Total Loss of Ship Arising From Collision at Sea

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1. Introduction

Ship collision incidents may occur in foreign territories or high seas and these ships may be of foreign registry. Due to such nature, collision actions can be complex, lead to many different issues and involve different jurisdictions and systems of law.

This Article only deals with Apportionment of liability and damages for a total loss arising from a collision under Japanese law[1]. It is beyond the scope of this Article to deal with every possible item of damages, but principal items of damages for a total loss are dealt with therein.

2. Apportionment of liability between colliding ships

Liability for collision damage is based upon fault. The Japan Coast Guard (JCG) conducts an investigation for criminal proceedings where the collision occurred. The Master and crewmembers are normally examined by the JCG. Once the criminal proceeding is closed i.e. sentence was finalized, the resulting statement is disclosed subject to prosecutors' approval. The Japan Transport Safety Board (JTSB) routinely investigates collisions for purposes of establishing what happened in order to improve safety in the future. JTSB issues and discloses the investigation report to public. Also, the Japan Marine Accident Tribunal gives crewmembers with a Japanese license administrative punishment. The report and ruling are very convincing evidence.

In case it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships is apportioned equally. On the contrary, in case it can be determined, each ship will bear liability in proportion to their respective faults (Article 797 of the Commercial Code), i.e. one such ship can recover against another ship only to such a proportion of his damage as corresponds to the degree of fault of that ship.

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[1] Japan is a party to the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels and 1972 Convention on the International Regulations for Preventing Conllisions at Sea, however, has not ratified the 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation or the 1952 International Convention on Certain Rules Concerning Jurisdiction in Matters of Collision.

Where a collision was occasioned by the fault of both ships and both were damaged in the collision, there is an issue whether their respective claims should be set off against each other and the balance remains (so-called single liability doctrine) or their respective claims should remain separately (so-called crossing-over liability doctrine).

There is no judicial precedent of the Supreme Court about this matter, but a judgment of the Tokyo District Court admitted the so-called crossing-over liability doctrine[2]. The doctrine is consistent with the opinion shared by majority of maritime law scholars[3].

In practice, once the claim has been assessed and the percentage representing collision liability is applied to the claims, the claims are then set off to discover the amount payable by one ship to the other. It is this set-off figure to which the limitation provisions apply so that one can never be certain that limitation is of relevance in any matter until final claims are agreed. However, in many cases, it is possible to estimate when limitation will apply. In any event, under the Limitation of Shipowner's Liability Act, if a limitation fund is established and it is ultimately discovered that limitation does not apply i.e. the set-off figure is lower than the limitation fund established, then the party seeking to limit can obtain a refund of the balance from the court and the party seeking to recover will receive only the set-off figure and no more.

3. Damages

(a) General principle

The law of tort is generally applicable to collisions at sea in the same way as it is applicable to torts on land[4]. In general, owners of colliding ships have to place owners of innocent ships as closely as possible to the same position they were at before the collision ("Restitutio in integrum"). Unless other intention is manifested, the amount of the damages shall be determined with reference to monetary value (Article 417 and Article 722 Section 1 of the Civil Code). With respect to this matter the judgments are piling up and the

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[2] 16 Kaminshu No.7, 1257 (Tokyo D. Ct., 20 July, 1965).

[3] Takashi Hakoi, Masahiro Amemiya, Satoshi Nakaide, Tadahiro Matsuda, Jumpei Osada, *The Law of Marine Collision*, 93 (2012).
In practice, normally the extent of the proportion of the respective faults can be determined. Therefore, collecting evidence for especially apportionment of liability is very important. The best opportunity for collecting evidence is immediately after the collision when all the witness are still on board and the events are still fresh in their minds. In some cases, local ship's agent is also very helpful in assisting claim handling and information collection. The collection of evidence such as charts, rough logs, notes, course records, VDR data and Als data etc. is vital.

