel Von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I: The Traditional Law", (29 Can.Y.B. Intl's L. 283 (1991), page 284, footnote 4, pages 298, 304, 307-308).

The State of Israel based its application on the legacy from the British Mandate over Palestine (Israel) which ended on 15 May 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"**). This Act established Maritime Courts in Her Majesty's Dominions and elsewhere out of the United Kingdom.

On the date when the Colonial Act was enacted the relevant Acts of Admiralty which were in force were the Admiralty Court Acts of 1840 and 1861. These, continue to govern the Israeli Haifa Maritime Court to-date. The Naval Prize Act, 1864 which was also in force at that time was never considered or was required to be considered as governing the Israeli Maritime Jurisdiction until the matter of the M/V Estelle.

The difficulty the Haifa Maritime Court was faced with, is the following: Under clause 2(3)(a) of the Colonial Act, unless being duly authorized, a Colonial Court of Admiralty was not allowed to exercise any jurisdiction under the Naval Prize Act or otherwise in relation to prize.

Therefore, according to the above Acts, the Authorization given to the Admiralty Court established in Jerusalem was limited. In relation to able it to act as a Prize-Court, a special additional authorization by her Majesty was required. The historical–legal question was whether or not such an authorization was provided?

The State of Israel argued that the HMC's authority to act as a prize court was established by an Order given by the High Lord Admiral of the United kingdom to the senior judge of the Supreme Court of Palestine (Israel) published in 10 October 1939 ordering him that **"when an announcement is made in Palestine (Israel) stating a war has commenced between her Majesty's and any foreign country, to pay attention to all kinds of captures and prizes of all kinds of ships, vessels aircrafts and cargos which will be taken and will be brought before the Supreme Court of Palestine (Israel) to rule over them, to judge and to confiscate them according to the Law of Admiralty and Regulations as will be in-force at that time. For this purpose this order is your writ of authority until cancelled or dismissed"**.

The counter argument was argued that the announcement mentioned in the above mentioned orders was not presented, and in any event it seems that it was in force only for the purpose and period of the Second World War which had ended – as so had the British Mandate – on 1948. In 1952, the State of Israel enacted the "Admiralty Court Act" which was merely an administrative act stating that all the authorities which were given to the Supreme Court of Jerusalem (to act as a Maritime Court) are transferred to the Haifa District Court acting (from now on) as the Maritime Court. This Act, therefore, does not deal with the jurisdiction and authorities themselves and can't establish an authorization to the Israeli Maritime Court to act as a Prize Court.

These unique matters got the attention of scholars. The underwriters, under articles published in the “Kathedra" (The Emil Zula Chair for Human Rights) questioned if indeed the HMC was authorized to act as a Prize Court, and if indeed back in 1952 the Israeli legislator indeed intended to authorize the Haifa District Court to give orders to the State of Israel (relating to confiscation of vessels) where such authorities to adjudicate in public law matters involving the State were transferred from the Supreme Court to the District Courts much later - only in the 1990. Due to the relevance of Prize considering the security challenges the State of Israel is facing, we argued that the Maritime Court should be provided with better legislative foundations than that of a doubted act of legislation, which took place almost a decade ago. Also Dr. Ziv Borrer of Bar-Ilan University argued under his article that the HMC was authorized to act as a Prize Court.

The Haifa Maritime Court, Honorable Judge Mr. Ron Sokol decided that between the two possibilities: The one he is authorized to act as a Prize Court and the other, he has not such authorization, he prefers the first. A specialized Prize-Court is in compliance with the Traditional Law's requirements rather than an absence thereof. This is reinforced by the need for matters of Prize to be dealt promptly as the capturing authority is required to provide the vessels documents to the Court immediately after the capture, and where the Maritime Court has the required experience and knowledge and authority to give immediate orders regarding the management of the captured vessel, its crew, its cargo and to relate to third-parties and cargo interests and claims.

