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To: Transport Industry Operators

Double Collisions (II)

The Hong Kong Court of Appeal issued a Judgment [CACV144/2017] [2018HKCA299] on 29/6/2018 upholding the High Court's Judgment dated 2/6/2017 (which was reported in our Chans advice/201).

Introduction

On 2 June 2017, Ng J sitting with a nautical assessor handed down his judgment ([2017] 3 HKLRD 387), in which he apportioned liability in respect of three container vessels in two almost simultaneous collisions, as between "Xin Nan Tai 77" ("Xin Nan Tai") and "MCC Jakarta" ("Jakarta") ("the 1st Collision"), and as between Jakarta and "TS Singapore" ("Singapore") ("the 2nd Collision"). Singapore settled liability with Jakarta and Xin Nan Tai prior to the trial. It was agreed that Singapore was not liable in respect of the 1st Collision and in relation to the 2nd Collision, Singapore was 5% to blame and Xin Nan Tai and Jakarta were between them 95% to blame. The judge apportioned liability for the 1st Collision at Xin Nan Tai 80% and Jakarta 20%, and apportioned liability for the 2nd Collision in the same proportions, taking into account the agreed 5% liability of Singapore, resulting in Xin Nan Tai 76%, Jakarta 19% and Singapore 5%.

Xin Nan Tai's Owners appealed against the apportionment of liability. Xin Nan Tai sought an order that the apportionment of liability for the 1st Collision should be one-third to Xin Nan Tai and two-thirds to Jakarta, and in relation to the 2nd Collision, the 95% liability as between them should likewise be apportioned one-third to Xin Nan Tai and two-thirds to Jakarta, resulting in Xin Nan Tai 31.66%, Jakarta 63.33% and Singapore 5%. Xin Nan Tai's Owners contended at the very least liability as between the two should be apportioned equally.

This appeal

In this appeal, Xin Nan Tai's Owners challenged the judge's findings, contending that the judge had misapprehended vital facts and as a result gave invalid reasons for the apportionment of blame. Xin Nan Tai's Owners submitted there were two key errors.

Firstly, the judge was wrong to find that "it was Xin Nan Tai which created the danger and difficulty inherent in a close-quarters situation", when it was the constantly curving course of Jakarta from 164° at 3:28 am to 144° at 3:33 am which largely created the close-quarters situation. Related to this was that the judge's failure to find that at the time when Xin Nan Tai should have turned to starboard (3:28 am to 3:30 am), Jakarta was not maintaining course and speed. The judge had suggested to the contrary that Jakarta was maintaining course and speed when directing himself on the facts for the apportionment of liability.

Secondly, the judge was wrong to hold that the "port 10" and "hard to port" orders of Captain Mlikota (Jakarta's master) were made at a time when he had "little or no time to think and when he was left with only "bad choices" ". It was wrong to conclude that the breaches of International Collision Regulations ("COLREGS") in respect of the "port 10" and "hard to port" orders were not as serious as the breaches of Xin Nan Tai.

Creating close-quarters situation and maintaining course and speed

Xin Nan Tai's Owners submitted that on the undisputed "real time" evidence, from 3:28 am to 3:33 am Jakarta was on a curving course constantly changing to port instead of a clearly defined course and increasing speed from 11 knots to 12.5 knots. The judge should have held that Jakarta was not maintaining course and speed. And if there was a crossing situation as at 3:28 am, it should have been held that Jakarta was in breach of Rule 17(a)(i) (the stand-on vessel in a crossing situation is required to keep her course and speed). Xin Nan Tai's Owners cited *Marsden and Gault on Collisions at Sea* (14th ed) §5-403 and *The Alcoa Rambler* [1949] AC 236 in support of its contention.

The Court of Appeal did not agree with Xin Nan Tai's Owners' submissions. The obligation of the stand-on vessel in a crossing situation to keep her course and speed does not preclude alterations of course and speed in the ordinary course of navigation, as is made clear in *Marsden* at §5-403 and the cases there cited, including *Owners of the Topaz v Owners of the Irapua* [2003] 2 CLC 708 at 727 §37, in which Gross J stated as follows:

> "As is well-established, Rule 17(a)(i), is subject to the qualification that the obligation of the stand-on vessel to 'keep her course and speed' does not preclude, broadly and neutrally, alterations of course and speed in the ordinary course of navigation. In short, the 'course and speed' are the course and speed that the stand-on vessel was going to take for the object she had in view, not the course and speed at any particular moment: see, *The Aracelio Iglesias* [1968] 2 Ll Rep 7, esp. at pp. 11-12, together with the other authorities referred to there. …"

As further explained in *Marsden* at §5-403:

> "Rule 17 does not require the stand-on vessel must maintain either a constant heading or a constant speed. A vessel reducing speed to pick up a pilot, a vessel (with her engines put to full speed) which was increasing her speed up to full speed, a vessel which was continually altering her heading across a tide, a vessel reducing her speed to run off her way to maintain her course preparatory to anchoring and a tug manoeuvring to pick up her tow, have been held not in breach of this rule."

