

THE KIVELI CASE

RULE 14 & THE 'TRAVAUX PREPARATOIRES'

Peter Thornton/Hill Dickinson's ("PT/HD") paper, "*'Head-on' or 'Crossing': do the travaux to the 1972 Colregs cast a different light?*"¹ makes for very interesting reading. In that paper they consider the recent decision of the English court in *The Kiveli*² case on the interpretation and application of the 'head-on' rule, Rule 14; and based on their analysis of the relevant case law and the 'travaux préparatoires' ("travaux") to the COLREGS they conclude, effectively, that the court's interpretation and application of Rule 14 in this case was wrong. Specifically, they believe the court adopted a different focus to that in the travaux and earlier cases and thereby wrongly construed Rule 14; and that in consequence the decision in this case has confused the legal position by removing what they suggest was the clear visual and legal division between a head-on situation and a crossing situation.

We discussed *The Kiveli* judgment in an earlier paper³ and for the reasons we set out in that paper and subject to our comments therein we believe the court in this case has correctly interpreted and applied Rule 14. We remain firmly of this view and notwithstanding the arguments put forward in their paper by PT/HD. In this paper we consider and provide our comments on these arguments, and under the same section headings for ease of reference.

SECTION 1: INTRODUCTION, ISSUES, FACTS, AND LEGAL BASIS

In this section PT/HD start by identifying what they consider to be the "key finding" in this case, that :

"a head-on situation [i.e. Rule 14] can now factually apply (i.e. not just when a vessel is in doubt) when a vessel can see two masthead lights (subjectively nearly in line and nearly ahead) but importantly only one sidelight."

In their opinion, this finding:

¹ Published by i-law and available on the Hill Dickinson website at www.hilldickinson.com/our-view/articles/a-critique-of-the-kiveli-judgment/ and on request from peter.thornton@hilldickinson.com

² [2025] EWHC 1185 (Admlty).

³ "*The KIVELI / AFINA I collision - Application of Rule 14*" - available on request from harry@hirstmarine.com.au

- (1) “widens and confuses what might be said to have been a mariner’s general understanding as to when the head-on situation [i.e. Rule 14] *factually* applies without doubt”;
- (2) “appears to go against Teare J’s finding in *The Apollo*”;⁴ and
- (3) “appears to go against the intentions of the drafters of Rule 14, as per the travaux préparatoires.”

PT/HD then go on to discuss the decision in this case summarising the three constructional issues identified by the judge as arising on the wording of Rule 14, and the salient facts of the case. They then compare this decision with the earlier decisions of Clarke J in *The Lok Vivek*⁵ and Teare J in *The Apollo*, and make the following observations:

1. prior to the decision in this case “the focus on whether a head-on situation existed or not was whether both vessels were in a position to see both sidelights”;
2. if the judge in this case had applied this test (the “both sidelights” test) it “seems safe to say that ... *The Kiveli* would be a crossing situation”;
3. the judge in this case took a subjective view of when a vessel’s masthead lights are “nearly in line” and when a vessel is “nearly ahead” without reference to the cut-off limits for sidelights;⁶ and
4. the finding by the judge that “a difference in course of up to 6° or slightly more should be considered reciprocal” is therefore, “vague and odd” in circumstances where the courses of the two vessels in this case differed by 7° from reciprocal.

PT/HD then conclude this section by asking the “obvious” question : “Where does the legal division now lie between a head-on situation and a crossing situation?”

Key finding

We agree this is the key finding in this case: that the so-called “both sidelights” test is not the only test for determining whether or not a situation is head-on, and that there is another, alternative and additional test based on the bearing and aspect of the vessels’ masthead lights (the “masthead lights” test).

We do not believe PT/HD’s purported distinction between situations when Rule 14 will “factually” apply and when it will apply because a vessel is “in doubt” is particularly helpful

⁴ *FMG Sydney v MSC Apollo* [2024] 1 Lloyd’s Rep.322

⁵ [1995] 2 Lloyd’s Rep. 230

⁶ COLREGS, Annex 1.9. A sidelight may be visible up to 3° across the bow.

or appropriate. We discuss this in more detail in our comments below on Section 3 of their paper.

Judicial focus

PT/HD observe that prior to the decision in this case the English court relied upon the “both sidelights” test in order to determine whether or not a situation was head-on as evidenced by the decisions of Clarke J in *The Lok Vivek* and Teare J in *The Apollo*. But did it? We believe these two decisions need to be considered carefully and in their proper context.

