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Cover Story

How does the International Regulations for Preventing Collisions at Sea 1972 apportion liability in collisions?

Introduction

In a situation where vessels are dangerously approaching each other and the action of one vessel alone may not be enough to avoid a risk of collision (i.e. a close quarters situation), it is rather difficult to assess the respective blameworthiness and causative potency of the vessels involved.

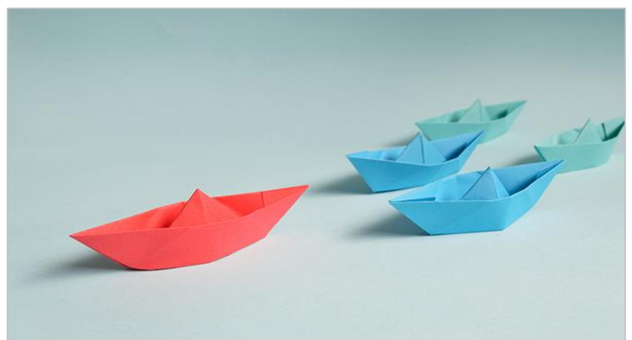
In *Owners and/or Demise Charterers of "TS Singapore" v Owners and/or Demise Charterers of "Xin Nan Tai 77"* [2018] HKEC 1821, the Hong Kong Court of Appeal was invited to examine the interpretation and application of the International Regulations for Preventing Collisions at Sea 1972 (the "**1972 Regulations**") in a crossing situation, and the approach to apportionment of liability when both vessels are at fault, which serve as an important guidance for further cases.

Background

The case concerns two almost simultaneous collisions between three container vessels near the East Lamma Channel Traffic Separation Scheme, Hong Kong on 14 May 2011. Both "MCC Jakarta" and "TS Singapore" were navigating on a south-easterly course outbound from Hong Kong and MCC Jakarta soon decided to overtake TS Singapore.

At that time, "Xin Nan Tai 77" was sailing in a westerly course and soon came to a crossing situation with MCC Jakarta. However, Xin Nan Tai 77 did not alter her course to give way but instead maintained her course and speed. MCC Jakarta, which was busy overtaking TS

Singapore at that time, also failed to notice Xin Nan Tai 77 until a close quarters situation was created. MCC Jakarta hastily turned to port in an attempt to avoid collision, but unknown to MCC Jakarta, Xin Nan Tai 77 turned to starboard at the same time. As a result, the port bow of Xin Nan Tai 77 collided with the starboard bow of MCC Jakarta ("**1st Collision**"). MCC Jakarta did not stop completely but continued to swing to her port side, colliding with TS Singapore a few minutes later ("**2nd Collision**").



The trial judge of the Court of First Instance ruled that, for both collisions, Xin Nan Tai 77 and MCC Jakarta were to be apportioned 80% and 20% liability respectively.

Court's ruling

On appeal, in respect of the issue of which vessel created the close quarters situation, the Court of Appeal considered that it was Xin Nan Tai 77 as she took no action to keep out of the way as the give-way vessel and even tried to navigate in between MCC Jakarta and TS Singapore when the two were uncomfortably close.

More importantly, on interpretation of Rule 17(a)(i) of the 1972 Regulations which provides that the stand-on vessel in a crossing situation should keep her course and speed, the Court held that to "keep course and speed" does not mean that alterations of course and speed in the ordinary course of navigation are not allowed. Further, when MCC Jakarta took a curving course and increased in speed, her objective was to overtake TS Singapore. Therefore, MCC Jakarta was ruled not to be in breach of Rule 17(a)(i) of the 1972 Regulations even though she did not keep her course and speed in the strictest sense.

Further, the Court held that it was right for MCC Jakarta to bear less liability than Xin Nan Tai 77, even though MCC Jakarta's port orders were in clear breach of Rule 17(c) of the 1972 Regulations. As suggested by the Nautical Assessor at trial, it was not the master of MCC Jakarta's fault that he had failed to observe Xin Nan Tai 77's 10-degree alteration to starboard. Rather, Xin Nan Tai 77's 10-degree alteration to starboard was "too little too late".

Conclusion

In view of the above, the Court of Appeal considered it right to follow the approach that "in most cases though not all it will be right to treat the fault of a ship that creates a situation of difficulty or danger as greater than that of the ship that fails to react properly to such situation after it has been created". Therefore, the Court dismissed the appeal and upheld the apportionment of 80% Xin Nan Tai 77 and 20% MCC Jakarta.

