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Israel: Law & Practice
J.SPRINZAK

2019

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Law and Practice

Contributed by J.SPRINZAK

Contents

J.SPRINZAK was founded in 2003 and is located in the centre of Tel Aviv, with offices in one of the most prestigious buildings in the city. It enjoys strong contacts throughout the shipping sector and has gained an international reputation in the specialised fields of shipping and maritime law, international transport, insurance, international trade and related matters. The firm represents Israeli and foreign insurers, shipowners, operators and managers, charterers, port agents, ports and terminals, freight forwarders and customs clearance brokers, exporters and importers, commodity traders and corporate clients in all three court instances. Moreover, with English-trained lawyers specialising in international arbitration law and procedure, the firm offers clients the benefit of its broad international experience, particularly in the arbitration hub of London. Its close working relations with expert counsel abroad also enable swift action to be taken to obtain security for clients' claims, whether by arresting vessels, freight or cargo, or procuring other attachments or garnishee orders on funds, bank accounts or property around the world.

Authors

Joseph S. Sprinzak founded the firm in 2003 as a boutique law firm focusing on shipping law. His specialist fields are shipping, multimodal transport, marine insurance and aviation law. Joseph has broad experience of litigating in all types of marine and shore-based disputes involving personal injury, charter parties, insurance coverage, collisions, salvage, general average and cargo for a variety of corporations, shipowners, time-charterers, port agents, freight-forwarders, ports, terminals, liability insurers, P&I clubs, cargo interests and their insurers, bunker suppliers and shipyards. He has participated in court litigation and arbitrations in the USA, England, Greece and Italy, and has accepted instructions from overseas clients on many occasions. A member of the Israeli Bar and the Israel Maritime Law Association, Joseph has an LLM degree from Queen Mary University of London and has lectured at Netanya Academic College on marine insurance, at Bar Ilan University on carriage of goods matters and at the Israel Chamber of Shipping on marine insurance.

Dr Rahel Rimon is a member of the firm who specialises in admiralty matters, marine insurance and reinsurance, drafting in-house and expert opinions for the courts, drafting contracts, ship sales, ship registration, and local and international arbitrations. Following work in one of Israel's top maritime law firms (where she met Joseph), Rahel pursued a PhD at the Institute of Maritime Law, Southampton University, under the guidance of Professor David Jackson. Her thesis on 'The Admiralty Jurisdiction of the Maritime Court of Israel' involves a comparative study of Israeli, English, Australian and South African admiralty law, and makes recommendations for reform in Israel. She is a member of Lincoln's Inn, London, and the Israel Bar, having obtained an LLM degree from University College London and graduated from the Inns of Court School of Law, London. Rahel was called to the English Bar in 1982 and, after additional study in Israel, the Israel Bar in 1987.

1. Maritime Finance: Legal Incentives for Maritime Finance Entities and Projects

1.1 Maritime Finance Projects

There are a number of maritime projects being conducted in Israel by foreign companies, such as the construction of container terminals in Ashdod and Haifa, and the provision of services to the gas drilling platforms. In agreements between the Israeli Union of Seamen and the state, it was agreed that the foreign companies would be required to employ at least two Israelis on every ship.

1.2 Maritime Projects' Eligibility for Incentives

Some of the double taxation treaties signed between Israel and other countries provide for exclusive arrangements for the taxation of revenues from the operation of vessels in international trade. Usually the tax will be collected by the state in which the effective management of the company operating the vessel is situated.

Certain tax regulations allow seamen employed on a vessel sailing in international waters for at least 50 days in one tax year to deduct for tax purposes foreign-currency payments from their employer, up to the amount specified in the regulations.

1.3 Fiscal Incentives

The government has published regular decisions aimed at improving the competitiveness of Israeli shipping.

Israeli legislation offers several tax incentives for owners of vessels registered there. These include:

- a special depreciation deduction up to the original cost of the vessel;
- submission of consolidated reports for tax purposes of companies operating the vessels in international transportation;
- tax emption for interest paid on financing obtained for the purchase or construction of a vessel and on the charter of a vessel; and
- tax incentives in the re-exchange of a vessel.

In addition, there is a zero VAT rate for various services rendered with regard to transportation of cargo by vessels and for the sale or import of vessels in circumstances specified in the VAT law.

There is no tonnage tax applicable in Israel. However, a government bill for the imposition of such a tax has passed a first reading in the Israeli Knesset and will be tabled for a second and third reading when the Knesset reconvenes following the April 2019 elections. Accordingly, it is uncertain when the legislation will be enacted.

1.4 Labour Incentives

The rights of Israeli seafarers are regulated by the Shipping (Seamen) Law 1973 and the regulations promulgated thereunder in 2002, as amended from time to time. These laws regulate the service conditions and social benefits of seafarers, for example, ensuring that seafarers are employed under written service contracts under which, *inter alia*, they receive separate payment for overtime. The law provides that, insofar as possible, an Israeli vessel must be crewed by an Israeli Master and seamen. A permit may, however, be obtained for a foreign Master.