The Lok Vivek

The collision in *The Lok Vivek* case occurred in 1988 before the introduction of AIS and VDR. The two vessels were initially approaching on courses which differed by 8° from reciprocal with the *Common Venture* steering a course of 157° and the *Lok Vivek* steering a course of 345°. The *Common Venture* considered the situation to be head-on whereas the *Lok Vivek* considered it to be crossing. In order to resolve this issue and in circumstances where the witness evidence was unreliable,⁷ Clarke J began by applying the “both sidelights” test. In doing so, he relied upon the courses steered by the two vessels leading up to the collision and the advice of his nautical assessors as to the likely extent to which each of the two vessels was yawing, and the sidelights of the other vessel which could have been seen. Their advice, which he accepted, was that neither vessel would have been able to see both sidelights of the other, even allowing for yaw; and he determined therefore, that the situation was crossing and not head-on.

It appears their advice however, referred to the time after the *Common Venture* had altered her course by 5° to port to 152°, and not when the two vessels first came in sight of one another and risk of collision arose. We say that because when considering what action the *Lok Vivek* should have taken to avoid collision Clarke J asked the nautical assessors to assume that the *Common Venture* was initially bearing (about) 5° on the port bow of the *Lok Vivek*.⁸ The *Lok Vivek* was then steering a course of 345° so that the bearing of the *Common Venture* was accordingly 340°; and as the *Common Venture* was steering a course of 157° her green sidelight was then open by 3°. The *Common Venture* was yawing up to 2° and depending upon the actual cut-off limits of her sidelights, it is possible that her red sidelight was also open occasionally as she yawed. We believe accordingly, that the *Lok Vivek* would have been able also, to occasionally see the red sidelight as well as the green sidelight of the *Common Venture*.⁹ At this time it follows that the bearing of the *Lok Vivek* from the *Common Venture* was 160° and as the *Lok Vivek* was steering a course of

⁷ Clarke J considered the evidence of the *Common Venture* as to what lights she saw and when to be “unreliable” and that of the *Lok Vivek* to be correct but “inaccurate”.

⁸ *The Lok Vivek* [1995] 2 Lloyd’s Rep.230 - at page 240 (column 2)

⁹ Provided the prevailing visibility and intensity of the lights allowed.

345° her red sidelight was then open by 5°. The *Lok Vivek* was yawing up to 3° and depending upon the actual cut-off limits of her sidelights, it is possible that her green sidelight was also open occasionally as she yawed. We believe accordingly, that the *Common Venture* would have been able also, to occasionally see the green sidelight as well as the red sidelight of the *Lok Vivek*.¹⁰ The decision in this case therefore, should be viewed with caution when considering the circumstances in which Rule 14 can apply.

Having determined the situation was crossing Clarke J went on to say:¹¹

“It follows that ... the ships were crossing so as to involve risk of collision within the meaning of Rule 15 of the regulations. There was some debate at trial about the scope of the head-on rule. However, I do not think it was argued on behalf of [Common Venture] that if the difference between the courses was 8° or more, the ships were meeting on reciprocal or nearly reciprocal courses within the meaning of Rule 14 of the regulations.”

It appears therefore, that whilst Clarke J relied upon the “both sidelights” test as a starting point for determining whether or not the situation was head-on or crossing, he was prepared nevertheless, to hear argument that the two vessels were meeting on reciprocal or nearly reciprocal courses within the meaning of Rule 14(a).

The Apollo

The collision in *The Apollo* case occurred more recently, on 29 August, 2020. At C-12 when risk of collision arose the *MSC Apollo* was steering a course of 267° and the *FMG Sydney* was steering a course of 105°; and the *FMG Sydney* was bearing 2° on the starboard bow of the *MSC Apollo* and the *MSC Apollo* was bearing 17° on the port bow of the *FMG Sydney*. As such, the *MSC Apollo* could see both masthead lights but just the red sidelight of the *FMG Sydney*, and the *FMG Sydney* could and did see both masthead lights and both the red and green sidelights of the *MSC Apollo*. In her submissions counsel for the *MSC Apollo* relied upon the wording of Rule 14(b) and argued that at C-12, as the *FMG Sydney* could see both sidelights of the *MSC Apollo*, a head-on situation was then deemed to exist.

Teare J rejected this submission but he did not rely upon the “both sidelights” test when determining the situation was crossing and not head-on. He relied instead, upon the definition in Rule 14(a) noting that a head-on situation “*is one where two vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision...*”;¹² and as the two vessels were steering courses which differed by 18° from reciprocal they

¹⁰ *ibid.*

¹¹ *The Lok Vivek* [1995] 2 Lloyds Rep.230 - at page 240 (column 1).

¹² *The Apollo* [2024] 1 Lloyd’s Rep.322 - at paragraph 99.

were not meeting head-on.¹³ Admittedly however, Teare J did go to say that the “*limit of reciprocal or nearly reciprocal*” courses is set by [the “both sidelights” test in] *Rule 14(b)*” and that this test “*must be satisfied by both vessels*.”¹⁴ These comments however, were *obiter*, as the judge in this case, Bryan J, recognised;¹⁵ and we believe they were also unnecessary and wrong.

