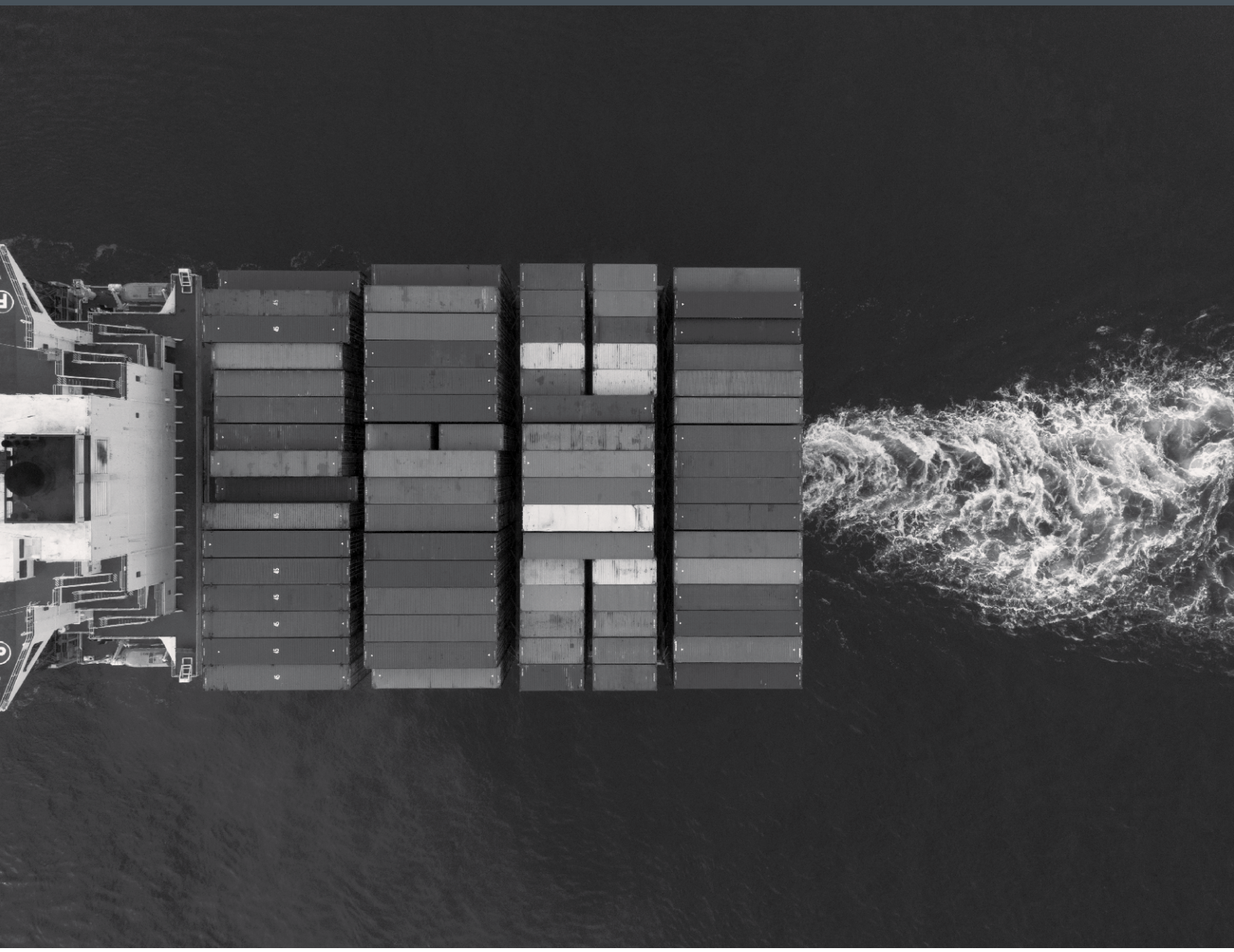

CHANGES TO CPR PART 61 - I'LL SHOW YOU MINE... AND I'LL TELL YOU YOURS!

Why fix it if it's not broken...?

Time-honoured institutions are often the slowest to embrace change. Tradition and custom are familiar and comforting – innovation and reform a daunting step into the unknown. The 700-year-old English Admiralty Court is no exception to this trend, which might explain why the shake-up of the procedural rules governing collision cases introduced on 6 April 2023 may feel long overdue.

Whilst not exactly *hot on the heels* given that it is more than six years since the so-called 'fast track' procedure was introduced for collision claims on 28 February 2017, the reforms attempt to further and more comprehensively address the modernisation in navigational equipment and latest developments in casualty investigation – reflected in cases that have recently – and not so recently – come before the Admiralty Court. They also remove certain procedural quirks, which are reflective of the Admiralty Court's unique historical treatment of collision cases, aligning the rules with those for other negligence claims.

Whilst the changes are generally welcomed, questions have been raised over whether any of them will enable collision disputes to be managed more efficiently, or whether they might inadvertently create additional cost and time stumbling blocks.