In addition, Israeli seamen enjoy all the rights and benefits provided by the general Israeli labour laws relative to work hours per week, overtime, sick leave, pensions, compensation, termination of employment contracts, etc. Further protection is provided in a number of special collective agreements that regulate terms of employment and various other benefits.

As part of the Israeli government's attempt to encourage seafaring, it subsidises the employment of Israeli officers and cadets employed on vessels registered in the Israeli Ship Registry and managed in Israel by Israeli companies. This is done in accordance with criteria updated by governmental decisions every three or four years. The most recent decision was issued in January 2018.

2. Substantive Provisions for Limitation of Liability for Maritime Claims

2.1 LLMC 76

Israel is not a member of LLMC 76. However, the Israeli Shipping Law (Limitation on a Shipowner's Liability) of 1965 (the Law) incorporates the International Convention relating to the liability of Owners of Sea-Going Ships (Brussels, 10 October 1957).

The Law incorporates the protocol amending the International Convention relating to the Limitation of Liability of Owners of Sea-going Ships of 10 October 1957, signed in Brussels 21 December 1979 (the 1979 Protocol).

According to Section 2 of the Law, the provisions of the 1957 Convention, as amended by the 1979 Protocol, shall have the validity of law, save for the provisions of Article 1(1)(c) therein, to the extent that they determine the rights and obligations of shipowners, masters, crew members, employees of the shipowner, their heirs, personal representatives, dependants, creditors, charterers, managers and operators, and to the extent that they determine the jurisdiction of the Israeli courts.

2.2 1996 Protocol

See **2.1 LLMC 76**, above.

2.3 Provisions for Limitation of Liability and the LLMC 76

The differences between the substantive provisions governing limitation of liability in Israel and LLMC 76 are, essentially, the differences between the 1957 and 1976 Conventions. In brief, in exchange for a much higher limitation fund under LLMC 76, there is virtually an unbreakable right to limit liability.

Both the 1957 Convention, applicable in Israel, and LLMC 76 provide for the calculation of a limitation fund based on the vessel's tonnage, and both allow limitation of liability for wreck removal and breach of contract. As noted, persons and entities entitled to benefit under both conventions include charterers, managers and operators of sea-going vessels.

The main difference between the two regimes relates to salvors and persons for whose act, neglect or default a salvor is responsible, who were introduced as a class capable of enjoying the right under LLMC 76 only.

In accordance with the 1957 Convention, limitation of liability in Israel is available in respect of acts or omissions done by a person or persons on board or in the navigation or management of the ship, or in loading, carriage or discharge of its cargo, or in embarkation, carriage or disembarkation of its passengers.

In contrast, LLMC 76 introduced a provision not found in the 1957 convention, namely potential liability of the shipowner for the cause of the loss as a condition precedent to a Master or crew-member seeking to limit liability.

With regard to claims by crew members, reference should be made to Section 3 of the Law, which, further to Article 1(4) of the 1957 Convention, provides that a shipowner is not entitled to limit his or her liability regarding claims by the Master, the vessel, his crew-members and other employees whose functions are related to the vessel, if their respective service contracts are subject to Israeli law.

2.4 Limitation of Liability Time Bar

In Israel there is no specific statutory provision providing a time-bar for filing a limitation of liability action and constituting a fund.

Accordingly, it is reasonable to assume that should the courts be required to deal with this issue, they would conclude that the time for filing such an application is commensurate with the prescription period applying to the underlying claim.

Article 5(5) of the 1957 Convention leaves the time limit for filing suit under the provisions of the Convention, namely, in respect of the causes of action relative to the carriage of goods by sea, to the lex fori.

Israel has adopted the Hague-Visby Rules by virtue of the Carriage of Goods by Sea Ordinance 1926 as amended in 1992. In accordance with these rules, the limitation period for filing a claim against a maritime carrier for damage/shortage of cargo is one year from the date of arrival of the cargo at its destination or from the date the cargo was due to reach its destination. This limitation period also applies to insurance companies' subrogation claims.

In cases of claims in respect of personal injuries, the limitation period is extended to three years where the personal injury claim is secured by a maritime lien.

Finally, in this regard it should be noted that, consistently with Article 2 of the 1957 Convention, in principle it is not necessary to constitute a fund to plead limitation of liability. The fund will be constituted if the shipowner submits an application to the court and the court permits that constitution.

2.5 Claims Subject to Limitation of Liability

The types of claims subject to limitation of liability are those set out in Articles 1(a), 1(b) and 1(c) of the 1957 Convention, namely:

- loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;
- loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible. Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his or her liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers; and
- any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways.

2.6 Claims not Subject to Limitation of Liability

This is as set out in Article 1(4) of the 1957 Convention, namely:

- claims for salvage or claims for contribution in general average; and

- claims by the Master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives or dependents, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his or her liability in respect of such claims.

2.7 Conduct Barring Right to Limitation of Liability

Conduct barring limitation is described in Article 1(1) of the 1957 Convention. It should also be noted that the 1957 Convention grants a shipowner the right to limit liability "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner."