Therefore, the Haifa Maritime Court held that it is authorized to act as a Prize Court. However, the Judgment ordered that under the current circumstances where the Israeli Navy has delayed the filing of proceedings for a 10 month period, which is contradictory to the principles of the Traditional Law, is also inequitable and is considered as being against the principals of administrative law, the Vessel Estelle

should be released immediately. The release of the vessel is also justified in the current circumstances where the cargo carried by the Vessel was humanitarian and the Vessel did not resist the visit of the Israeli Navy or its capture and arrest.

The State of Israel appealed before the Supreme Court and argued that the HMC erred in denying its application to order on the confiscation of the vessel (Civil Appeal 7307/14). Under the appeal, both parties presented again the question of the HMC's authority to act as a Prize Court. The Supreme Court, after citing the different opinions as expressed in the articles related to this matter (as mentioned above), held in its judgment released on August 2016 that in order to decide if the HMC' was right in its decision not to order on the confiscation of the vessel, there is no need to decide in the debate whether the HMC is authorized to act as a Prize Court. The fact that the State of Israel had waited 10 months from the capture of the vessel until it brought proceedings before the Court, is sufficient to dismiss the appeal. The Supreme Court's main reasoning was that, under clauses 16 and 17 of the Naval Prize Act 1864, every ship taken as a prize shall forthwith be delivered to the marshal of the Court, and "the captors shall, with all practicable speed after the ship is brought into port, bring the ship papers into the registry of the Court". In fact, The Supreme Court held, the act of prize is not completed without the adjudication (which should take place promptly), and therefore, a postponement of 10 months does not comply with the requirements of "forthwith" and "with all practicable speed, as set by the law.

Vessels owners and operators must be aware that a 1864 British Act relating to Prize might be exercised on their vessel and lead to its confiscation if the vessel would be involved in a breach of the naval blockade (which was found lawful by the U.N Report of the Secretary-General's Panel of Inquiry headed by Sir G. Palmer - which investigated the M/V Mavi Marmera incident) or in trafficking weapons to any of the Israeli enemies.

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Cross-Border Insolvency and Hanjin Shipping Co Limited: A South African Perspective

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On 1 September 2016, Hanjin Shipping Co Limited ('Hanjin') successfully applied for and obtained an order whereby it was placed under rehabilitation. Such an order was obtained within 24 hours of the company making application to the Korean courts, without notice or input from other interested parties, most notably Hanjin's creditors.

It is reported that Hanjin has filed a Chapter 15 petition in a US bankruptcy court in New Jersey and plans to pursue legal action in roughly ten countries during the week (5-9 September 2016), and later expand that to 43 jurisdictions, no doubt to obtain recognition of the Korean rehabilitation proceedings ("the Korean proceedings").

Although South Africa is a signatory to the United Nations Convention on Cross Border Insolvency, the provisions of that convention have not been given effect to in South Africa, with the result that there is no automatic recognition of the Korea proceedings. In order for the Korean proceedings to be recognised in South Africa, the Receiver would formally have to make application to the South African court for recognition. A number of applications for recognition of foreign 'rehabilitation' proceedings have been made in South Africa in the past, including those of Korea Line, STX Pan Ocean, Excel Maritime, Daichi Chuo Kisen Kaisha and Starbulk Carriers.

The practice that has developed in South Africa is that such applications are brought ex parte (without notice). Recognition is sought on the basis of comity, meaning that the position of the appointed official / liquidator would be recognised in South Africa and afforded appropriate power in this jurisdiction, based on the association between South Africa and the U.S. for their mutual benefit. To date, none of these applications have been challenged, and as a result, there is no jurisprudence in South Africa on this point. Comity, in principle, requires that similar relief is available in this jurisdiction.

Whether an application for recognition of the Korean proceedings would succeed on the basis of comity remains to be seen. As mentioned above, no opportunity was provided to other interested parties when the Korean order was sought. The affairs of the company are not susceptible to independent judicial