The gradual alterations of course and speed of Jakarta from 3:28 am to 3:33 am were made in the ordinary course of navigation, for overtaking Singapore, as the judge found. The Court of Appeal rejected the contention that Jakarta was in breach of Rule 17(a)(i). The Court of Appeal noted also that the nautical assessor did not form the view that Jakarta had failed to maintain course and speed, or was not on a defined course.

As for *The Alcoa Rambler*, the Court of Appeal agreed with Jakarta's Owners that that case does not stand for the proposition that any and every alteration of course and speed means that a vessel is not maintaining course and speed. The Privy Council held at 249 that the test whether a vessel is on a course is: "was what was being done open and notorious to a seaman on the other ship in the ordinary course of navigation. … The ordinary idea of a course is a sufficiently constant direction of a ship on the same line or heading. This will enable a navigator when he sees the other vessel to know if she is on a crossing course". In that case, "there was no obvious or ordinary manoeuvre which would give knowledge to the Rambler [the give-way vessel], so that quite apart from the difficulty inherent in a curved course, the case could not be held to be a case of crossing vessels because the necessary knowledge of the situation could not be ascribed to the Rambler" (at 250). The fact situation in the case in question was very different. It was common ground that "at some point of time prior to the 1st Collision, [Jakarta and Xin Nan Tai] were in a crossing situation" and "even on Captain Hung's [Xin Nan Tai's master] own testimony, 3:28 am was the point of time when Xin Nan Tai should have taken action to give way to Jakarta while 3:31 am was the latest point of time when she should have done so". *The Alcoa Rambler* was of no assistance to Xin Nan Tai's Owners.

Xin Nan Tai's Owners submitted it was Jakarta's gradual alterations to port at 3:28 am to 3:33 am that "substantially contributed to the creation of a close-quarters situation", as the effect of the alterations of course and speed was to place Jakarta and Xin Nan Tai on a collision course. Xin Nan Tai's Owners argued that by 3:34 am Jakarta had increased speed and gradually altered course to port in a manner that would not have been apparent to Xin Nan Tai so as to put the two vessels on a collision course.

Xin Nan Tai's Owners pointed to two hypothetical plots produced at trial by the solicitors on each side. Jakarta's plot showed that the vessels would have collided if they had both maintained course and speed from 3:33 am onwards, after Jakarta's gradual alterations to port. Xin Nan Tai's Owners argued from there that the vessels would not have collided had Jakarta not gradually altered course to port. Xin Nan Tai's plot showed that Xin Nan Tai would have passed clear astern of Jakarta, and the collision would have been avoided, had Jakarta maintained course and speed at 3:29 am, and not made gradual alterations to port. Xin Nan Tai's Owners also pointed to the fact that it was after Jakarta had completed the gradual alterations to port at 3:33 am that Jakarta's ARPA alarm sounded and Mardep issued its radio warning to Jakarta, suggesting that risk of collision only arose after Jakarta's gradual alterations to port.

It was common ground that Xin Nan Tai was the "give-way" vessel and Jakarta the "stand-on" vessel in a crossing situation. The crossing situation had existed for quite some time. As the judge had found, "Xin Nan Tai … had plenty of time to give way: the two vessels were at a distance of 3.1 nautical miles at around 3:28am, and at a distance of 2.1 nautical miles at around 3:31 am. During those few minutes, Xin Nan Tai could easily have made a large alteration of course to starboard to avoid both Singapore and Jakarta, just like the Model Vessel." And yet Xin Nan Tai took no action to keep out of the way and avoid crossing ahead of the stand-on vessel. At 3:33 am, she crossed ahead of Singapore, notwithstanding she was the give-way vessel to Singapore. At around 3:33 am / 3:34 am, she altered course 10 degrees to starboard, so as to pass astern of Jakarta. Essentially, she was trying to navigate in between Singapore and Jakarta when these vessels were uncomfortably close. That was clearly a wrongful manoeuvre. The judge was fully in agreement with the nautical assessor that the master of Xin Nan Tai "allowed a situation to arise where he would be created (sic) a close quarters situation which resulted in a collision with Jakarta".

To argue in these circumstances it was the gradual alterations to port of Jakarta that "substantially contributed to the creation of a close-quarters situation" was quite simply unrealistic.