The 1976 Convention provides a substantial departure from this standard and greatly increases the prospects of limitation. Article 4 of LLMC 76 provides: "A person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

This provision of the LLMC 76 is of great significance because it extends additional protection to the shipowner by requiring proof of:

- actual intent or reckless conduct, which is a higher degree of fault than privity or knowledge; and
- a personal act or omission, excluding vicarious conduct of servants.

Reference to conduct barring limitation of liability is also found in Section 5 of the Law, which provides that the Minister of Transport may prescribe by order published in Reshumot (Israel's gazette of record) that this Law shall not apply to vessels registered in a particular state, not being a party to the Convention, if he considers that such state does not, in the matter of the limitation of liability of an Israeli vessel, act in accordance with the principles laid down by this Law.

It should be noted that under Article 1(6) of the 1957 Convention, the question of upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault or privity of the owner, shall be determined by the lex fori.

According to Section 8 of the Law, the burden of proof lies on the person claiming that a particular event was caused by reason of the fault or privity of the shipowner, where no contrary provision is found in the Civil Wrongs Ordinance 1944 or any other law.

From this point of view, Israeli law modified the approach taken by the 1957 Convention, where the burden of proof lies upon the shipowner to prove absence of his actual fault or privity with respect to loss or damage, and is closer to the approach taken by LLMC 76, which places the burden of proof on the claimant or party attempting to break limitation.

Accordingly, unless the shipowner or other party entitled to limit has been proven liable for acts intended to cause damage or conduct, or recklessly and with knowledge that damage would probably result, the party will be entitled to limit liability. This standard creates a very high threshold to break limitation successfully.

In this regard, note should be taken of the Israeli Supreme Court decision in 4520/97 *The Surfer 1 v The Israeli Phoenix Insurance Co Ltd* (1997). The court held that the vessel seeking to constitute the fund was not entitled to do so if the event giving rise to the claim ensued from the "actual fault or privity" of the owners. The vessel had to prove all the elements permitting it to receive the remedy of limitation sought.

The court further held that whether the shipowner was subject to absolute liability by virtue of Section 2 of the Damage Caused by Ships under Navigation Ordinance 1939, or liability had to be determined under the Torts Ordinance (referred to in Section 8 of the Shipping Law (Limitation of Liability of Ship Owners) 5725/1965, by virtue of Article 1(6) of the convention applying the lex fori to the issue), the burden of proof could be transferred – if not by virtue of Section 41 of the Torts Ordinance, then by virtue of the rule that when there was a high probability of fault or negligence arising from the circumstances and the experience of life, the burden of proof had to be imposed on those who were likely to be liable by virtue of that probability.

2.8 Limitations of Liability

The limitation of liability applies to ships below and above 300 tons as described in Article 3(5) of the 1957 Convention.

By virtue of Article 3(1) of the 1957 Convention, the limitation fund for property claims is set at 1,000 Gold Francs per tonne, whereas for personal claims the fund is set at 3,100 Gold Francs per tonne.

The Israel Shipping (Limitation on a Shipowner's Liability) (Amendment) Law 1987, amended the 1965 Law referred to in **1 LLMC 76**, above by adopting the 1979 Protocol. The 1979 Protocol replaced Gold Francs with Special Drawing Rights (SDR), which are maintained by the IMF. Pursuant to the 1979 Protocol, the limitations of liability applicable in Israel are SDR 66.67 per tonne for cargo claims and SDR 206.67 per tonne for personal claims.

LLMC 76 significantly increased these levels of limitation, in some cases by up to 300 per cent.

It should be noted that by virtue of Section 21 of the Law, all sums payable from the limitation fund shall be subject to linkage to the consumer price index and interest from the date of the constitution of the fund through to the date of payment. The non-index linked interest stands at 4% per annum. This figure is subject to modification at the discretion of the Minister of Finance and Minister of Transportation after consulting with the governor of the Bank of Israel.

The entity constituting the fund is responsible for paying the index differentials and interest. Where no cash has been deposited in the fund, the guarantor of the fund is also responsible for their payment.

2.9 Breaking Shipowners' Right to Limit Liability

See **2.7 Conduct Barring Right to Limitation of Liability**, above.

2.10 Acceptable Guarantees

The Israeli courts are accustomed to the deposit of funds in Israeli currency, in a sum determined by the court. However, parties will often agree on the provision of local (and, in some cases, foreign) bank guarantees.

2.11 P&I Clubs' IOUs

It should be noted that Israeli law does not contain any specific provision regarding the constitution of limitation funds. However, the Israeli Admiralty Court has accepted LOUs issued by P&I Clubs as security for the release of vessels from arrest (in essence, in a manner similar to the position taken in the English case *Atlantik Confidence* [2014] 1 Lloyd's Rep. 586). Thus, it seems likely that they would follow the same approach and accept LOUs issued by P&I Clubs in lieu of limitation funds.

2.12 Other Claims

According to Section 9(a) of the Law, constitution of a fund creates a bar to other actions.