PT/HD consider these comments amounted to a “*previous interpretation*” of Rule 14 which they do, but being *obiter* they do not carry the same weight as those of Bryan J in this case. We suspect Teare J’s particular reference to the “both sidelights” test in Rule 14(b) was prompted by the way in which counsel framed her submission.¹⁶ This submission however, could have been readily dismissed on the express wording of Rule 14(b). There was no need for Teare J to interpret this Rule as he did, and especially when there is nothing in the express wording of this Rule to support his interpretation. Teare J was concerned that it was “*implicit*” in counsel’s submission that “*it is sufficient to bring about a head-on situation if only one of the two vessels can see both sidelights of the other*.”¹⁷ But such a sighting is only sufficient to bring about a head-on situation when these lights are seen ahead or nearly ahead.¹⁸ In that case the *MSC Apollo* was bearing 17° on the port bow of the *FMG Sydney* and whilst the *FMG Sydney* could see both sidelights of the *MSC Apollo*, she was not seeing them ahead or nearly ahead.

Constructional Issues

Bryan J in this case clearly did reject some of the views expressed by Teare J in *The Apollo*, but the interpretation of Rule 14(b) aside, we believe the decision in this case has much in common with the decisions in *The Lok Vivek* and *The Apollo*.

The Definitional Issue

In this case Bryan J found that Rule 14(a) defines what is a head-on situation. This was also the view of Teare J in *The Apollo*¹⁹ and it appears to have been the view too, of Clarke J in *The Lok Vivek* (see above).

¹³ *ibid*. Teare J refers to a difference of 17° but we believe this to be a typo as the difference between both their courses steered and their courses made good over the ground is 18°.

¹⁴ *ibid*, at paragraph 101.

¹⁵ *The Kiveli* [2025] EWHC 1185 - at paragraph 137.

¹⁶ To the *FMG Sydney* seeing both sidelights of the *MSC Apollo* rather than both of her masthead lights in a line or nearly so.

¹⁷ *The Apollo* [2024] 1 Lloyd’s Rep.322 - at paragraph 101.

¹⁸ Rule 14(b).

¹⁹ Teare J said “*the essence of a head-on situation is that both vessels are meeting on reciprocal or nearly reciprocal courses*” - *The Apollo* [2024] 1 Lloyd’s Rep.322 - at paragraph 101.

In all these cases the three judges recognised and accepted that Rule 14(a) has to be read together with Rules 14(b) and (c). The key difference is that in this case, unlike in *The Apollo*, Bryan J decided that Rule 14(a) is not subject to Rule 14(b); that Rule 14(b) is only a “*deeming*” provision and that the conditions therein do not have to be satisfied in order for Rule 14 to apply (and insofar as the “both sidelights” test is concerned it appears this could also have been the view of Clarke J in *The Lok Vivek*).

PT/HD believe that if Bryan J had applied the “both sidelights” test in this case it “*seems safe to say that... The Kiveli would be a crossing situation*”. It is possible however, from the way in which he construed Rule 14, that he would still have found the situation in this case to be head-on; that the two vessels were on nearly reciprocal courses involving risk of collision as defined in Rule 14(a) and notwithstanding the “both sidelights” test in Rule 14(b) was not satisfied.

The “and/or” Issue

In this case Bryan J interpreted the words “and/or” in Rule 14(b) to mean that as well as the “both sidelights” test there is an alternative and additional visual test for when a situation can be deemed to be head-on, namely the “masthead lights” test:²⁰ the key finding. It should be noted that in doing so he gave these words their ordinary and natural meaning,²¹ one that would give effect to his understanding of the intention of the rule drafters²² and which took account of the different lighting requirements for power-driven vessels,²³ the different visible ranges of these lights,²⁴ and that Rule 14 also applies in daylight.²⁵

The “a vessel” Issue

This issue only arose in this case because of Teare J’s comments in *The Apollo* case. As noted above, we believe Teare J’s comments were unnecessary and wrong; and as Bryan J noted in this case, aside from these comments there is nothing in the wording of this Rule or otherwise to suggest the conditions in Rule 14(b) must be satisfied by both vessels.²⁶ Bryan J accordingly and correctly in our opinion, found that Rule 14(b) is satisfied “*by reference to what a vessel can see of the other.*”²⁷ We discuss this further in our comments below on Section 2 of PT/HD’s paper.

²⁰ This is also *Farwell’s* - and, we believe, the correct - interpretation of Rule 14(b).

²¹ *The Kiveli* [2025] EWHC 1185 - at paragraph 161.

²² *ibid* - at paragraph 119.

²³ *ibid* - at paragraphs 143, 144.

²⁴ *ibid* - at paragraphs 152, 153.

²⁵ *ibid* - at paragraph 174.

²⁶ *ibid* - at paragraphs 178 -181.

²⁷ *ibid* - at paragraph 184.

Head-on or crossing

General understanding

PT/HD's view that "*a mariner's general understanding*" is that Rule 14 only definitely applies when one vessel can see both sidelights of the other is of course, only their opinion.