The reforms

The reforms, which apply in all collision actions commenced on or after 6 April 2023, have been introduced to Part 61 of the English Civil Procedure Rules (CPR), its corresponding Practice Direction (PD 61) and the two-part Collision Statements of Case (CSoC) by which a party's case is pleaded by the blind exchange of Form ADM3. These amendments address four distinct procedural steps of ship collision claims, and can be summarised as follows:

1. CPR 61.4(4A) is amended to remove the mutual exchange requirement of Electronic Track Data (ETD). A party with ETD in its possession must disclose it regardless of whether the other party also holds ETD. The extent to which this might extend to independently sourced Automatic Identification System (AIS) data does not appear to have been clarified.
2. Eight questions (Questions 17-24) have been added to Part 1 of Form ADM3 (the CSoC) relating to the facts leading up to the time of the collision. These additional questions focus on evidentiary issues which have arisen in recent collision cases, including requiring parties to precisely identify the bridge team, use of electronic navigational aids, status of recording equipment and manoeuvring status. Emphasis is placed on the time period for such information, with the new questions requiring data ranging from at least 30 minutes prior to the collision, up to 30 minutes later. These additional questions are obvious and (should be) uncontroversial. The specified time period is helpful and should be a relief to those concerned by increased Voyage Data Recorder (VDR) storage requirements creating huge volumes of data, as it precludes a waste of time and costs poring over hours' worth of irrelevant recordings.
3. CPR 61.4(6), paragraph 4.2 of PD 61.4 and Form ADM3 are amended to mandate the inclusion of all allegations of causative negligence and other fault in Part 2 of the CSoC (the paltry nature of the previous requirements meant these Part 2s were often formulaic and repetitive of Part 1, and unhelpful to the Court in determining the issues at play), as well as the sequence of any other material events leading up to the collision which are relied on. This is perhaps the most controversial of the amendments; not only does it create a tight schedule between receipt and consideration of opponent's data, but no real clarity has been provided on how far this is intended to go, save that parties are obviously being encouraged to move away from trotting out the usual list of rules which might apply, and actually go to the effort of applying and pleading to them based on the evidence.
4. New sub-paragraphs CPR 61.4(6A) - (6C) and PD 61 4.5A - 4.5D are introduced to require the filing of a defence to the CSoC within 28 days of the CSoC being filed. Any (optional) reply is to be served within 21 days of the defence. The inclusion of this requirement brings collision claims much more in line with a standard negligence claim.

What does it all mean?

The above changes have largely been welcomed, reflecting the modern trajectory in casualty investigations from a quantitative to a qualitative exercise. The advent of VDR and widespread use of AIS means collision investigations are rarely about the "how" anymore, instead focusing on the "why".

Whereas practitioners would previously keep their powder dry until trial on what they consider their opponents' side of the story to be, fuller pleadings are possible because the parties now know how the collision occurred, and the exercise is rather one of analysing the electronic data and corresponding witness evidence in order to assess culpability and causative potency.

Similarly, the mutuality requirement for both parties to exchange ETD had become outdated – a requirement in deference to the fact that it was unusual to mandate the early disclosure of such data. ETD is now a ubiquitous feature of vessel technology and casualty investigation, and the amended requirement for a party to provide ETD if it has it fits more naturally into this modern context and, of course, the overriding objective.

An opportunity missed?

Although the requirement to plead all allegations of causative negligence is hardly ground-breaking (and is in fact reflective of the procedural rules for other negligence cases), the sheer volume of data to analyse in collision cases, in addition to the challenges in obtaining seafarers' evidence and the retained unique requirement that CSoCs are filed blind, could all contribute to making the obligation to set out legal and factual issues in full at the outset both practically and tactically difficult. Give away too little, and a party could find itself in contravention of the new requirements. Give away too much without a clear picture of the facts, and a party could prejudice its case.

Criticism has also been levelled at the reforms for not going far enough in addressing issues currently causing unnecessary expense and delays in collision litigation. CPR 61(1)

> **"Whilst the changes are generally welcomed, questions have been raised over whether any of them will enable collision disputes to be managed more efficiently, or whether they might inadvertently create additional cost and time stumbling blocks."**

(m), which lists VDR as only one of various examples of ETD, remains unamended, meaning a party can satisfy the new early exchange of ETD requirements without disclosing VDR audio or transcripts of the same, although they are often at the crux of the factual investigations. Exchange of audio transcripts is sometimes only agreed by the parties after the trial has started and generally after significant expense is incurred on audio quality / translation issues, which often encumbers the parties' ability to agree on the transcripts. This leads to a phenomenon where the cases pleaded at trial, informed by a crucial piece of evidence in the audio transcripts, are materially different from the cases pleaded in the CSoCs. These problems may be exacerbated by the latest requirements to set out fuller allegations in Part 2 and a defence to the CSoCs, leading to time-consuming amendments to the pleadings and consequential costly delays to the proceedings.

Disappointment has also been expressed at the failure to address any requirements as to criteria for the selection of nautical assessors (from Trinity House's Elder Brethren) who assist the Admiralty Court on issues of navigation and seamanship. Perhaps an issue for another day but, unlike technical experts selected by each party, the parties have no say in their appointment to assist in a particular case, leading to questioning of their relevant experience / ability to advise the court on the precise matters at hand.

Remaining procedural hurdle

Finally, a note of caution that the Commercial Court Guide (CCG) has not been updated to reflect the latest changes to CPR 61. The CCG FAQs and paragraph N1.2 are clear that CPR 61 will take precedence if there is any conflict between the CPR and the CCG, but there is nonetheless likely to be some confusion caused by the current discrepancies caused by the CCG reflecting the old rules.

Conclusion

Although the reforms bring welcome change to the procedural rules for ship collision claims, addressing the realities of modern-day collisions and some of the issues facing practitioners in pleading collision cases before the Admiralty Court, they are unlikely to bring seismic change to the procedural order. The parties and the court may benefit from more detailed pleadings in their preparation for trial, but time will tell as to the extent to which these changes can bring about the intended efficiencies of process.

For further information please contact:

CLAIRE WOMERSLEY
Partner, London
T +44 (0)20 7264 8023
E claire.womersley@hfw.com

MELISANDE BESSE
Associate, London
T +44 (0)20 7264 8785
E melisande.besse@hfw.com

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our shipping capabilities, please visit hfw.com/Shipping.

Americas | Europe | Middle East | Asia Pacific