As for the argument based on the hypothetical plots, it was pertinent to bear in mind that COLREGS are designed to avoid close-quarters situations in order to avoid the risk of collision. The Court of Appeal agreed with Jakarta's Owners it did not assist Xin Nan Tai, when her master had "allowed a situation to arise where he would be created (sic) a close quarters situation", to say that there could have been a "close pass" of the vessels. The Court of Appeal rejected also the suggestion that the risk of collision arose only after 3:33 am with the completion of the gradual alterations to port of Jakarta. As stated by Lord Simon in *The Statue of Liberty* [1971] 2 Lloyd's Rep 277 at 288:

> "Your Lordships are concerned with those Rules of the Collision Regulations that relate to vessels which are crossing so as to avoid a risk of collision. This arises if the vessels in question are on courses which if maintained, will intersect, and which, if maintained, will involve a risk of collision – not necessarily the probability of collision, but its possibility, having regard, among other things, to the normal hazards of navigation, including faulty seamanship by another vessel …"

In deciding that it was Xin Nan Tai which "created the danger and difficulty inherent in a close-quarters situation", it was not the judge's holding that the close-quarters situation was caused solely by Xin Nan Tai. The judge had fully taken into account Jakarta's faults. He took the view that Xin

Nan Tai had contributed more to creating the close-quarters situation, as reflected in his conclusion that Jakarta was 20% to blame. His decision was premised on the fact that the duty of Xin Nan Tai as the give-way vessel was to take "early and substantial action to keep well clear" as required by Rule 16, and her failure to take proper action had greater causative potency towards creating a close-quarters situation leading to the 1st Collision. As the judge had stated, "given Captain Hung himself also accepted Xin Nan Tai was the give-way vessel, there was really no excuse for him not to take early and substantial action to keep well clear of Jakarta".

There was no misapprehension of any vital fact, and the judge's reasoning could not be faulted.

Jakarta's "port 10" and "hard to port" orders

Xin Nan Tai's Owners submitted the judge erred in concluding that the master of Jakarta's breaches of COLREGS in issuing the "port 10" and "hard to port" orders were not as serious as those of Xin Nan Tai, because they were made "at a time when he had little or no time to think and when he was left with only "bad choices" ". Xin Nan Tai's Owners contended that Jakarta was not left with only "bad choices" at 3:34 am, because as the judge had held, there was no physical restriction and she could have turned to starboard. The only bad choice was for Jakarta to turn to port, which was in clear breach of Rule 17(c). A decision of the stand-on vessel to turn to port in a crossing situation is particularly dangerous, because it involves the stand-on vessel turning in the direction of the give-way vessel rather than away. It was "contrary to every instinct of a mariner" (*The Sanshin Victory* [1980] 2 Lloyd's Rep 359 at 365). In contrast, the decision of the master of Xin Nan Tai to turn 10 degrees to starboard at around 3:33 / 3:34 am, although inadequate, was in principle proper action in accordance with COLREGS.

It was further contended that Jakarta's master had adequate time to make proper decisions, had he maintained a proper lookout. The judge agreed with the nautical assessor that Jakarta was in breach of various rules in COLREGS in respect of the "port 10" and "hard to port" orders. Breaches of the obligations imposed on ships in certain defined situations by COLREGS will usually be regarded as seriously culpable (*The Nordlake and the Seaeagle* at §149(ii)). Even if Jakarta's master had little or no time to make decisions, this was because of his own breaches. "Where a crisis arises wholly or partly from a person's negligence, he cannot rely on the crisis as excusing or mitigating further errors on his part" (*The Salaverry* [1968] 1 Lloyd's Rep 53 at 63).

Xin Nan Tai's Owners also cited *The Estrella* [1977] 1 Lloyd's Rep 525, in which the stand-on vessel was held five-eighths to blame for making successive turns to port prior to the collision, as "reminiscent" of the present fact situation.

The above arguments were fully canvassed before the judge , who had taken into account Jakarta's breaches of COLREGS and weighed the different considerations in assessing causative potency. Through no fault on his part, Captain Mlikota failed to observe Xin Nan Tai's 10 degree alteration to starboard. When he issued the "port 10" order instead of going to starboard, he at that time believed Xin Nan Tai had made no alteration of course or speed. His "port 10" and "hard to port" orders were made in response to the close-quarters situation created by Xin Nan Tai. In contrast, Xin Nan Tai's 10-degree alteration to starboard at around 3:33 / 3:34 am was "too little too late". Subsequently, Captain Hung observed Jakarta was turning to port and ordered Xin Nan Tai to go hard to starboard at around 3:35 am.

In these circumstances, the judge was right to have regard to 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" (*The Nordlake and the Seaeagle* at §149(iv)).

The cases cited by Xin Nan Tai's Owners emphasising that a turn to port is wrong and in breach of COLREGS were consistent with the judge's finding that Jakarta was in breach of Rules 17(c) and 13(a). As to causative potency and apportionment of liability, each case must turn on its own facts.

Conclusion

The judge did not misapprehend any vital fact. His conclusion in the weighing and balancing exercise of apportioning liability was well within the scope of decision that a reasonable judge could reach. The Court of Appeal had no basis to interfere with his apportionment. The appeal must be dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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