Clearly, in situations where one vessel can see both sidelights of the other directly ahead Rule 14 will definitely apply, and that, we believe, is and has been the general understanding of all mariners. PT/HD recognise however, that a mariner may be in doubt about the application of Rule 14 in other situations; and a classic example is where two vessels are meeting on exactly reciprocal courses involving risk of collision and shaping up to pass starboard to starboard (or port to port) and such that each can only see one sidelight of the other. This case has now determined that Rule 14 applies in these situations as well; and we believe that is and has been the general understanding of many mariners since this Rule first came into force in 1977. The master of the *Afina I* considered the situation in this case to be head-on even though he was predominantly seeing only the one, green sidelight of the *Kiveli*;²⁸ and the nautical assessor also considered the situation in this case to be head-on.²⁹ *Farwell*³⁰ supports the decision in this case which suggests US mariners are likely to have a similar understanding; and one of the leading UK teaching texts, *Cockcroft*,³¹ also states that Rule 14 can apply in these situations³² (albeit *Cockcroft* qualifies this statement by noting that Rule 14 is "*apparently*" not intended to apply when only one of the other vessel's sidelights can be seen).

Application

So too, PT/HD's view that the "both sidelights" test is one which "*allowed Rule 14 to apply equally to almost all power-driven vessels because, save for those under 7 metres proceeding under 7 knots, all such vessels have sidelights ... and were, therefore, subject to the same visual test.*"

Rule 14 applies of course, to all power-driven vessels which are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision;³³ and the same visual tests are to be used by all such vessels.³⁴ We believe the point which PT/HD are trying to make is that

²⁸ *ibid* - at paragraph 52.

²⁹ See also, Section 3.

³⁰ Craig H Allen: *Farwell's Rules of the Nautical Road*.

³¹ Cockcroft & Lamejier: *A guide to the Collision Avoidance Regulations*.

³² *ibid* (from the 5th Edition); that is, in situations where "*each vessel sees the masts, or masthead lights, of the other nearly in a line and nearly ahead but the vessels appear likely to pass dangerously close to each other starboard to starboard, or port to port*" (at page 99).

³³ Rule 14(a).

³⁴ Rule 14(b).

as most all such vessels carry sidelights but significantly fewer are obliged to carry two masthead lights³⁵ the “both sidelights” test is to be preferred to any alternative and additional “masthead lights” test. This however, ignores the fact that Rule 14 also applies to such vessels during the day as well as at night, as Bryan J observed when construing Rule 14(b) in this case; and a visual test based on the other vessel’s mast/s is, we believe, considerably more useful for determining her aspect during the day than one based on the likely visibility of her sidelights. We comment further on this below, when discussing Section 3 of PT/HD’s paper.

PT/HD consider that in this case Bryan J took a subjective view of when a vessel’s masthead lights are “*nearly in line*” and when a vessel is “*nearly ahead*” without reference to the cut-off limits for sidelights;³⁶ and that his finding that “*a difference in course of up to 6° or slightly more should be considered reciprocal*” is therefore, “*vague and odd*” in circumstances where the courses of the two vessels in this case differed by 7° from reciprocal. It is clear from his judgment however, that Bryan J had read the commentaries on Rule 14 in the leading texts on the COLREGS and was well aware of the significance of the cut-off limits for sidelights and the existing case law on what could be considered “*nearly reciprocal courses*” and “*nearly ahead*”.³⁷ Indeed, his finding is based on these cut-off limits³⁸ (“*up to 6°*”) with due allowance for doubt (“*or slightly more*”), for example when the vessels are yawing.³⁹

No clear division

PT/HD suggest that the acceptance of this alternative “masthead lights” test means “*there is no longer a clear visual division*” between a head-on situation in which Rule 14 applies, and a crossing situation in which Rule 15 applies. We understand them to mean that with the “both sidelights” test there is such a clear visual - and legal - division: that if one vessel could see both sidelights of the other ahead or nearly ahead then the situation is head-on but if she could only see one sidelight of the other then the situation is crossing.

This is not correct however. Consider again, the example of two vessels approaching on exactly reciprocal courses involving risk of collision and shaping up to pass starboard to starboard (or port to port), with each vessel seeing only the one green (or red) sidelight of the other. These situations clearly fail the “both sidelights” test but they are not crossing situations. (This is the lacuna that existed under the old, 1960 COLREGS where the ‘head-

³⁵ Rule 23. Vessels of less than 50 metres in length are not obliged to exhibit an after masthead light.

³⁶ COLREGS, Annex 1.9. A sidelight may be visible up to 3° across the bow.

³⁷ *The Kiveli* [2025] EWHC 1185 - at paragraphs 121-126.

³⁸ See Hirst: *Collisions at Sea - Volume 1: Liability and the Collision Regulations* (at pages 134-5, and the diagram on page 330).