[4] The Lisbon Rules were drafted by the Comite Maritime International (CMI), at Lisbon, in 1985. They have no legal force and they are not designed to deal with the question of liability. Their sole purpose is to provide a uniform method of assessment of damages arising from collision and to save both parties time and expense otherwise incurred in proving their respective claims. However, in Japan it is but seldom that the parties agree that their respective claims arising out of the collision shall be assessed in accordance with the Rules.

following precedent theory[5] is established in Japan;

Article 416 of the Civil Code[6] as to assessment of loss and damage in case of breach of contract shall apply to tort cases likewise[7].

It is stipulated in Article 416 of the Civil Code that;-

(i) A demand for damages shall be for compensation from the obligor for such damages as would ordinarily arise from the non-performance of the obligation-duty.
(ii) The obligee may also recover for damages which have arisen through special circumstances, if the parties have foreseen or could have foreseen such circumstances.

The claimant is entitled to compensate for loss and/or damage which would have been able to be anticipated to occur before the tort from the view-point of reasonable people[8].

(b) Value of ship

Where a ship has sunk as a result of a collision and cannot be salved and restored to useful service in an economical manner, she has become a total loss. A ship is a

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[5] Minshu No. 5, 386 (Sup. Ct., 22 May, 1926).

[6] This concept is considered to have been introduced from England i.e. the famous case, Hadley v Baxendale.

[7] If a victim sustains loss and/or damage and the claim stands within the category of foreseeablity, then the victim is entitled to damages even if he/she does not sustain any damage to the property. We have many precedents in which tenants of offices and shops were permitted to claim economic loss when the rented offices and shops were damaged by negligence of the third parties. In this sense, under Japanese law, theoretically speaking, a time charterer of a ship can claim his own loss when his chartered ship is involved in marine accidents. However, in most of cases, time charterers do not sustain economic loss because in such cases ships become off-hire, and charterers do not need to pay for that period. However, if time charterers sustain additional loss which cannot recovered by off-hire and such economic loss would have been able to be anticipated by the tortfeasor before the accident, then such economic loss would be recoverable to the extent of the requirement of special circumstances provided for Article 416 of the Civil Code.

[8] Under Article 95 of the Limitation of Shipowner's Liability Act (1996 Limitation Convention) ships causing damage to other ships can be arrested because such claims create a maritime lien. The lien becomes time-barred after the lapse of one year from the date of the accident (Article 847 of the Commercial Code). Japan is not a signatory of 1926 Convention, of 1967 or of 1993 Convention relating to Maritime Liens and Mortgages. The district court which has territorial jurisdiction over the place where the subject ship is currently located has jurisdiction for the enforcement of maritime lien on her by way of public auction. We have two kinds of major view regarding governing law with respect to creation and validity of maritime lien. One is that both the law of the subject ship's flag and the law governing the claim to be secured by the maritime lien should apply and provided that both affirm creation of maritime lien, a Japanese court recognize the maritime lien. Another is that only Japanese law applies i.e. the lex fori principle.

constructive total loss when the cost of salvage and repairs would exceed the ship's market value at the date of the collision.

When a ship has become a total loss, the owner's damage will be measured by the market value at the date of the collision[9], i.e. even though a repair would be physically feasible, damages are limited to the value of the ship.

The value is calculated by reference to the type, age, condition, nature of operation of the ship, hire or freight market, costs for construction of a new similar ship and any other relevant factors. Salvage value of a wreck, if any, should be deducted from the market value. In practice, the value of a ship is proved by calling evidence from marine experts such as the Japan Shipping Exchange, Inc, surveyors or shipbrokers.

(i) How much owners of a lost ship can recover from owners of a colliding ship when the market value of the ship has changed between the time of the collision and the time when a hearing is concluded.