Section 9(a) provides: "Where the applicant has constituted a limitation fund in accordance with an authorisation under Section 7, the court shall, on his application, direct a stay of all operations for the execution of a judgment against him as to a claim subject to limitation of liability, and the court may direct a stay of all hearings, of a claim as aforesaid on which judgment has not yet been given if it considers that such should be done in order to ensure the just distribution of the fund constituted as aforesaid. Where the court has directed a stay of execution proceedings or a stay of hearings the claim shall be deemed to have been filed under Section 13."

Section 13 of the Law refers to the filing of a claim against the fund.

3. Procedure for Judicial Sale of Vessels Before Maritime Courts

3.1 Points to Establish Before the Sale of a Judicial Vessel

For historical reasons, the jurisdiction of the Israeli Admiralty Court is equivalent to that applied by the English High Court of Admiralty in 1890. Similarly, the admiralty practice is that set out in the Vice-Admiralty Rules of 1883.

In Israel, the District Court of Haifa sits as the Admiralty Court, although the other competent civil courts have jurisdiction over commercial or civil disputes in accordance with the amount claimed.

Currently, claims below NIS 2.5 million fall within the purview of the Magistrates' Courts, while higher claims are heard by the District Court. In the event that the Admiralty Court considers it does not have jurisdiction to hear a case, it may decide to transfer the matter to another competent (civil) court. Appeal from the District Courts and the Admiralty Court lies with the Supreme Court of Israel.

The Admiralty Court has jurisdiction over both Israeli and foreign vessels and will accept jurisdiction once the vessel has entered Israeli territorial waters (12 nautical miles). Israel does not recognise the right of a plaintiff to arrest a vessel not directly connected with the cause of action, ie claims against sister-ships or associated vessels (although such vessels may be attached within the framework of *in personam* proceedings in the civil courts).

A claimant seeking to arrest a vessel will usually file an *ex parte* application supported by an affidavit, and supplement it with a claim *in rem* before the court asking for the arrest of the vessel as security for the claim. The grounds for arrest must satisfy the provisions of the Admiralty Courts Acts. Once the court is persuaded that there is a cause of action and that the damage caused to the applicant by not granting the warrant of arrest would be greater than the damage caused to the defendant by the grant of the order, it will issue a warrant of arrest valid for six months. To become effective, the warrant of arrest is served on the master, the port authority and the border police. This is usually done by electronic means.

A shipowner anticipating this process may file a caveat against arrest, undertaking to provide security in lieu of arrest.

In accordance with rules of procedure and Supreme Court precedent, particularly CA 168/93 and ALA 201/93 *Fullwood Marinated Inc v Lofobunker Co SA ('The Arctic Hunter')* and save in exceptional cases, claimants in admiralty proceedings seeking the arrest of a vessel will not be required to put up any security for the arrest.

According to the above case, an exceptional circumstance might be if the application for a warrant of arrest is based on documents, the veracity of which is doubtful. Nonetheless, the court will take into account the property rights of the shipowner, if appropriate, in accordance with Section 3 of Basic Law: Human Dignity and Liberty, and the need to balance these fundamental rights against the claimant's right to an *ex parte* order of arrest, and where necessary do so by ordering counter-security in favour of the shipowner.

In contrast, in ordinary civil proceedings where an attachment is sought, claimants *are* required to provide an LOU on their own behalf, as well as a third-party LOU to reimburse the defendant should the temporary application be set aside and/or the claim be dismissed on the merits, causing the defendant to incur a loss. The court may exempt the claimant from providing a third-party LOU if it deems it just and proper to do so.

In *ex parte* proceedings (which are the norm), the claimant must furnish further security in the form of a "real security" (cash or a bank guarantee). The amount of the real security is determined by the court. The court may exempt the claimant from this obligation if it deems it just and proper to do so.

There is a court fee for filing the claim, equal to 2.5% of the amount sought. Of this, half is payable upon filing the claim *in rem* or the application for arrest, whichever is earlier, and the remainder is payable seven days before the first evidentiary hearing.

Hearings in the Admiralty Court are conducted in accordance with the rules of procedure set out in the Vice-Admiralty Rules 1883, which relate *inter alia* to service, appearances, filing preliminary acts in collision cases, preliminary proceedings, caveats, the trial and execution of judgments, and the duties of the Marshal. Nonetheless, insofar as these rules fail to deal with an issue, it is dealt with in accordance with the Israeli Rules of Civil Procedure. Parties exchange pleadings and discovery of documents, and engage in evidentiary hearings in the usual way.

Once a vessel has been arrested in accordance with the above rules and judgment has been entered *in rem* against the vessel and/or shipowner, the court, usually at the request of the claimant, will examine whether the shipowner is able to pay the sum awarded. In the event that it concludes that the owner is incapable of paying this sum, the court will order the sale of the vessel.

It should be noted that there have been cases – particularly where the vessel is deteriorating in value, guarantees have not been produced *in lieu* of arrest, or crew and suppliers have not been paid – where the court, at the request of a claimant, will order the appointment of a receiver in order to preserve the vessel, its crew and cargo.