³⁹ Rule 14(c).

on' rule, Rule 18, only applied if the "both sidelights" test was satisfied:⁴⁰ see *The Sea Star*.⁴¹ Historically, the "both sidelights" test only provided a visual division between what was and what was not a head-on situation, but even then, this division was not always particularly clear: see, for example, *The Kaituna*.⁴²

PT/HD are right to suggest the key finding in this case "*widens*" the scope for applying Rule 14 but wrong to suggest it "*confuses*" matters. Widening the scope for applying this Rule⁴³ removes this lacuna and some of the uncertainties which existed before with the "both sidelights" test, thereby reducing the risk of conflicting actions. Admittedly, there is still some room for confusion - doubt - but this is covered now by Rule 14(c).

As this is the first collision case in which the English court has found that Rule 14 applied there is currently no clear legal division between a head-on situation and a crossing situation. As the body of case law on the application of Rule 14 increases however, the legal division will become clearer. We doubt however, that there will ever be a simple answer to the "*obvious question*" posed by PT/HD as that answer will vary with the facts of every case. At the margin we believe the legal division will still be somewhat blurred, as it always has been.⁴⁴

SECTION 2: CONSISTENT WITH THE TRAVAUX PREPARATOIRES?

In this section PT/HD set out why, in their opinion, the key finding in this case "*appears to go against the intentions of the drafters of Rule 14, as per the travaux preparatoires*". They begin by setting out the wording of the old 'head-on' rule, Rule 18.⁴⁵ They then refer to Bryan J's finding in this case that the express requirement in this old rule for the "both sidelights" test to be satisfied "*was dropped*" when Rule 18 was replaced by Rule 14; a finding which, they believe, "*highlights the significance of the travaux in considering if the previous application of Rule 18 was intended to be dropped.*" They then go on to discuss the travaux in the context of the three constructional issues involving Rule 14 which Bryan J addressed in this case (see above), and which, in their opinion, show (essentially) that the drafters only intended for Rule 14 to apply in situations where the "both sidelights" test is satisfied.

⁴⁰ *The Kiveli* [2025] EWHC 1185 - at paragraph 119.

⁴¹ [1976] 1 Lloyd's Rep.115; [1976] 2 Lloyd's Rep.4777 (Court of Appeal).

⁴² [1933] 46 Ll.L.Rep.200

⁴³ See also, Section 2.

⁴⁴ Under earlier versions of the COLREGS there were 'rules of thumb' (only) as to when the courses of the two vessels might be considered nearly reciprocal, and when the bearing of other vessel could be considered nearly ahead.

⁴⁵ 1960 COLREGS.

Old Rule 18

It should be noted that the old Rule 18 contained two separate tests: one which applied by day; and the “both sidelights” test which applied by night. In order for this Rule to apply by day each vessel had to be able to see *“the masts of the other in a line, or nearly in a line, with her own.”*

It should also be noted that what was “*dropped*” when Rule 18 was replaced by Rule 14 was the express requirement for the “both sidelights” test to be satisfied at night in order for the situation to be head-on. That there is no longer any such express requirement is clear from the wording of Rule 14. Bryan J did not find that this test should be dropped, only that a head-on situation can now also exist and Rule 14 can apply when this test is not satisfied. Clearly, when this test is satisfied the situation will be deemed to be head-on⁴⁶ and Rule 14 will apply.

Development of Rule 14

We do not have access to the travaux and our comments which follow are based entirely on those travaux which PT/HD have referenced in their paper.

In summarising these travaux PT/HD assert that *“it is safe to say that the drafters of Rule 14 did not intend to widen the application of the head-on situation beyond scenarios in which both vessels could see both sidelights, even if a vessel is only able to use a transit of masthead lights to determine aspect.”*⁴⁷ We disagree.

As PT/HD note, the drafters of Rule 14 considered that *“the principle of Rule 18 should be maintained but the present text should be shortened and simplified so far as possible.”* We believe the “principle” being referred to here, is the requirement for an express rule which applies when two power-driven vessels are meeting head-on, and that the scope of this rule should be modelled on the old Rule 18. We say “modelled on” because the exact scope of Rule 18 was considered too uncertain as the referenced travaux indicate.⁴⁸

The current wording of Rule 14 was finally agreed after some two years of discussion. As Bryan J noted in this case, the structure of this Rule is such that Rule 14(a) now defines a head-on situation; Rule 14(b) is a deeming provision containing the visual tests designed to help mariners determine when such a situation exists; and Rule 14(c) is a direction to

⁴⁶ Rule 14(b).

⁴⁷ In the context of the “and/or” issue of construction.