In The FUKIMARU[10], she sank as a result of a collision. World War I broke out after several months of the collision and then the demand for ships had gone up sharply. Accordingly the market had exploded, but some time later the market turned and deteriorated. The value of FUKIMARU at the time of the conclusion of the court hearing returned to the same level as that at the time of the collision. The plaintiff insisted on compensation at the highest value. However, it was held that the recoverable amount should be the just market value when the collision occurred unless the defendant foresaw or should have foreseen that the plaintiff could have earned more than that value by disposal of the ship or other means if the collision had not occurred.

(ii) Which market's value is taken to be ascertained.

The opinion shared by majority of maritime law scholars is that the market value of the port of registry should be taken[11]. However, in view of the fact that most of ocean-going ships are flag-of-convenience ships, the market value of the port of registry does not seem to be necessarily reasonable.

(iii) Ships without market value

A ship may have a value peculiar to itself, having regard to its special construction or use, or the position or occupations of the owner such as warships, fishing boats, dredgers.

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[9] 11 Minshu No.1 170 (Sup. Ct., 31 January, 1957), Hanrei-Times No.141, 148 (Kobe D. Ct., 15 December, 1962), Hanrei- Jiho No748, 77 (Tokyo D. Ct., 17 June, 1974) and others.

[10] Supra note 5.

[11] Takashi Hakoi, *The Maritime Law*, 361 (2nd ed. 2013). There is no precedent regarding this issue.

If the lost ship cannot fairly be valued at a market price, then the basis of assessment may be the special value of the ship to her owners. In these cases the reproduction cost less depreciation by age or scrap value may be evidence of value at the date of collision[12].

In *The Toyomaru*[13], a fishing boat became a total loss due to collision. There was no market for such fishing boats. However, the owner of the sunken fishing boat could purchase a similar fishing boat. Gross tonnage of both the sunken boat and the substitute boat was almost same and their engines were the same type and age, however, hull of the substitute boat was seven years newer than the sunken boat. The Supreme Court upheld the decision of the appeal court that as far as the owners does not have intention to make excessive profits with the collision, even though the substitute boat was not totally same as the sunken boat, the owner shall be entitled to damages equal to the cost of purchasing a similar boat.

(iv) Insured value

With respect to hull insurance, insured value is agreed between owners and hull underwriters. Generally speaking, insured value is agreed based on the amount needed for which the owner will procure a replacement for the insured ship. Therefore, it may be considerably higher or occasionally lower than the market value.

In case of fishing boat insurance, insured value is calculated from the residual value rate based on the fishing boat insurance evaluation standard and the age. Therefore, insured value often accords with market value. In *The Yukiyoshimaru*[14], the insured value of the sunken fishing boat was recognized as the market value at the date of the collision.

(c) Loss of earnings

The loss of profits or of the use of a ship pending repairs arising from a collision is a proper element of damage. Although collect freight lost because the cargo cannot be delivered is included in the measure of damages for total loss, whether there is a right of recovery for loss of profitable use in total loss cases is disputable[15].

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[12] In judgment of Kobe District Court of 30 October 1963 (9 Shomu-geppou No.12, 1329), it was held that the value of sunken ship was 20% of reproduction cost of a substitute ship bearing in mind that age of the sunken ship was 25 years.

[13] Kaijiho-kenkyukaishi No.46, 23 (Sup. Ct., 17 July, 1981). Hanrei-Jiho No.868,89 (Nagoya H. Ct., 15 February, 1977).

[14] Hanrei-Jiho No.2080, 111 (Miyazaki D. Ct., 12 March, 2010)

[15] Rule I 2(d) of the Lisbon Rules provides that damages recoverable in the event of a total loss shall be include, subject to reimbursement for any claim for loss of freight under paragraph(c) above, compensation for the loss of use of the vessel for the period reasonably to find a replacement whether the vessel is actually replaced or not.

There are judicial precedents rendered by the Supreme Court that expected earnings in case of a total loss of a cargo ship is not recoverable because the value of the lost ship should cover all losses sustained by the owner[16].

