Trends and Developments

Contributed by:
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Harris & Co. Shipping & Maritime Law

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The Haifa Maritime Court

Located at the strategic meeting point of Europe, Asia and Africa, and governing the ports of Haifa, Ashdod and Eilat, the Haifa Maritime Court is an esteemed and efficient forum for enforcing maritime liens and litigating maritime in rem claims, and other marine matters.

The Court also decides on claims and arrest applications filed by entities incorporated in countries that do not have formal full diplomatic relations with Israel. Previous cases include a bunker supplier incorporated in one of the Persian Gulf countries that sought to recover from a non-paying vessel that was being bunkered elsewhere in the world and called at an Israeli Port, and a Libyan-controlled company owning a tanker that was victim to document piracy and sought the cancellation of an Israeli registration of the vessel (which was indeed eventually cancelled by the Haifa Maritime Court).

The Court's historical roots and traditions have resulted in two sets of rules governing its authority, making 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, and the latest developments in Israeli Maritime Law.

The sets of rules governing the Maritime Court's authority

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. These continue to apply to the Israeli Haifa Maritime Court's jurisdiction.

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 powers 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.

Clause 2 (2) of the Colonial Act empowers the jurisdiction of a Colonial Court of Admiralty with the jurisdiction over "the like persons, matters and things as the Admiralty jurisdiction of the High Court in England whether existing by virtue of any statue or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations". In accordance with these provisions, and following the transfer of powers from the Supreme Court, when exercising its jurisdiction over maritime claims and matters, the Haifa Maritime Court can apply its civil and other powers as a District Court under Israeli law.

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. This resulted in the Israeli Maritime Court (namely, the Haifa District Court) having two sets of rules related to maritime liens. To add to this ambiguity, the Supreme Court has handled relatively few cases (specifically, appeals against the Maritime Court's judgments). As a result, apart from a small number of Supreme Court judgments relating to the basic principles, there are 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. However, in the 32 years following this judgment, the Supreme Court has addressed only a few matters relating to maritime liens.

As a result, the development of Israeli maritime law has largely been empirical, driven by 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 has been moving towards greater clarity and predictability. The latest developments in Israeli shipping and maritime law will now be explored by focusing on the judgments of the Haifa Maritime Court and the Supreme Court.

The requirement for owners' liability

The concept of a maritime lien can be described metaphorically to emphasise its unique nature. It can be said to "spring into existence the moment the circumstances give birth to it" and like an unseen demon "attaches itself to the res and diminishes the owner's property rights in the vessel". This lien remains invisible to owners and other creditors, maintaining a silent hold over the vessel until it manifests in a legal process, typically through a claim in rem.

The question of whether a maritime lien requires an owner's personal liability seems to be viewed differently by European civil admiralty law (rooted in Rhodian Sea Law, Roles (Rules) of Oleron,

Consolato del Mare Laws of Visby and the Ordonnance de La Marine of 1861) and by English common law, which imported the concept of a maritime lien through the Doctors' Commons.

While under English law "a proper maritime lien must have its root in personal liability of the owner" (*The Castlegate* (1893)), no such 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.

However, in the matter of *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 (which were 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*, in so far as the local ship agent was not entitled to a maritime lien for port dues paid by the agent for the vessel, during its calls at Haifa Port. It was reasoned that the agent's commercial relations were with the operator of the vessel and not with the owners with whom he had no agreement, and that there was no personal liability on behalf of the owner to pay the agent. Therefore, due to the fact that a maritime lien requires personal liability on behalf of the owner, the agent had no maritime lien. However, the finding of the Haifa Maritime Court was used by the agent in its successive claim filed against the operator of the vessel for the unpaid port dues and other amounts due, which were claimed separately as a civil claim.

In the matter of *MV Captain Hurry* (2016), the Haifa Maritime Court dismissed a bunker supplier's claim due to res judicata, following a German declaratory judgment that declared that all contractual relations took place between the bunker supplier and the charterers only (and not with the owner) and that, accordingly, no liability was imposed on the owners towards the bunker supplier.

In *MV Captain Hurry*, however, the Haifa Maritime Court also mentioned that the maritime liens differed from each other, whereby some were 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. These findings might affect further court cases dealing with maritime liens and owners' liabilities.