Normally, this process will be quickly followed by an order of sale with or without judgment in favour of the claimant. In rare cases, the court has ordered that a vessel be sold by private contract. In all these cases, the sale proceeds serve as substitute security for the claim, pending judgment on the claim *in rem* and subsequently subject to an order as to priorities, in accordance with Section 41 of the Shipping (Vessels) Law 1960.

To complete the picture, it should be noted that Israel is not a party to the International Convention relating to the Arrest of Sea-Going Ships 1952 or the Arrest Convention 1999.

3.2 Notification of Judicial Sale

Notification is made by way of publication in the local and international professional press.

3.3 Appraisal of Vessels

The court will appoint a receiver to handle the sale of the vessel. The vessels are appraised by a surveyor appointed by the receiver and approved by the court. The appraisal is privileged at least until the conclusion of the sale in the Admiralty Court.

3.4 Number of Rounds in Judicial Sale Proceedings

There is no limitation on the number of rounds. The public auction process concludes only when the Admiralty Court is satisfied that the possibility of receiving a higher price has been exhausted. Factors such as increased operational costs and port dues accruing to the vessel by virtue of the delay in its sale are also taken into account. There have been cases where vessels were not sold until the third round of a judicial sale.

3.5 Minimum Bids

The court determines a minimum amount for the bid at each round.

3.6 Judicial Sale Auction Date

The court determines a minimum amount for the bid. The participants then engage in a round of bidding – sometimes with leaps of USD100,000, sometimes less – until the best offer is received. Once a winning bid has been recognised, arrangements are made for execution of the sale. These include the provision of a monetary guarantee within two days in case the winning bidder breaches the sale purchase agreement and setting a date for payment of the balance of the purchase price and receipt of possession of the vessel. The date on which the risk in the vessel is transferred to the purchaser is also determined (even prior to the completion of the purchase), as well as responsibility for the safety team on board the vessel, port fees and payment for necessaries.

3.7 Prospective Bidders Role in Judicial Sale Proceedings
A bidder may appear by means of an attorney or other personal representative, but is of course entitled to be present during the judicial sale.

3.8 Actions Required to Participate
A bidder must submit a financial offer (usually this will be a minimal sum that enables the prospective buyer to participate in the judicial sale) and produce security (cash or a first class Israeli bank guarantee) to the receiver appointed by the Israeli Admiralty Court.

3.9 Sale Price Timeline
A successful bidder usually has two weeks to post the sale price once the vessel has been provisionally sold to them.

3.10 Parties With Judicially Recognised Credit
There is no restriction on the identity of the bidders in a judicial sale conducted by the Israeli Admiralty Court. A creditor who wishes to submit a bid will not enjoy any advantage, even if his financial bid is successful and he is awarded the sale contract.

3.11 Winning Bidder and Arrest Expenses
We are not aware of any case where a maritime judge has approved a sale where the winning bid did not cover the arrest expenses incurred within the claim that gave rise to the judicial sale proceeding.

4. Carriage of Goods by Sea Claims

4.1 Carriage of Goods by Sea Regime Convention
Israel has adopted the Hague-Visby Rules by virtue of the Carriage of Goods by Sea Ordinance 1926 as amended in 1992.

4.2 Rules Applicable to Cargo Claims in the Absence of Conventions
See **4.1 Carriage of Goods**,above.

4.3 Scope of Rules
By virtue of the above Ordinance as amended in 1992, the Hague-Visby Rules apply to any bill of lading in respect of carriage of goods by sea in any vessel:

- from a port in Israel to another port, whether in Israel or outside of Israel;
- from a port in a country which is party to the Hague Rules or the Hague-Visby Rules, or when the bill of lading was issued in a country that is party to the rules;
- when they apply to the contract of carriage included in the bill of lading or the bill serves as proof of its existence, according to a term stipulated in a contract or under the laws of the country whose laws apply to such contract; and
- on a voyage to a port in Israel, when the laws of Israel apply to such carriage, whether according to the contract of carriage, to another agreement between the parties, or to the determination of the Court.

4.4 Implication of a Bill of Lading Evidence
According to Article 2(3) of the Ordinance, the Hague-Visby Rules are applicable to bills of lading in respect of the carriage of goods by sea in any vessel, *inter alia*, "when they apply to the contract of carriage included in the bill of lading *or* where the bill of lading serves as proof of its existence".

The law therefore considers the bill of lading as an instrument that includes the contract of carriage or as evidence of such a contract. Various Israeli Supreme Court precedents have further refined this understanding. They hold that the bill of lading should be considered and classified as evidence of the contract of carriage and not necessarily as the entire agreement. This takes into account that additional terms and conditions (including those varying the terms of the bill of lading) may have been agreed between the parties thereto elsewhere (in a charter party, by oral agreement, etc) and evidence of this may be cited by both contractual parties.

Moreover, in the important case of CA 154/80 *Borchard Lines Ltd London v Heiderbarton Ltd*, it was held that where a contract of carriage exists between the parties, the bill of lading should not be regarded as a new contract that replaces the existing contract of carriage. In the event of a contradiction between the terms of the contract of carriage and the terms of the bill of lading, the former shall override.

