

James Watthey

**On the Right Track: the new rules on electronic track data and the crossing rule – Nautical Challenge Ltd v Evergreen Marine (UK) Ltd**

**Where did they come from?**

Back in the mists of time, an Admiralty Judge trying a collision action would regularly have to resort to live witness evidence to determine the precise place of contact, and the vessels' tracks as they moved towards each other. At least with collisions between large commercial ships, this *should* be a thing of the past due to the presence onboard of GPS, AIS and most importantly Voyage Data Recorders, which together create an electronic record of location and track.

The Admiralty Judge, Admiralty Registrar, the Admiralty Solicitors Group and newly-formed Admiralty Bar Group worked together to formulate changes to the Admiralty Court rules to ensure that such material is preserved and exchanged as soon as possible so as to ensure that parties to collision actions have an early exchange of electronic track data and then make good use of it to resolve the dispute efficiently and expeditiously.

The result of those endeavours was an update to the CPR and the Admiralty and Commercial Courts Guide which came into force on 28 February 2017. A new rule at CPR 61.1(1)(m) defines what we are talking about: “*‘electronic track data’ means a digital or electronic recording of the track of a vessel (including any associated visual or aural recordings) as recorded by, for example, ship or shore-based AIS (Automatic Identification System), ECDIS (Electronic Chart and Display Information System), or a voyage data recorder*”.

New provisions in CPR 61 and PD61 together with Section N and Appendix 20 of the Guide now set out the rules for dealing with this data. In particular:

- Rule 61.4(4A) requires parties to give early disclosure of any electronic track.
- Indeed, Appendix 20 at §5 says that parties are expected to exchange this data *before* proceedings, and may face a costs sanction if they do not.
- §N8.1 requires a claimant to apply for a CMC within 7 days after the filing of the last Collision Statement of Case, and to take place within 5 weeks of such application.
- Pursuant to §N8.1(vi), the Court will seek to employ fast track procedures to determine liability issues; such procedures may include (PD61 §4.7):

*(a) limiting further disclosure to contemporaneous documents made shortly before and shortly after the collision;*



**Chief Executive** Carolyn McCombe **Senior Clerks** Carl Wall and Stewart Gibbs  
4 Pump Court, Temple, London EC4Y 7AN  
**Tel** +44 (0)20 7842 5555 **Fax** +44 (0)20 7583 2036 **DX** 303 LDE  
[www.4pumpcourt.com](http://www.4pumpcourt.com)

Also tenants at  
Arbitration Chambers Hong Kong  
[www.arbitrationchambershk.com](http://www.arbitrationchambershk.com)

- (b) limiting witnesses to those most closely involved with the collision;*
- (c) excluding or limiting expert evidence;*
- (d) requiring the parties to provide a memorandum of points of agreement and dispute, to include an agreed plot of each vessel's track leading up to the collision;*
- (e) dispensing with oral evidence;*
- (f) limiting the number of assessors to one, or dispensing with the assistance of assessors;*
- (g) dispensing with an oral hearing...;*
- (h) allocating the case to a deputy High Court Judge sitting in the Admiralty Court, or to the Admiralty Registrar; and/or*
- (i) making a costs capping order.*

The potential for savings in time and costs are obvious.

### **Ahead of their time**

Of course, sensible litigants have always sought to cooperate to resolve their disputes cost effectively.

In **Nautical Challenge Ltd v Evergreen Marine (UK) Ltd** [2017] EWHC 453 the Admiralty Judge, Mr Justice Teare, sat with Nautical Assessors to determine and apportion liability for a collision between two laden ships at Jebel Ali, UAE on 11 February 2015: the VLCC "ALEXANDRA 1" and the container ship "EVER SMART". ALEXANDRA 1 was older, slower and bigger; she was described by her Master as being as manoeuvrable as "a hog on ice with no skates", while EVER SMART was "a Mercedes".

In giving judgment, the Judge reminded Admiralty lawyers of the imminent changes outlined above.

In that case, pursuant to the CMC order, the parties agreed the course, heading and speed of the vessels for the 26 minutes before the collision; they also agreed engine and helm orders and transcripts of from recorded conversations between Officers.

The collision took place at 2342 just outside the dredged channel, about 5 cables WNW of No.1 buoy. Visibility was good. and both vessels were exhibiting the correct lights. EVER SMART was outbound from Jebel Ali and had just disembarked her pilot; ALEXANDRA 1 was inbound and was waiting to embark the same pilot.

Port Control advised that ALEXANDRA 1 could enter the channel "once EVER SMART was clear". In addition, there was a very unfortunate misunderstanding: ALEXANDRA 1 overheard an instruction from Port Control to a local tug, telling her to go around "a waiting tanker". He thought this was EVER SMART being directed to go around ALEXANDRA 1.

EVER SMART passed outbound along the channel at 12kts over ground, briefly slowing while the pilot disembarked. At 2340, ALEXANDRA 1 observed that EVER SMART was abeam of No.1 buoy and was not turning to port to give way and go around her, as was expected due to the overheard conversation.



**Chief Executive** Carolyn McCombe **Senior Clerks** Carl Wall and Stewart Gibbs  
4 Pump Court, Temple, London EC4Y 7AN  
**Tel** +44 (0)20 7842 5555 **Fax** +44 (0)20 7583 2036 **DX** 303 LDE  
[www.4pumpcourt.com](http://www.4pumpcourt.com)

Also tenants at  
Arbitration Chambers Hong Kong  
[www.arbitrationchambershk.com](http://www.arbitrationchambershk.com)

In the 30 seconds before the collision, ALEXANDRA 1 called Port Control to advise that a collision was imminent. She attempted to slow, her deck lights were turned on and she hailed EVER SMART by VHF to turn hard to starboard. During the same period, Port Control called a warning to EVER SMART and the pilot called on her to go hard to starboard. These calls were actioned but clearly too late. EVER SMART was frank that ALEXANDRA 1 was not seen until the deck lights were turned on.