However, in *The Toyomaru*[17], the Supreme Court gave a different judgment ruling that expected loss of earnings during the period reasonably required to obtain a replacement ship is recoverable. The case was concerning loss of earnings of a fishing boat owner. The Tokyo Appeal Court also accepted the expected loss of earnings during the period reasonably required if he had built a new ship[18]. In that case the plaintiff did not build a new ship. Also, a judgment rendered by the local court recently admitted the expected loss of earnings during the period reasonably required to build a new fishing ship as a recoverable damage[19].

(d) Others recoverable damages

In total loss cases, the expenses of repatriating the crew, damages for loss of the personal effects of the crew[20] should be recoverable.

The wreck removal costs should be recoverable. If the ship sunk due to a collision with another vessel in the port or navigational channels or fairway, then the port authorities or the JCG may order to the owner of the sunken ship to remove the ship or make the cargo on board harmless. In such case, the owner of the sunken ship cannot insist limitation of liability to those authorities. If the owner of the sunken ship refuses to comply with orders given by JCG, that would be a criminal offence. JCG or local government can perform the wreck removal operation in case that the owner of the sunken ship does not do it and later, claim reimbursement of the full costs from the sunken ship or its P&I Club. Then, the owner of sunken ship or its P&I Club would seek to be indemnified those costs from another ship whose navigational faults contributed to the occurrence of the collision. In such case, it is an issue whether the other ship can insist on limitation of the owner's liability. The Sapporo Appeal Court rendered a ruling that the other ship can limit its liability for the wreck removal costs paid by the owner of the sunken ship as per the JCG order[21]. The ruling was upheld by the Supreme Court[22].

Also, it is usual to allow the claimants around 10% of the total claim to cover his legal fees[23].

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[16] Supra note 5 and others.
[17] Supra note 13.
[18] Judgment of Tokyo Appeal Court of 27 March, 2002.
[19] Supra note 14.
[20] In general, it is not straightforward to collect evidence justifying an amount of damage.
[21] Hanrei-Times No.478, 132 (Sapporo H. Ct., 29 June, 1982).
[22] 39 Minshu No. 3, 899 (Sup. Ct., 26 April, 1985).
[23] 23 Minshu No.2, 441 (Sup. Ct., 27 February, 1969) and others.

Interest on damages is recoverable in addition to the principal sum. Normally, interest runs from the date of the collision to the date of payment. However, where the loss was sustained or the expense was incurred after the collision, interest runs from that date to the date of payment. The rate of interest is 5 percent per year (Article 404 of the Civil Code).

4. Statute of limitation

Claims arising from a collision at sea are extinguished by prescription upon the lapse of one year (Article 798 of the Commercial Code).

There is a judgment to the effect that by virtue of Article 724 of the Civil Code the claim is time barred if it is not exercised by the claimant within one year from the time when the claimant comes to know of the damages and the identity of perpetrators[24]. There is a crucial difference between the judgment and the Convention. The judgment, therefore, is criticized by some scholars[25].

There is an old judgment to the effect that Article 798 of the Commercial Code did not apply to personal injury claims arising from a collision and by virtue of Article 724 of the Civil Code the claim is time barred if it is not exercised by the claimant within three years from the time when the claimant comes to know of the damages and the identity of the perpetrator[26].

If negotiations are underway, it is possible for parties to waive benefits of prescription. Even though the parties cannot conclude such an agreement, the claimant's demand nullifies the prescription, whether the demand was made in writing or orally. However, the demand shall not have the effect of interruption of the prescription unless a judicial claim, filing for demand of payment, filing for settlement, participation in bankruptcy procedures, participation in a rehabilitation procedure, participation in a reorganization procedures, attachment, provisional seizure, or provisional disposition is commenced within 6 months (Article 153 of the Civil Code).

[24] 59 Minshu No.9, 2558 (Sup. Ct., 21 November, 2005).
[25] Takashi Hakoi, Masahiro Amemiya, Satoshi Nakaide, Tadahiro Matsuda, Jumpei Osada, supra note 3, 137.
[26] Minroku No.21, 530 (Sup. Ct., 20 April, 1915).