⁴⁸ The Netherlands considered Rule 18 lay *“too much emphasis on the cases where it does not apply”* and that *“it should state more explicitly the cases where it does apply”*; and the USSR noted that *“There is no clear limitation as to the application of Rule 18”*.

mariners that when in doubt they should assume the situation is head-on. The key points to note and where Rule 14 differs from the old Rule 18 are:

The Definitional Issue: Paragraph (a)

1. The requirement for the two vessels to be “*meeting end on or nearly end on*” in Rule 18 has been replaced by the requirement for them to be “*meeting on reciprocal or nearly reciprocal courses*”.
2. The express provision in Rule 18 that the head-on rule “*does not apply to two vessels which must, if both keep on their respective course, pass clear of each other*” - in particular, that it does not apply “*by night, to cases where the red light of one vessel is opposed to the red light of the other or where the green light of one vessel is opposed to the green light of the other or where a red light without a green light or a green light without a red light is seen ahead, or where both red and green lights are seen anywhere but ahead*” - has been dropped. This could be because Rule 18 was criticised for putting “*too much emphasis on the cases where it does not apply*”,⁴⁹ but it could also be because the drafters intended that Rule 14 should apply in these situations (that is, to situations in which the “both sidelights” test is not satisfied) provided the two vessels are on reciprocal or nearly reciprocal courses involving risk of collision.

The “and/or” Issue: Paragraph (b)

1. The separate test which applied by day in Rule 18 has been re-worded so as to apply at night by replacing the reference to “*the masts of the other*” with “*the masthead lights of the other*”.
2. The use of the words “*and/or*” suggests the drafters intended for this to remain a separate and additional test for determining whether or not the situation is head-on; and this would have to be so if (as we believe) the drafters intended that Rule 14 should also apply to the situations described above which do not satisfy the “both sidelights” test.
3. We would be very surprised if the member States and the drafters of this Rule were unaware of the ordinary and natural meaning of these words and the effect of this amendment. PT/HD found “*no notes [i.e. travaux] to explain*” the reason for it, as would be expected if its effect was not fully understood or considered unacceptable, and especially in circumstances where, as PT/HD note, until this amendment was accepted “*all suggestions and Committee meeting iterations only referred to sidelights to determine whether a head-on situation existed*”.

⁴⁹ *ibid.*

The “a vessel” Issue

As noted above, this issue only arose in this case because of Teare J’s comments in *The Apollo* case and the way he wrongly interpreted this Rule. This issue does not arise if this Rule is properly interpreted in the way we believe the drafters intended and for the reasons Bryan J set out in this case.

Significance of the travaux

In Section 1 of their paper PT/HD refer to the English Supreme Court’s decision in *JTI Polska SP z o o v Jakubowski*⁵⁰ and state that “the court can use the travaux as an aid to construction where they either “clearly and indisputably point to a definite legislative intent” or in any event, confirm the meaning under article 31 of the Vienna Convention⁵¹.” This statement however, is misleading. The use of the travaux as an aid to construction is set out in article 32 of the Vienna Convention which provides:

“Recourse may be had to supplementary means of interpretation, including [the travaux]... in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or*
- (b) leads to a result which is manifestly absurd or unreasonable.”⁵²*

Article 31 of the Vienna Convention is headed “General rule of interpretation” and provides:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose....”

In *JTI Polska SP z o o v Jakubowski* the Supreme Court explained the “structured approach” to the interpretation of treaties established by these two articles⁵³ noting that:

“32 The use of supplementary material [e.g. the travaux] to confirm a meaning is not subject to the restrictions set out in article 32(a) and (b). They only apply when the material is relied upon to determine the meaning...”

We question therefore, whether there was any scope or requirement for the court to have recourse to the travaux in this case in order to interpret the wording and application of Rule 14. This is especially so in circumstances where Bryan J found the ordinary meaning of the words to be clear; and (we believe) his interpretation promotes the object and purpose of

⁵⁰ [2023] 2 Lloyd’s Rep.64

⁵¹ The Vienna Convention on the Law of Treaties, 1969.

⁵² *ibid*, Article 32.

⁵³ [2023] 2 Lloyd’s Rep.64 - at paragraphs 26-32

the COLREGS⁵⁴, does not leave the meaning of Rule 14 ambiguous or obscure, and does not lead to an absurd or unreasonable result. In any event, any supposed ambiguity can only relate to the meaning of the words “and/or” in Rule 14(b) about which PT/HD were unable to find any travaux; and which we believe Bryan J interpreted properly and as the drafters intended.

Wider application

This, we believe, is PT/HD’s main concern about this case. They “*have no issue*” with Bryan J’s finding that Rule 14(b) contains two separate visual tests (i.e. the “both sidelights” test and the “masthead lights” test) “*provided the limit of when masthead lights being “nearly” in line [i.e the “masthead lights” test] is not widened beyond the arcs of the sidelights*” as otherwise “*it removes the clear focus by the drafters of Rule 14 on the requirement of seeing both sidelights.*”

We believe the point which PT/HD are trying to make is this: that (1) Rule 14 can apply when one or both vessels actually sees the other ahead or nearly ahead and her masthead lights in a line or nearly in a line but only one (or neither) of her sidelights; but (2) only provided the relative positions and courses of the two vessels at the time when risk of collision first arises are such that *both* vessels “*could see*”⁵⁵ (that is, would theoretically be able to see) both sidelights of the other assuming the visibility, range, and intensity of these lights so allowed. If this was the drafters intention however, there would be no need to include the “masthead lights” test and we believe Rule 14(b) would have been worded accordingly.