Finally, it should be noted that given that a bill of lading is considered a standard contract (Standard Contracts Law 5743/1982) and its provisions regarding the annulment of discriminatory provisions may apply where the contract of carriage is governed by Israeli law.

4.5 Contracting Parties
The contracting parties are the parties to the bill of lading, ie carrier (shipper or consignor) and consignee (who may also be the receiver or notify party).

The carrier may be a demise charterer, however, the Israeli Supreme Court has held in CA 58/89 *Yardenia Insurance Co Ltd v Operative Mills Ltd – Ricegrowers Co* that while a time charter party and voyage charter party enable the charterer to ship goods for a particular period of time or on a particular voyage, or even sub-charter the vessel, the possession and control remain in the hands of the shipowner and it alone will be regarded as the carrier.

However, in certain cases where the charterer signs the bill of lading in its own name or where the identity of the carrier

is unclear, the liability of a carrier is imposed jointly on the charterer and the shipowner.

4.6 Parties Who Can Claim for Cargo Claims

As a rule, the lawful holder of the bill of lading may bring suit under the bill of lading. There may be a case, however, where a party who is a named consignee under a non-negotiable bill of lading may have a cause of action against the maritime carrier, for example, the buyer of the cargo under a sale contract, who has not received by way of transfer or indorsement a right to assert a claim under the bill of lading.

It should be noted that according to Article 8 of the Ordinance (and without derogating from Article I(b) and Article -III part 4 of the Hague-Visby Rules and any other provisions of law), the party to which the cargo was consigned (the consignee) and the party to which the bill of lading was duly endorsed (the endorsee) are considered, as applicable, a party to the bill of lading. As such they are entitled to all the rights arising from the transaction due to which the bill was made, and subject to the obligations referring to such transaction in exercising their aforementioned rights.

4.7 Parties Who Can be Sued for Cargo Claims

In appropriate cases, cargo interests may bring a claim against both the physical carrier and the contractual carrier under the bill of lading, who need not necessarily be the shipowner. Where appropriate, claims may also be brought against charterers and operators.

4.8 Carrier

Where the master has signed the bill of lading, the registered owner will usually be regarded as the carrier. Pursuant to the Hague-Visby Rules, the carrier will be a named party in the contract of carriage, and this could be the owners or charterers. The carrier is not necessarily the physical carrier, albeit the physical carrier (shipowner) may retain liability in certain circumstances.

4.9 Suing the Vessel

For historical reasons, the Admiralty Court in Israel applies the admiralty law adopted by the English High Court of Admiralty in 1890, subject to any enactments by the local legislative authority. No enactments have been made in relation to suit in the Admiralty Court for cargo claims. Accordingly, Israel, *inter alia*, applies the English Admiralty Courts Acts 1861, Section 6 of which provides:

"The High Court of Admiralty shall have Jurisdiction over any Claim by the Owner or Consignee or Assignee of any Bill of Lading of any Goods carried into any Port in England or Wales in any Ship, for Damage done to the Goods or any Part thereof by the Negligence or Misconduct of or for any Breach of Duty or Breach of Contract on the Part of the Owner, Master, or Crew of the Ship, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales: Provided always, that if any such Cause the Plaintiff do not recover Twenty Pounds, he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court." (Naturally, it is necessary to read Israel instead of England and Wales).

This right of action gives rise to a right *in rem* and *in personam*.

4.10 Right in Rem or Maritime Lien

It follows from **4.9 Suing the Vessel**, above that the damage to cargo claim will give rise to a statutory right of action *in rem*.

4.11 Tort

A claimant may sue in tort, for example, for damage caused by negligence, fault or deceit under the Civil Wrongs Ordinance, which forms the normative basis for torts law in Israel.

4.12 Himalaya Clauses

The Israeli courts have acknowledged the effectiveness of contracts for the benefit of third parties and indeed the Israeli Contracts Law (General Part) 1970 Chapter D provides specifically for contracts in favour of a third party.

Of particular note is Section 34, which provides for the conferment of a right: "An obligation assumed by a person in favour of a person who is not a party to the contract (hereinafter: beneficiary) confers on the beneficiary the right to demand fulfilment of the obligation, if the intention to confer that right on him is apparent from the contract."

Moreover, in the Supreme Court decision CA 791/77 *Rosenfeld v Fireman's Fund Insurance Co Ltd*, the Court considered the right of a ship's agent to enjoy the benefit of the shipowner's exemption from liability and tacitly recognised its effectiveness.

Furthermore, according to the recent Supreme Court judgment in CA 8205/16 MV *Thor Horizon*, the Himalaya Clause may be regarded as supplementing the Hague-Visby Rules so as to protect persons who are not direct parties to the bill of lading, such as employees of the vessel or independent contractors involved in the performance of the contract of carriage.

4.13 Immunities

The defences available to a carrier are those set out in the Hague-Visby rules.

4.14 Limitation of Liability Regime

The limitation of liability regime available to carriers is as set out in the Hague-Visby Rules as amended by the 1979

Protocol and, where appropriate, the provisions of the Israeli Shipping (Limitation on a Shipowner's Liability) Law 1965 as amended in 1987.