This case provides a useful illustration on the assessment and apportionment of liability between vessels in a crossing and colliding situation. It also serves as an important reminder to those at the helm to follow the 1972 Regulations whenever possible.

Cosco Shipping announces merger clearance

On 29 June 2018, Cosco Shipping Holdings, a Shanghai and Hong Kong listed company and the port arm of China Cosco Shipping Group, filed an announcement with The Stock Exchange of Hong Kong Limited informing the public that it has obtained the greenlight from the anti-monopoly bureau of the China's Ministry of Commerce for its acquisition of one of its competitors, Orient Overseas (International) Ltd.

Having said that, Cosco is still waiting for the approval of the Committee on Foreign Investment in the US in respect of the said takeover. A Cosco spokesperson revealed that the Cosco is still in the course of communicating with said US authority and would provide further information in respect of the progress.

Shipping losses in Asia continue to rise

Allianz Global Corporate and Specialty SE ("**Allianz**") has recently published its "Safety and Shipping Review 2018" reporting on shipping losses (the "**Review**").

Image source: Allianz Global Corporate and Specialty's Safety and Shipping Review 2018

According to the Review, there were 94 shipping losses worldwide in 2017, 38% of which came from the Asian region. More significantly, around 30% of the losses occurred in Southeast Asia waters, leading the region to be labelled as the "new Bermuda Triangle". While around 25% of shipping losses were attributed to bad weather, human error continues to be the major cause of marine accidents.

In particular, Allianz citied the Sanchi oil tanker collision and the NotPetya malware on container terminals and box shipping as particularly serious incidents and proposed to prevent similar incidents from occurring by predictive analyses. It is suggested that the massive amount of data on crew behavior and near-misses should be better utilised to generate new insights on error patterns.

In addition to the current problems associated with shipping losses, new risks are emerging in the shipping industry. Containing ships are increasing in size and may pose fire risks as well as salvage issues. As such, Allianz emphasises that a correct balance shall be struck between human interaction and technological enterprise.

The first Northern Sea Route voyage of a LNG tanker

As environment issue has become a growing concern around the globe, Liquefied Natural Gas ("**LNG**"), as a clean energy source, is an increasingly popular alternative energy source.

On 17 July 2018, Vladimir Rusanov, a LNG tanker jointly owned by Mitsui OSK Lines and China COSCO, has made its first journey from the LNG plant at Sabetta Port in Russia to PetroChina LNG Jiangsu Terminal in China via the Northern Sea Route as part of the Yamal LNG project (the "**Project**").

Since serving for the Project in March 2018, this is the first time the LNG tanker navigated eastwards along the Northern Sea Route without ice breaker support. The net voyage time was only 19 days as compared to 35 days for travelling via the conventional route via the Suez Canal. As such, utilising the Northern Sea Route in the future would potentially lower costs and shorten the transportation time.

Photo source: Arjan Elmendorp

Chiwan Wharf's plan to acquire China Merchants Port

The Shenzhen-listed company, Chiwan Wharf, has made an offer to acquire a 38.7% shareholding in a Hong Kong-listed China Merchants Port (which is worth about RMB24.7 billion), as part of an internal port asset restructuring of the state conglomerate China Merchants Group. As a consideration, Chiwan Wharf will issue more than 1.1 billion of its shares in exchange for nearly 1.3 billion shares of China Merchants Port.

At the same time, Chiwan Wharf will also obtain the voting rights of another 23% stake by way of "acting in concert" with China Merchants Holdings (Hong Kong) Company, which is entitled to 23% of China Merchant Port's total equities.

Upon the completion of the transaction, Chiwan Wharf would be the parent company of China Merchants Port.

Navigator Spirit SA v Five Oceans Salvage SA

[2018] EWHC 1108 (Comm)

On 20 December 2016, Flag Mette, a bulk carrier, was on a laden voyage from Guinea to Germany. The main engine was spontaneously shut down by its automated systems when Flag Mette was navigated to the Bay of Biscay. Several attempts were made to restart the engine but were unsuccessful. On 23 December 2016, the condition of Flag Mette was investigated by Five Oceans Salvage SA (the "**Salvors**"), which ascribed the problems to substandard assembly and wiring. After a continuous effort of repairing by the Salvors, Flag Mette was able to continue her voyage.