It is clear from PT/HD’s comments that they believe a head-on situation should only exist if the relative positions of the two vessels are such that each could see both sidelights of the other; that is, when each vessel is bearing within 3° of bow of the other. This is PT/HD’s interpretation of the “both sidelights” test, which we shall refer to as the “within 3° on the bow” test, and which we discuss below in our comments on Section 3 of their paper.

⁵⁴ The object and purpose of the COLREGS is to “*maintain a high level of safety at sea*” and Bryan J’s interpretation of Rule 14 removes a lacuna which existed under the 1960 COLREGS and reduces the risk of conflicting actions : see our earlier paper “*The Head-on Rule, Rule 14 and the FMG Sydney / MSC Apollo Collision*”.

⁵⁵ The words used in Rule 14(b).

SECTION 3: PRACTICAL IMPLICATIONS AND CONCLUSION

In this, the final section of their paper, PT/HD examine the nautical assessor's comments in answer to the questions put to him by Bryan J in this case and explain why they believe their interpretation of Rule 14 is to be preferred.

Nautical Assessor's Answers

PT/HD consider Bryan J placed significant reliance in this case on the statements the nautical assessor made in answering questions 2 and 3; that at C-22 when the two vessels were both in sight of one another and risk of collision existed:

1. both vessels were then "*within reasonable tolerance of being considered to be on reciprocal or nearly reciprocal headings*"⁵⁶; and
2. both vessels could see the other "*ahead or nearly ahead*".⁵⁷

[Although PT/HD do not expressly mention it, the nautical assessor also said, in answer to question 4, that at this time "*each vessel would have seen the masthead lights of the other vessel to be in line or nearly in line*".]

PT/HD consider these statements were "*perhaps too subjective*" as they were (so they assert) "*based on his general safe practical application rather than referring to the arcs of navigation lights that he referred to earlier*." Obviously, his answers were subjective in that they represented his own views. As with the answers of all nautical assessors however, they are (usually) relied upon by the court because they are considered to be statements of good seamanship practice; that is, they represent what might be said to be the general understanding of mariners. In this case the nautical assessor was well aware of the cut-off limits for sidelights,⁵⁸ and in making these statements he was not only expressing his own view but also what he believed to be the view of mariners generally.⁵⁹

In support of their assertion PT/HD highlight what the nautical assessor said in answer to question 8: that "*... a reasonably competent mariner, taking a practical view of the*

⁵⁶ The Nautical Assessor used the word "heading" to mean CTW and in order to differentiate CTW from COG - see *The Kiveli* [2025] EWHC 1185 - Answer to Qn.2 (at page 86).

⁵⁷ Both vessels were bearing within 5° of the other's bow at this time and were so from C-30 until about C-16 -see *The Kiveli* [2025] EWHC 1185 - Answer to Qn.3 (at page 88).

⁵⁸ He referred to them in his answer to question 2, noting that "*the precise cut off of angle of these vessels within that 1 to 3 degree range are unknown and therefore the data can only be indicative*."

⁵⁹ *ibid*. He reached this conclusion "*From the data provided and my experience of how I believe such visual observations would be interpreted [i.e. by other mariners] in the circumstances ...*"

circumstances would conclude that the safest deduction was to assume that this was a head on situation.” This, according to PT/HD, “is the language of doubt found in Rule 14(c)” and they refer again to their purported distinction between situations when Rule 14 will “factually or legally” apply under Rules 14(a) and 14(b), and when it will apply under Rule 14(c) because one or both of the two vessels is in doubt.⁶⁰

The nautical assessor was not in any doubt that this was a head-on situation as his answers to questions 2 and 3 (above) demonstrate. The *Afina I* had concluded the situation was head-on but the *Kiveli* had concluded the situation was crossing, and we believe the purpose of this question was to find out what conclusion a reasonably competent mariner would have reached on the facts of this case. The nautical assessor’s answer to this question indicates that both vessels, and the *Kiveli* in particular, should have assumed the situation was head-on; that practically, this was the safest conclusion to reach and the one which a competent mariner would have reached on the facts. When addressing this issue in his judgment, Bryan J said:

“234. The next issue that arises is whether, at the time when a risk of collision arose, the situation was a head-on situation (Rule 14) or a crossing situation (Rule 15). I am in no doubt whatsoever, that when the risk of collision arose at 05:39 (C-22) (and continuing thereafter) the situation was a head-on situation and Rule 14 applied. As addressed below, this is consistent with the advice of [the nautical assessor] (at Answer 8) which I accept.”

