Trends and Developments

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Harris & Co Maritime Law Office

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The Haifa Maritime Court

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 most 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.

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 and preferring this regime over English law. Therefore, the Israeli Maritime Court (namely, the Haifa District Court) has two sets of rules related to maritime liens.

A maritime lien is a substantive right

The main Supreme Court judgment relating to maritime liens was 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.

The requirement for owner's 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" (Thomas, "Maritime Liens", 1980, page 1) and like an unseen demon attaches itself to the res

and creates a "subtraction from the interest of the owners" (Thomas, page 23, citing The Teravate (1922), using the words of The Ripon City (1897). 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 that "relates back to the period when it first attached" (The Bold Buccleugh, 1851).

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, as mentioned, was adopted by the Israeli legislature.

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, therefore (according to the court's view) not falling 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.

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). Accordingly, no liability was imposed on the owners towards the bunker supplier. 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.

In the matter of Moraz Shipping, while denying the owners' application for establishing a limitation (according to the Brussels Convention of 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 the 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 MV 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 v MV HEBEI SHIJUAH, and the arrest was ultimately granted. 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.

to conclude, 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. Not all maritime liens are uniform in nature, and some maritime liens might exist without the personal liability of the ship-owner.

Enforcement of maritime lien for damage "done to goods"

Recently, in the matter of Poliva v Ruby T, the Haifa Maritime Court held that the intended receiver of alleged damaged goods, who denied the goods and rejected the B/L (s) issued (and did not become their holder), has no title to sue for its commercial losses for the purchasing of substitute cargos. The Court dismissed the maritime claim filed under the maritime lien for "damage done to the goods". This decision has been appealed before the Supreme Court.

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.

In the matter ofMV 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 1960. Furthermore, Israel is not a signatory party to any of the conventions allowing such an arrest (ie, 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 charges" included port charges paid by the agent (for the vessel) at a foreign port.

Do pollution damages constitute the lien of "damage done by any ship"?

Currently, two matters of contamination damages caused to port decks and commercial losses resulting from oil leaking from polluting vessels are pending before the Haifa Maritime Court. The claimants are seeking for court authorities and remedies under the maritime lien of "any damage done by any ship" in Article 7 of the Admiralty Court Act 1861, enacted when vessels navigated with the power of steam and referring to the Court's mission of interpreting the Admiralty Court Acts of 1840 and 1861 in accordance with the modern world – as was done, for example, when including bunkering under the necessaries' lien provided in the Admiralty Court Act of 1840 (MV Zim Sao Paolo, Israel Ports Company v Moraz Shipping LLC).

Registration

In the matter of MV 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 done ex parte, without the consent of the owners (a Libyan government's company).

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 UN 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.

Mortgage

In the matter of Vapi Kredi Banaksi v MV 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) or 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.

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) that governs the sea carriage of cargo either from any Israeli port or from any port of a country that 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 civil appeal 7195/18 Fhya v Millobar (2018), the Supreme Court held that if a claim filed within one year after the discharge of the cargo was filed by a claimant that 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)

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; 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 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 of 1957. The Israeli Shipping Act (Limitation of the Liability of Owners of Sea Going Ships) of 1965 adopted the Brussels Convention of 1957 but excluded Article 1 (1) (c); 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 by the actual fault or privity of the owners – ie, by 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.

Seafarer's rights

The Israeli Shipping Act (Vessels) of 1960 recognises, under clauses 40–41 (4), the maritime lien for "Payments claimed by the master, crew and others who served on the vessel, as a result of their employment in the vessel, either by their heirs or their substitutes, which are due either according to an agreement, or for compensation for civil damages or by any other way".

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 constitute the above-mentioned lien.

In the matters of MV Stellar Pacific (2022) and Astrid L (2022), the Haifa Maritime Court accepted claims for compensations filed on behalf of the heirs of two Ukrainian seafarers who sadly lost their lives while serving on the respective vessels. In both cases, the owners denied liability and at the same time did not pay any compensation to the heirs, which led to the arrest of the vessels at their call at an Israeli port. In both cases, the amounts awarded by the Court exceeded the amounts stated in the collective agreements as compensation for the seafarers' death. Although judgments were awarded without reasoning, due to the parties' consent, the amounts awarded seem to imply the Israeli law proposition that owners' limitation of tortious

and other liabilities in relation to casualties of seafarers will be void, as such limitation is not within the public policy.

Grounding and marine casualty 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 rescue co-ordination centre (RCC) communications that took place between the distressed MV Diana and the RCC at Haifa prior to its grounding on 19 January 2018, 250 metres from the Haifa Bay shore.

These communications were collected by the Administration while investigating the incident, in accordance with their authority under the Port Regulations (Navigation safety) of 1982, 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, were 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

In the matter of MV 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 that paid for the vessel. The issuance 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 MV FREEDOM and MV 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 that 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 MV Estelle (2014), MV Marianne (2016), and MV 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 confiscated vessels) will be transferred to the Gaza strip through Ashdod port and inland carriage. Currently, applications for the confiscation of two fishing boats accused of violating the fishing zones near the Gaza shoreline and engaging in confrontations with Israeli navy ships are pending before the Haifa Maritime Court (Folio No 6625-11-2, 58223-02-22). These will be decided against the backdrop of the infiltration by Hamas terrorists at Zikim Shore in Israel, and the killing of 19 citizens there during the 7 October massacre.

On 27 October 2022, in the UN case Naqura, the Israeli and Lebanon delegations signed the Israel–Lebanon Maritime Border Agreement, demar-

cating the maritime boundary line between the countries.

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

The Treaty of Peace, Diplomatic Relations and Full Normalisation Between the United Arab Emirates and Israel, followed by normalisation agreements with Bahrain, have strengthened the strategic location of Israel and Israeli ports.

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 MV Huseyn Javid for unpaid bunkers) and a Libyan owner (in cancelling the Israeli registration of MV 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 to be a favourable jurisdiction.

The Israel-Hamas 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 UNCLOS and constituted piracy as defined in Articles 101 and 102.

The Property Tax and Compensation Fund Act of 1973 provides for a governmental war risks insurance arrangement and damages to vessels located within the Israeli exclusive economic zone (including the territorial waters). 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.

Although the Houthi's attacks blocked Eilat Port, the shipping lines found their solution in navigating around Africa, and it seems that the most suffering was caused to the Suez Canal Authority, who reported a drop of 23.5% in its income from marine traffic in the canal during the Egyptian financial year of July 2023 to June 2024 and a loss of approximately USD 2.2 billion, which obviously increased during the following months up to the present time.

Now, after the State of Israel has defeated Hamas' military power and severally deprived Hezbollah of its military abilities, and with the fall of Asad's regime in Syria, Israel has strengthened its strategic position despite still being under military conflict, which will probably have an impact on the economy and trade.