### The crossing rule in confined waters

Most interestingly, those findings raised an important question of principle about the application of the “crossing rule” in the approaches to narrow channels. Rule 15 of the Collision Regulations provides:

*“Where two power-driven vessels are crossing so as to involve a risk of collision, the vessel with has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel”*

If this rule applied, the blame would sit heavily on ALEXANDRA 1, since she had EVER SMART on her starboard side; but ALEXANDRA 1 argued that it had no application where the respective vessels were leaving and preparing to enter a channel.

The Judge had to deal with a large number of historical authorities and commentary.

The most closely analogous English decision was still off-point. In *The Canberra Star* [1962] 1 Lloyd’s Rep 24, Hewson J spoke of vessel A approaching the channel entrance while vessel B was on her way out, where both should be able to keep to their side of the channel and avoid a collision. In those circumstances, his Lordship said that the crossing rule did not apply.

A judgment of Lord Clarke sitting as a Judge of the Final Court of Appeal of Hong Kong directly considered the question of the rule’s application where one vessel was on her way out of the channel and other other was *preparing* to enter it. In *Kulemesin v HKSAR* [2013] 16 HKCFA 195, his Lordship said that the vessel transiting the channel was bound by the narrow channel rule (i.e. she had to keep right – Collision Regulations Rule 9) and not the crossing rule. As to the other vessel, he said:

*“vessels approaching a narrow channel and intending to proceed along it are not bound by the crossing rule but must enter the channel and, as they do so, keep as near to the starboard side as is safe and practicable in accordance with r.9. It seems to me to follow that a vessel shaping to enter the channel should, as a matter of good seamanship, navigate in such a manner that, when she reaches the channel, she is on the starboard side of the channel in accordance with r.9”*

While neither of these judicial statements were binding on the Judge, the eminence of the sources meant he felt compelled to follow them unless he considered them wrong. So *were* they wrong? Why should the crossing rule not apply just because one of the crossing vessels was in the channel, particular if that vessel was stand-on? The answer to this, said the Judge was found in Lord Clarke’s further comment:



**Chief Executive** Carolyn McCombe **Senior Clerks** Carl Wall and Stewart Gibbs  
4 Pump Court, Temple, London EC4Y 7AN  
**Tel** +44 (0)20 7842 5555 **Fax** +44 (0)20 7583 2036 **DX** 303 LDE  
[www.4pumpcourt.com](http://www.4pumpcourt.com)

Also tenants at  
Arbitration Chambers Hong Kong  
[www.arbitrationchambershk.com](http://www.arbitrationchambershk.com)

*“Safety requires a vessel approaching the channel so as to proceed along it to navigate so that if the vessels pass in the channel they will pass port to port. This will be achieved if the narrow channel rule applies. If it does not, there is considerable scope for confusion”*

So why could not *both* rules apply? The Judge noted that a vessel in the channel with another vessel on her port bow could not be required to keep her course and speed and at the same time keep to starboard; on many occasions that would require different action.

Thus, the Judge considered that the observations of Lord Clarke in particular were in line with the principles underlining the Collision Regulations, and that the crossing rule *did not* apply where one vessel was in the channel and the other was shaping to enter it.

ALEXANDRA 1 had not turned to starboard to aim at the channel entrance but that did not change anything. In circumstances where she had been slowly proceeding to the channel entrance and was embarking her pilot to enter it, it remained unsafe, confusing and illogical to apply the crossing rules to ALEXANDRA 1 and the narrow channel rules to EVER SMART.

Thus, the duty upon a vessel in the position of ALEXANDRA 1 is not to keep out of the way of a vessel coming from her starboard side. Rather, she must, as a matter of good seamanship, navigate in such a way that when she reached the channel she would be on the starboard side of it in accordance with Collision Regulations Rule 9. The fact that she was embarking her pilot did not absolve her from that duty.

On the facts, EVER SMART was in breach of Rule 9 because she was not as far to starboard as safe and practicable. She was also found to have been remiss in keeping a good lookout, to have been steaming too quickly, to have made no sound signal and to have taken no avoiding action. Meanwhile, ALEXANDRA 1 was properly positioned near the entrance of the channel and kept a good visual lookout. However, her Master did not listen sufficiently carefully to the VHF and the misheard conversation resulted in her not turning to starboard to enter the channel, thus putting her in breach of Rule 9. Weighing up the relative culpability and causative potency, the Judge found EVER SMART 80% and ALEXANDRA 1 20% responsible for the collision.

There will always be disputes, like *Nautical v Evergreen* where there is heavy reliance upon witness evidence and legal submissions, but at least vessels' duties under the Collision Regulations in these circumstances have now seen some helpful and much needed clarification. Needless to say, early exchange of electronic track data under the new Rules will hugely assist the parties in determining and perhaps even agreeing whether those duties have been complied with.

Please note that this is a bulletin and does not provide legal advice. Whilst every care has been taken in the preparation of this document, we cannot accept any liability for any loss or damage, whether caused by negligence or otherwise, to any person using this document



**Chief Executive** Carolyn McCombe **Senior Clerks** Carl Wall and Stewart Gibbs  
4 Pump Court, Temple, London EC4Y 7AN  
**Tel** +44 (0)20 7842 5555 **Fax** +44 (0)20 7583 2036 **DX** 303 LDE  
[www.4pumpcourt.com](http://www.4pumpcourt.com)

Also tenants at  
Arbitration Chambers Hong Kong  
[www.arbitrationchambershk.com](http://www.arbitrationchambershk.com)