The Salvors claimed salvage, and the assessment of the sum was referred to arbitration. The original arbitrator made an award in favour of the Salvors, but the Salvors were not satisfied with the award and made an appeal against the award. The appeal was allowed by another arbitrator (the "**Arbitrator**") and the amount of the award was substantially increased.

Navigator Spirit SA (the "**Owners**"), the owners of Flag Mette, made an application to the English Commercial Court to set aside the award for irregularity and procedural injustice according to s33 and s68 of the Arbitration Act 1996. It was contended that the Arbitrator failed to act fairly and conducted proceedings without following the procedure agreed by the parties. The application was supported on the basis that the Arbitrator considered an alternative hypothetical scenario that was not presented by either party in justifying the increased award.

The Commercial Court dismissed the Owner's challenge to the salvage award, and held that the Arbitrator's conduct did not amount to unfairness and serious irregularity under the Arbitration Act 1996. The refusal of the application was decided based on two issues:

1. <u>Duty to act fairly (s33 of Arbitration Act 1996)</u>

   Regarding the Owners' complaint that their counsel did not have a fair opportunity to deal with the new issues, the Court held that the matter had to be viewed from the Arbitrator's perspective instead of the parties.

   It was open for the Arbitrator not to accept the hypothetical scenarios presented by both parties if he considered them to be an inaccurate reflection of the situation. The Arbitrator had fairly put his own scenario to both parties and carefully assessed the dangers based on the scenario. Even though the owner missed the point that there was a risk of collision offshore in the new scenario but it was fair on the Arbitrator's part not to necessarily be aware of the lack of

awareness by the Owners. The Court was of the opinion that the Arbitrator acted reasonably and did not breach his duty to act fairly.

2. Substantial Injustice (s68 of Arbitration Act 1996)

   The Court rejected the Owner's submission that the award should be remitted to the original arbitrator to consider the quantum appeal. The Arbitrator was reasonable in upholding the complaint as the original arbitrator failed to take full consideration of what would have happened in the absence of salvage assistance. In respect of whether the Arbitrator may produce a significantly different outcome had the Owner addressed the dangers that the Arbitrator may have in mind, the Court is not convinced that the Arbitrator would have reached a different conclusion. The Court held that the Owners could not establish that "substantial injustice" was caused within the Arbitrator's conduct. Accordingly, the application to set aside the award was dismissed.

Agile Holdings Corporation v Essar Shipping Ltd

[2018] EWHC 1055 (Comm)

* *

The appellant, Agile Holdings Corporation ("**Agile**"), time chartered the vessel "Maria" to the respondent, Essar Shipping Ltd ("**Essar**"), for a single trip from Tunisia to India. The cargo was a consignment of direct reduced iron ("**DRI**"), which was well known to be highly reactive and combustible. During loading of the cargo, the conveyor belt was seen to have caught fire, but the appointed supercargo inspected the holds and advised that loading could continue. The DRI remained on fire throughout the voyage and upon discharge, the cargo interests, Essar Steel Limited (an associated company of Essar) brought a claim against Agile.

Agile commenced arbitration against Essar arguing that the cause of the cargo claim was the manner in which the DRI had been handled during loading, and sought a declaration that Essar was obliged to indemnify it under Clause 8(b) of the Inter-Club New York Produce Exchange Agreement ("**the ICA**").

Clause 8(b) of the ICA ("**Clause 8(b)**") provides that:-

"Cargo claims shall be apportioned as follows: …

(b) Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo: 100% Charterers unless the words "and responsibility" are added in clause 8 [of the NYPE form] or there is a ***similar amendment*** making the Master responsible for cargo handling in which case: 50% Charterers 50% Owners save where the Charterer proves that the failure properly to load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel in which case: 100% Owners" ***(emphasis added)***

Clause 49 of the charterparty ("**Clause 49**") also provides that:

"Stevedore Damage

The Stevedores although appointed and paid by Charterers / Shippers / Receivers and or their Agents, to remain under the direction of the Master who will be responsible for proper stowage and seaworthiness and safety of the vessel..."

Meaning of “similar amendment”

Agile contended that the phrase “similar amendment” in Clause 8(b) meant that the relevant provision had to transfer all cargo responsibilities (including loading, stowing, discharge, trimming, etc.) to the master/owner. Essar contended that a partial transfer would be sufficient provided that that particular aspect of cargo handling was in issue in the particular case.