In the matter of Moraz Shipping, while denying the owners' application for establishing a limitation (according to the Brussels Convention of the year 1957), the Maritime Court cited the above-mentioned *Captain Hurry* matter as authority that in rem proceedings can be taken against a vessel regardless of owner's liability, because for enforcing these, it is enough that those who

were authorised to obligate the vessel were the ones who caused the damage.

In the matter of M/V *HUA YANG MEU GUI*, a successful arrest of the vessel was achieved due to unpaid bunker dues. These bunkers were supplied while the vessel was under charter, and the charterers were liable for ordering and paying for the bunkers per the charterparty. This arrest was facilitated after presenting the Haifa Maritime Court with a full disclosure on the merits.

A key aspect of this case was the reference to American law, which was the governing law per the supplier's terms and conditions. Under American law, there is a presumption that charterers and their agents have the authority to bind the vessel by ordering necessaries, unless there is an explicit notice from the owners stating otherwise. This principle was cited from the case of World Fuel Services Vs. *M/V HEBEI SHIJUAH*, and the arrest was ultimately granted. The matter itself was settled after the arrest, but although no judgment on the merits was rendered, the fact that the arrest was granted under these circumstances implies that the Haifa Maritime Court might accept arguments and arrest applications for unpaid necessaries ordered by a charterer.

It can be concluded that, although the Haifa Maritime Court's approach is that a maritime lien requires owner's liability, there is some flexibility in how such liability is established, whether directly or through those acting on behalf of the owner. There is also acknowledgement that not all maritime liens are uniform in nature, and that some maritime liens might exist without the personal liability of the ship-owner.

Only the contractual supplier is recognised as a necessary lien

In the matter of *MV Emmanuel Tomasus* (2012), 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.

As mentioned above, in another matter relating to bunker supplies, *MV Captain Hurry* (2016), the supplier's claim was denied due to the findings that the supplier's commercial contracts were with the charterer of the vessel and not with the owners.

Sister-ship arrests

In the matter of *MV Huriye Ana* (2017), the Maritime Court held that Israeli law did not allow for a sister-ship 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).

In the matter of *MV OSOGOVO* (2021), while denying a supplier's arrest application for necessaries supplied to sister-ship vessels of the subject vessel, the Haifa Maritime Court mentioned that it did not deny the possibility of extending, under "judicial legislation", the possibility of sister-ship arrest, leaving the path open for applying for such an arrest by using, for example, the legal principles of lifting the corporate veil.

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 charg-

es" included port charges paid by the agent (for the vessel) at a foreign port.

Therefore, also in this matter, it was decided that a foreign marine insurer can use its subrogation rights and file a claim for damages even if not registered as an Israeli or foreign insurer in Israel.

Registration

In the matter of *M/V BADR* (2022), the Haifa Maritime Court accepted the owner's claim and held that a vessel registered in Libya cannot be registered under Israeli registration too, and ordered the cancellation of the Israeli registration of the vessel, which was done ex parte, without the consent of the owners of the vessel (held by the Libyan government's company). In this matter, the registration of the vessel under Israeli registration took place after several failed attempts to have the vessel registered in different registers around the world; legal proceedings are taking place in Bulgaria between the owners of the vessel and those who claim their ownership over it, following the arrest of the vessel in Bulgaria based on a mortgage deed which was found to be fake.

In its judgment, the Haifa Maritime Court referred not only to the Israeli Shipping Act 1960 and the relevant regulations relating to registrations of vessels, but also to the Convention on the High Sea 1958 (to which Israel is a signatory party) and to the United Nations Convention on the Law of the Sea 1994 (UNCLOS) ("the Law of the Sea") under which ships shall sail under the flag of one state only (Article 94). Israel is not a signatory party to UNCLOS but its official position as presented recently before the Supreme Court (in a different matter) is that customary international law is incorporated into Israeli law insofar as there is no contradiction between the two.

The defendants filed an appeal before the Supreme Court but withdrew their appeal after filing of pleadings and before the hearing took place. Nevertheless, in addition to the withdrawal of the appeal, the Supreme Court made an order of costs against the applicants.

Mortgage

In the matter of Vapi Kredi Banaksi v *M/V Hurriye Ana* (2020), the Haifa Maritime Court denied a bank's claim to enforce a mortgage that was written in the vessel's registration. The Court held that the validity of the loan agreement was not proven and that no information was provided in relation to the payment schedule agreed with the debtor (which was not the owners) and the exact amount of remaining debt. The fact that a mortgage is written in the vessel's registration is not enough to have it enforced.