4.15 Burden of Proof in Cargo Claim

Israeli case law dealing with the burden of proof in cargo claims is fairly sparse as is case law dealing with the inter-relationship between the burden of proof and the carrier's exemption from liability for damage caused as a result of a "peril of the sea," set out in Article IV(2)(C) of the Hague Rules.

In one of the few cases considering the issues, CA 3377/92 The '*Zim Marselis*', the Supreme Court considered the meaning of the term "peril of the sea," and the relationship between the carrier's exemption in conjunction with issues of proof. The Court took the view in determining what is a peril of the sea that as a rule, and with exceptions, the extent of the defence is to be derived from the unpredictability of the weather, both in terms of its strength and in terms of the area and timing of the natural occurrence, that caused the damage.

In terms of the burden of proof, under Article III (1) of the Hague Rules, the carrier is bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy. However, under Article IV(1) it is provided that neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness, unless caused by want of due diligence to make the ship seaworthy.

Analysing these provisions, the Court held in the above case that a carrier which seeks to be exempted from liability by contending that a loss was caused by reason of perils of the sea must prove that prior to the voyage the vessel was seaworthy, or at the least that it acted with due diligence to prepare the vessel for the voyage.

This means that the defence of the perils of the sea may be relied on by a carrier only if he shows that the loss was in fact caused as a result of the materialisation of the perils of the sea. The burden of proving the causal connection between the peril of the sea and the damage also includes the negation of the nearest alternative reason for the damage being caused, which is the carrier's breach of his obligation to prepare the vessel for the voyage.

In accordance with the Hague-Visby Rules, notice of loss must be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage. If the loss or damage is not apparent, it must be given within three days of arrival at the port of destination.

In the absence of such notice, the burden of proof regarding the loss or damage is transferred to the person asserting damage.

4.16 Time Bar in Cargo Claims

As noted, Israel has incorporated the Hague-Visby Rules into its law. In accordance with Article 6 of the rules, subject to paragraph 6 bis, the carrier and the vessel shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.

Article 6 bis provides that an action for indemnity against a third person may be brought after a year if within the time allowed by the law of the court seized of the case. However, the time allowed shall be not less than three months, commencing from the day the person bringing the action for indemnity has settled the claim or has been served with process in the main action.

In Supreme Court case ALA 9444/00 *Bellina Maritime SA Monrovia v Menorah Insurance Co Ltd*, the Court held that a subrogated insurer cannot benefit from the provisions of Article III 6A of the Hague-Visby Rules (namely, the provision that forms an exception to the short prescription period of one year set out in Article III (6)).

4.17 Time Bar Extension

As mentioned in **4.16 Time Bar in Cargo Claims**, above, the time bar may be extended by agreement of the parties, and in practice seeking such agreement is not unusual.

4.18 Validity of Jurisdiction and Choice of Law Clauses

The Israeli courts give full effect to the choice of law clauses contained in any contract, including contracts of carriage and bills of lading. Where the case is conducted in Israel, foreign law is considered a matter of fact, which must be proved in the usual way, generally through expert testimony.

With regard to jurisdiction clauses, Israeli courts will give effect to exclusive jurisdiction clauses, even where the action sought to be stayed is *in rem*. In the case of CA 8205/16 *MV Thor Horizon,* the Supreme Court held that a foreign jurisdiction clause contained in a bill of lading issued by a sub-charterer could apply to a claim *in rem* against the vessel for damage to goods.

The Supreme Court emphasised that seizure of the vessel in Israel alone, without further links to the country, would not be sufficient to determine that Israel was the convenient forum in the face of a foreign jurisdiction clause. Furthermore, the fact that the damage to the goods was discovered

upon the arrival of the vessel in Israel was not, on its own, sufficient to weigh against a stay of proceedings in Israel.

Nonetheless, in that case, prescription in the foreign forum meant that, in the particular circumstances, the convenient forum for hearing the case was in fact Israel.

In another case, ALA 1785/15 *Cosco Container Lines Co Ltd v Alison Transport Inc*, the Supreme Court upheld the District Court decision that one consideration against an argument that Israel was not a *forum non conveniens*, was the fact that the suit had been brought against the carrier, shipper and other parties. The Court held that it was important for all the disputes to be heard in a single forum.

In that case, the dispute would in any event have been heard in Israel against three of the parties, and it would not have been appropriate, for policy reasons, to stay the action in respect of the fourth party.

Other links between the suit and Israel included the facts that the damage was caused to an Israeli company, the destination of the cargo was Haifa port and the contract signed in Israel was a principal element in the chain of events leading to the flawed carriage of goods. Moreover, the defendant international forwarder seeking a stay could or should have anticipated that it would be subject to a suit in the country of destination of the cargo it had handled.

In the event of a foreign arbitration clause, Section 6 of the Israeli Arbitration Law provides that when an action is brought before court in a dispute which it had been agreed to refer to arbitration, and if an international convention to which Israel is a party applies to the arbitration and that convention lays down provisions for a stay of proceedings, then the court will exercise its power under Section 5 in accordance with and subject to those provisions.