The tribunal held that the first proviso to Clause (8)(b) applies to this case and that the liability should be split 50/50 between Agile and Essar. Agile appealed against the tribunal’s decision to the English Commercial Court

The Court disagreed with Essar’s arguments. He considered that if Essar’s position was correct, one would have to carry out a detailed analysis of which particular cargo handling functions were in issue so as to compare them with the cargo handling functions which form the subject of the “similar amendment”, which would be contrary to the simple and mechanistic approach of the ICA. Moreover, it would be commercially odd if the transfer of any part of cargo handling would be enough to engage Clause 8(b) without more.

The Court also confirmed that the only causal enquiry required for Clause 8(b) to be engaged was to determine in broad terms whether the claim arose out of cargo mishandling, but not other factors such as unseaworthiness, navigation or shortage.

Nature of Clause 49

It was common ground that Clause 49 affected only a partial transfer of cargo handling responsibilities back to the master/owner. Clause 49 was concerned specifically with one aspect of cargo handling, namely stowage, and thus it was ineffective to engage Clause 8(b), which the Court had held required a complete transfer of all cargo handling responsibilities.

Accordingly, the Court held that Agile was entitled to a complete indemnity in respect of any claim it might be liable for by cargo interests.

Zetta Jet Pte Ltd v Ship "Dragon Pearl"

[2018] FCAFC 99

This case concerns an application for leave to appeal in the context of a proprietary maritime claim in respect of the motor yacht "Dragon Pearl" (the "**Ship**"). The registered owner of the Ship is Dragon Pearl Limited ("**DPL**"), and Du Yan is its sole shareholder. The plaintiffs, Zetta Jet Pte Ltd ("**Zetta**") and Jonathan King asserts that Zetta is entitled to the beneficial ownership and possession of the Ship by constructive or resulting trust for funding DPL to purchase the Ship. In support of their claim, Zetta sought an order with the Federal Court of Australia to arrest the Ship on 13 October 2017. An arrest warrant was subsequently issued by Admiralty Marshal of the Court and the Ship was taken into the custody.

On 22 February 2018, the case was set down for a five-day hearing commencing on 5 June 2018. Four days before the trial, the plaintiffs urgently made an interlocutory application for leave to issue subpoenas to three witnesses outside Australia, including two principal witnesses, Ms Lee and Ms Weai-Hunt, who had previously given their affidavits in late 2017. The plaintiffs were particularly concerned because the success of their claim was highly dependent on the witnesses' appearances in court. Later on 5 June 2018, the interlocutory application was amended to seek orders for the court to send a letter of request to take the evidence of Ms Lee and Ms Weai-Hunt and file the depositions in the Victorian Registry of the Court. The plaintiffs also seek an order for adjournment of the trial.

After reviewing evidence regarding the taking of evidence from Ms Lee and Ms Weai-Hunt, the trial judge was unwilling to accept the adjournment application and dismissed it on four grounds. First, the trial judge was not satisfied that it would be appropriate to grant the letter of request based on the evidence. Second, it was uncertain whether the request would be granted and how long it would take. Third, the trial judge took the interests of third parties into consideration and was concerned that allowing the adjournment application would dislodge third party interests. Fourth, the trial judge was not convinced by the plaintiffs' explanation for bringing the adjournment application late. He found it inadequate to suggest that Zetta was surprised by the failure of their witnesses to co-operate without securing their presence given the long-time of preparation.

With the refusal of the first adjournment and letter of request, the trial judge adjourned the matter to later in the day to allow the plaintiffs to seek further instructions. On the next day, the plaintiffs desire to adduce fresh evidence from Mr Seagrim. However, the application was refused by the trial judge due to the inchoate state of the new evidence and the difficulty in resolving issues on logistics and admissibility. After the refusals of admitting a number of witnesses, the plaintiffs were not able to proceed their case and their claim had to be inevitably dismissed. The plaintiffs appealed against the trial judge's decision to the Federal Court.

The issue before the Federal Court was whether the trial judge was correct in refusing the letter of request and adjournment applications.

The Federal Court unanimously agreed with the primary judge's approach in dealing with the matters by taking relevant factors into consideration. The Federal Court rejected the plaintiffs' submission that procedural fairness was not afforded. It was stressed that the plaintiffs had a reasonable opportunity to present their case and bring forward constructed evidence before the trial. The trial judge was also open to taking public interest and the efficient use of course resources into account.

As such, the Federal Court held that the trial judge was accurate in his application of principles governing an adjournment and the trial decision was justified. Accordingly, the appeal was dismissed with costs.