Cost of COVID-19 hospitalisation

In the matter of *MV Moraz* (2021), the Haifa Maritime Court accepted that the costs of medical treatment provided by a local hospital to a crew member who became ill with COVID-19 constitute a maritime lien on the vessel, under the maritime lien for "payments claimed by the captain, crew and others who served on board, arising out of their employment in the vessel…".

Cargo claims and underwriters

Under the Order of Carriage of Goods in Sea, as amended in 1992, Israeli law has adopted the Hague-Visby Rules, which 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 judgment in the matter of civil appeal 7779/09 HDI v Orl, it was held that the quantities stated in the B/L are prima

facia evidence, not only towards the owners but also towards the underwriter insuring the cargo (which was carried under the B/L) in marine insurance.

In a Supreme Court decision in civil appeal 7195/18 Fhya v 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" (stopped). Consequently, amending the claim to add a new claimant with the title to sue after the one-year period is not permissible if the claim of the additional claimant is already time-barred.

In the matter of *MV Chrysopigi*, the Haifa Maritime Judge, the honourable R. Sokol held that a foreign marine insurer has title to sue under the insured rights that have been subrogated to it, 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 supervisor's supervision.

Under this decision, the court has given effect to the Israeli legislature's wording and meaning when excluding the marine insurance from supervision and other liabilities according to the Insurance Agreement Act of 1982 (this decision was approved by the Supreme Court, when denying the filed appeal).

In the similar matter of Civil Claim 31521-01-20 Nobel Energy v Zim, the Haifa District Court further ordered that the act of subrogation does not relate to the manner in which an insurer handles its insurance agreements and therefore the act of subrogation should not be subject to local regulations and supervision.

Limitation fund

In the matter of *MV Moraz* (2022), the Haifa Maritime Court denied the owners' application to constitute a limitation fund in order to limit its liability to damages caused as a result of an oil leak from the vessel while being bunkered near Haifa Port and due to the fact that for some reason valves of the receiving tank, which should have been closed, were open.

The Court held that the nature of the damages caused, namely the contamination of port facilities and the port area by ten tonnes of oil, should be construed as damages to "harbour works, basins and navigable water ways", per Article 1 (1) (c) of the Brussels Limitation Convention 1957. The Israeli Shipping Act (Limitation of the Liability of Owners of Sea Going Ships) 1965 adopted the Brussels Convention 1957, but excluded Article 1 (1) (c), and, therefore, the incident is not included in the matters allowing a limitation fund to be constituted.

In addition, the Haifa Maritime Court held that the incident was caused due to the actual fault or privity of the owners – through the actions of the local operators of the vessel, who did not issue the vessel's crew with the required instructions and did not supervise the qualifications of the crew members. This was also one of the grounds for the denial of the owners' application.

Grounding and marine casualties investigations

Under Folio No 67484-03-19 HDI and Others v State of Israeli/Ministry of Transportation and the Owners of *MV Diana*, the Haifa District Court held that the Administration of Shipping and Ports (within the Ministry of Transportation) will disclose to foreign cargo interests the RCC communications which took place between the distressed *MV Diana* and the RCC centre at

Haifa prior to its grounding on 19 January 2018, 250 metres from the Haifa Bay shore.

These were collected by the Administration while investigating the incident, and the Court held that the parties with cargo interests on board the *MV Diana*, whose cargo was damaged due to the vessel's grounding are entitled to receive the communications, based on the Israeli Freedom of Information Act, 1998 and the Arbitration Act, 1968, and in view of the London arbitration being conducted between the cargo interests and the owners.

Enforcing a foreign order

Recently, in the matter of *M/V Tiber River*, an arrest order was obtained under a claim for executing a judicial bailment order issued a few days before by the Piraeus Court. The latter order transferred legal and physical possession of the vessel to the claimant nominated as the judicial bailee, in order to keep the vessel as a security for its claim regarding management services and payments provided and paid for the vessel. Although the matter was settled soon after the arrest, and the arrest was issued ex parte, the issuing of the arrest order indicates that in certain circumstances the Haifa Maritime Court is willing to enforce a foreign order regarding the detention of a vessel even if the foreign order has just been issued (and is still appealable).