In this regard it should be noted that Israel is a party to the 1958 New York Convention on the Enforcement and Ratification of Foreign Arbitral Awards. This provides for the stay of judicial proceedings in the case of a foreign arbitration agreement, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

5. Miscellaneous

As mentioned, the Admiralty Court in Israel applies the admiralty law and jurisdiction adopted by the English High Court of Admiralty in 1890, and consequently the Admiralty Courts Acts of 1840 and 1861 (legislation left over from the time of the British Mandate). However, this jurisdiction is naturally subject to subsequent local legislation.

The most important local law affecting the Admiralty Court's jurisdiction is the Shipping (Vessels) Law 1960. This Law deals, inter alia, with:

- the registration of vessels;
- their transfer and devolution;
- liens;
- mortgages;
- loss of qualification;
- striking off the register;
- the effect of the registration of rights, nationality and flag;
- the name of the vessel

The provisions that affect the jurisdiction of the Admiralty Court are laid out in Section 40, which provides for debts to be secured by a first lien (on the vessel, freight and accessories), and in Section 41, which lists the type of debts that can be secured and the order of priority of the liens.

The Law does not expressly refer to the position under the Admiralty Courts Acts, although it does retain existing legislation concerning the creation or transfer of a mortgage or charge upon a vessel. It is accepted that the creation of these statutory liens also confers complementary jurisdiction i*n rem* on the Admiralty Court.

However, the court has not yet dealt with the issue of the ranking of priorities in the event of a conflict between the provisions of Section 41 of the Shipping (Vessels) Law and accepted principles of general admiralty law.

In any event, Section 41 sets out the debts in the following order of priority:

- expenses of judicial sale;
- pilotage and port fees;
- expenses of guarding and maintaining the vessel;
- master and crew wages;
- salvage;
- personal injury;
- collision;
- necessaries.

It should be noted that bunker supplies are regarded as necessaries both under Section 41(8) of the Shipping (Vessels) Law 1961 and under Section 5 of the Admiralty Court Act 1861. Accordingly, a bunker supplier may arrest the vessel in the event of breach of contract to pay for the bunkers.

Nonetheless, according to the judgment handed down in CF 45897-02-12 OW *Bunker Malta Ltd v MV Emmanuel Tomasos*, the lien, and consequently the right of arrest, is limited to the party that directly entered into the supply agreement with the vessel and does not follow into the hands of subcontractors who supplied the fuel.

The rationale behind the distinction between the supplier of the goods and sub-contractors is that the supplier has collateral to secure the payment for the goods, namely the vessel itself. Under this construction, the vessel may proceed with its regular voyage while the supplier need not wait for other collateral, thereby delaying and interfering with the operation of the vessel.

By comparison, the sub-contractor does not have a direct arrangement with the vessel and will receive its payment from the party ordering the goods and not the vessel, its owners or crew. The grant of security over the vessel to a sub-contractor is not required in order to secure the mobility of the vessel.

The court also noted that the recognition of the right of each one in the chain of sub-contractor suppliers to realise a maritime lien would probably lead to the situation whereby the vessel would be required to pay a number of entities for the same supplies, contrary to the vessel's expectation that it would have one supplier, the agreed consideration for these supplies.

It should be noted that according to Section 53 of the Shipping (Vessels) Law 1960, debts accumulated by a charterer are dealt with in the same way as those accumulated by an owner. More precisely, the section states: "The provisions of this chapter shall apply also to a vessel operated by a charterer or some other person who is not the owner thereof, unless he obtained the vessel unlawfully and the fact was known to the creditor."

Consequently, it is arguable, pursuant to Section 53, that debts created by a charterer during the period of a charter party will vest a maritime lien or, at minimum, a statutory action *in rem* against the vessel. However, this matter has not yet been decided by the Israeli courts.

With regard to foreign maritime liens, it should be noted that the Israeli Admiralty Court will look at the proper law of the claim in order to determine the validity of a lien. Thus, in CA 352/87 '*The Nadia S*', the Supreme Court held that the validity of a maritime lien and the validity of a mortgage are issues of substantive law and as such must be controlled by the lex causae.

This decision was based on the premise that creditors planned their actions in reliance of the existence or absence of a maritime lien as a matter of the proper law of the claim.

Another area of interest relates to damage caused by a vessel in the course of being piloted. Issues of pilotage, including licensing of pilots and navigation within the limits of a port without a licence, are governed by the Ports Ordinance [New Version] 1971. Section 2 of the Pilotage Ordinance 1939 imposes liability for any loss or damage caused by a vessel being navigated on the owner or master of that vessel. However, in the Supreme Court decision in CA 4530 *Israel Ports Authority v ZIM Israel Navigation Co Ltd (MV Yafo*), overruling the prior *El-Yam* precedent, it was held that liability for damage caused during piloting would be imposed, in the relations between the ports authority and the shipowner, fully on the ports authority, except in a case involving special circumstances.

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