What are the responsibilities of a port owner? (III)

As mentioned in our previous two issues of *The Voyager*, due to the development of international trade, the ports sector becomes an essential part of the global economy. As such, the Ports Good Governance Guidance (the "**Guidance**") published in March 2018 aims to set out the good governance guidance for the Statutory Harbour Authorities which is also relevant to all organisations that own or manage harbour and port facilities.

We have discussed the six major aspects that a port owner should take into account as recommended by the Guidance in our last two issues, including leadership, board effectiveness, accountability, remuneration, effective stakeholder engagement, and provision of information. In this article, we continue to explore the sections of "safety" and "other duties, harbour dues, and security" recommended by the Guidance.

How to ensure safety?

It is a fundamental responsibility of port owners to enhance safety for all users and workers at the port. In respect of how to ensure marine and landside safety, port facilities owner may follow the guidelines set out in the Port Marine Safety Code ("**PMSC**"). Under PMSC, a duty holder should be selected by port owners to be responsible for maintaining safety in marine operations. Most port owners will designate the role of duty holder to the board or the management team.

The Guidance further sets out some insights in relation to the responsibilities of duty holders. In particular, part of a duty holder's role is to ensure the operation of a proper Safety Management System ("**SMS**") with formal safety assessment techniques. A suitable person should also be appointed to present independent advice on marine safety and keep track of the effectiveness of the SMS.

With regard to marine safety, duty holders should publish a marine safety plan tracking performance against objectives and targets. Alongside, competent personnel should be appointed to manage marine safety to ensure the continuous improvement of marine safety management.

Conscientious duty holders should also be familiar with the operations of their port marine activities, SMS and relevant policies and procedures.

Thorough consideration should be made before appointing a competent board member who could act as the initial point of contact with regard to his or her maritime qualifications and experiences. Duty holders should also ensure that sufficient resources are made available for discharging their statutory duties regarding marine safety. Further, it is of utmost importance for the board to fulfil the said duties to entrench good governance.

In terms of landside safety, the Guidance reminds port owners of the legal duties that are imposed by relevant legislation. To ensure compliance, the Guidance suggests port owners to refer to the relevant industry guidance.

What are the other duties, harbour dues and security?

Port facilities owners should be aware of the specific powers and duties conferred upon them by both their own domestic legislation and general legislation. The Guidance emphasises the importance of reviewing the specific powers and duties periodically to ensure that they are still adequate and applicable to managing a harbour. Depending on circumstances, port owners can alter their powers and duties by applying to relevant authorities. General or harbour directions may be given and byelaws may be revised upon consideration of the application.

The Guidance also provides that port owners should ensure the safety and efficiency of marine operations by maintaining a statutory and legal framework. Such framework should be regularly updated and adhere to new legislation. In general, it is common practice to entrust the chief executive or harbour master to keep updated of new changes to the law and report the same to the board. Automatic review on port regulations and byelaws with due regard to local circumstances should also be frequently held.

In respect of levying charges for the usage of harbour and the provision of services including mooring and licensing, the port owners may consider the cost of maintaining the harbour and the return on investments. It should also be noted that standard dues tariffs should be published.

Further, the Guidance provides that port owners have a duty to exercise its pertinent functions in connection with environmental conservation. In relation to emergency planning, special attention should be paid to the speediness in handling emergency situations, especially those that may cause an adverse impact on human welfare, the environment or security.

The Guidance considers that maritime security should be effectively maintained in the deterrence of security threats and reduction of corruption risks in ports. Subsequent to the 9/11 terrorist attacks, the International Ship and Port Facility Security (ISPS) Code (the "**Code**") is adopted by the International Maritime Organisation in 2004, which provides a set of security measures for the compliance of contracting governments. As Hong Kong is one of the contracting governments, port owners should therefore pay attention to the Code.

While new ways of working and more effective management are made possible by the advancement of digital technologies, the Guidance warns that such technologies may lead to the exposure of cyber security risks. In this regard, port owners should beware of such risks and take preventive measures against security threats.

Concluding remarks

The above are only some aspects of the issues discussed in the Guidance to which the port facilities owner should pay attention. In any event, readers should bear in mind that the Guidance itself does not constitute an exhaustive list of what should be done in order to establish an effective port business.

For enquiries, please contact our Litigation & Dispute Resolution Department:

E: shipping@onc.hk T: (852) 2810 1212
W: www.onc.hk F: (852) 2804 6311
19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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