The Authority to Act as a Prize Court

In the matters of *M/V FREEDOM* and *M/V KAARSTIEN* (2021), the Haifa Maritime Court continued to establish its authority to act as a prize court according to the Naval Prize Act 1864, and to order, at the request of the State of Israel, the confiscation and judicial auction sale of vessels which are captured by the Israeli navy while attempting to breach the naval blockade imposed upon the Gaza shore. In these matters, it was further ordered that the amount received from the sale will be transferred to the State of Israel (Ministry of Treasury).

These judgments follow the Haifa Maritime Court's decisions in the matters of the *M/V Estelle* (2014), *M/V Marianne* (2016), and *M/V Zaytouna Olivia* (2019) and clearly state that any attempt to break the blockade, even for the purpose of protesting against the blockade itself, will result in the confiscation of the relevant vessels, while humanitarian aid itself (if carried on board the confiscated vessels) will be transferred to the Gaza strip through Ashdod port and inland car- riage. Currently, applications for the confiscation of two fishing boats accused of violating the fish- ing zones near the Gaza shoreline and engag- ing in confrontations with Israeli navy ships, are pending before the Haifa Maritime Court. These will be decided against the backdrop of the infiltration by Hamas terrorists at Zikim beach in Israel, and the killing of 19 citizens there during the October 7th massacre.

The Delimitation of the Israeli Exclusive Economic Zone

On 27 October 2022, in the UN case Naqura, the Israeli and Lebanon delegations signed the Israel–Lebanon Maritime Border Agreement, demarcating the maritime boundary line between the countries.

Previously, on 23 October 2022, the Supreme Court denied the petitions filed by Kohelet Policy Forum and Others against the authority of the government of Israel to enter into the Agreement (Folio No 6654-22). In the government's response to the petitions, it was stated that Israel (which is not a signatory party to UNCLOS) sees itself as obliged to UNCLOS orders relating to maritime areas, as these reflect customary international

law, which is incorporated into Israeli law insofar as there is no contradiction between the two.

The above-mentioned Israeli–Lebanese agreement complements the agreements reached between Lebanon and Cyprus in January 2007 and Israel and Cyprus in December 2010 for the delimitation of the exclusive economic zones of each of the two countries. These agreements have established stability in relation to the boundaries of Israel's exclusive economic zones, which will impact natural gas drilling and related maritime and shipping activities in these areas, which are expected to increase.

The Abraham Accords

The Treaty of Peace, Diplomatic Relations and Full Normalisation Between the United Arab Emirates and the State of Israel, followed by normalisation agreements with Bahrain, have strengthened the strategic location of Israel and Israeli ports, and an increase in trade and transport between Israel and the Gulf states is expected.

In light of these developments, the Haifa Maritime Court has already shown its capacity to accommodate diverse international interests. For example, it has exercised its rights in favour of a bunker supplier located in Dubai (arresting the *MV Huseyn Javid* for unpaid bunkers) and a Libyan owner (in cancelling the Israeli registration of the *M/V BADR*). With the conclusion of the Abraham accords, claimants from the Persian Gulf or other Middle Eastern claimants and interests will find the Haifa Maritime Court, and other Israeli courts, to be a favourable jurisdiction.

The Hamas-Israeli War

The war between Hamas and Israel began on 7 October 2023 with the murder, by Hamas terrorists, of 1,200 people, mainly civilians, and the kidnapping of 200 more. This massacre was followed by Hezbollah's missile launches from Lebanon, and the Houthi's attacks on vessels navigating through the Red Sea at Bab-al Mandab straits, which violated freedom of navigation under Article 38 of the UNCLOS and constituted piracy as defined in Articles 101 and 102. These events have led underwriters to activate war cancellation clauses and to cancel regular marine risk insurance policies for voyages and cargoes intended for Israel, with notices given 14 or 7 days in advance.

The Property Tax and Compensation Fund Act – 1973, provides for a governmental war-risks insurance arrangement and damages to vessels located within the Israeli exclusive economic zone (including the territorial waters). Now, the State of Israel has issued an alternative marine insurance arrangement covering vessels located outside the exclusive economic zone but bound for Israel, namely a premium of 0.1725% of the vessel's value for a period of two weeks, and which also covers cargo from loading to discharge.

Following the above, as well as the operations of Operation Prosperity Guardian of the Combined Marine Forces (CMF) (commanded by the US Navy), Israeli ports are operating (almost) as normal, just four months after the war began.