It is clear from his judgment Bryan J was in no doubt that factually and legally the situation was head-on because the facts satisfied both Rules 14(a) and 14(b);⁶¹ but that if there was any doubt this, which he did not consider there was, “each vessel should have assumed that [a head-on situation] *did exist*” in accordance with Rule 14(c).⁶² He also went on to find that the *Kiveli* “was mistaken in considering the situation to be a crossing situation.”⁶³

As we have said, we do not believe PT/HD’s purported distinction between situations when Rule 14 will “factually or legally” apply under Rules 14(a) and 14(b), and when it will apply under Rule 14(c) because one or both of the two vessels is in doubt, is particularly helpful or appropriate. Either Rule 14 applies to the particular situation or it does not. A situation can arise in which a mariner may harbour doubts about whether or not it is head-on, but he is then to assume that it is head-on and that Rule 14 does apply; and provided the court finds his doubts were reasonable in all the circumstances we believe it will (and should) go on determine that the situation was head-on and that Rule 14 applied; i.e. that Rule 14 factually *and* legally applied. As Bryan J said in this case:

⁶⁰ See our commentary on Section 1 of PT/HD’s paper.

⁶¹ *The Kiveli* [2025] EWHC 1185 - at paragraphs 237; 238.

⁶² *ibid* - at paragraph 239.

⁶³ *ibid* - at paragraph 250.

"187. I also reject the suggestion made by KIVELI, that if Rule 14(c) is engaged this does not mean that this is a "head on" situation and merely compels the vessel in doubt to act accordingly (and the other vessel to do nothing). That suggestion is contrary to the whole structure of Rule 14. Rule 14 bears the heading "Head-on situation" (which is then defined in Rule 14(a) and deemed in Rule 14(b)) and requires both vessels to act, whilst Rule 14(c) requires an assumption to be made that "such a situation" exists. All of sub-paragraphs (a), (b) and (c) are within the rubric of Rule 14 (a "Head-on situation" per the Rule's heading). The point is in any event, somewhat academic for if one vessel is in any doubt the overwhelming likelihood is either that the other vessel will consider that it is a Rule 14(a) or a Rule 14(b) situation or like the first vessel will be in doubt and so too will be within Rule 14(c). On any such permutation each vessel shall alter her course to starboard...."

The "within 3° of the bow" test

PT/HD note⁶⁴ that if a vessel "sees another vessel within 3° either side of right ahead, showing masthead lights in line or nearly in line and/or both sidelights, then the other vessel, looking out of their window, will see the same aspect." They then go on to assert⁶⁵ that "the limits of seeing both sidelights is the clearest and simplest method of determining when a head-on situation exists for almost all power-driven vessels..." We have several issues with this.

Firstly, we do not believe the drafters intended Rule 14 to be of such limited application (see above). If that was their intention then we believe they would have worded Rule 14(b) more precisely.⁶⁶ Secondly, sidelights are required to "reach practical cut-off between 1° and 3°"⁶⁷ so a vessel cannot be absolutely sure, even in these situations, that the other vessel is actually seeing the same aspect.⁶⁸ Thirdly, with this construction the scope⁶⁹ of "nearly reciprocal" courses is limited to situations where the courses of the two vessels do not differ by more than 6°. ⁷⁰ Vessels on such courses however, can be meeting with risk of collision when one is bearing up to 6° on the bow of the other⁷¹ (and more with risk of collision

⁶⁴ In Section 2 of their paper.

⁶⁵ In this, Section 3 of their paper

⁶⁶ e.g. by replacing "ahead or nearly ahead" with "bearing directly ahead or within 3° either side thereof".

⁶⁷ COLREGS, Annex 1.9

⁶⁸ As PT/HD acknowledge in their paper.

⁶⁹ Before any allowance for doubt e.g. where the vessels are yawing and their aspects are not steady.

⁷⁰ See Hirst: *Collisions at Sea - Volume 1: Liability and the Collision Regulations* - at page 134. PT/HD acknowledge this in their paper.

⁷¹ *ibid* - at pages 138-139.

properly construed).⁷² Such situations meet the definition in Rule 14(a); and as *Farwell* notes,⁷³ the wordings of Rules 14(a) and 14(b) when read together, “*suggest that a vessel should be considered to be nearly ahead if she is within ... five or six degrees of the bow.*” With this test however, Rule 14 will only apply to those of these situations where the bearing is 3° or less on the bow. Fourthly, where the minimum safe passing distance in clear visibility and open waters is at least 0.5 miles,⁷⁴ then in situations where the two vessels are meeting on exactly reciprocal courses involving risk of collision albeit shaping up to pass starboard to starboard (or port to port), each vessel will only have the other bearing within 3° of her bow at ranges in excess of 9.5 miles (round figures).⁷⁵ Rule 14 would then apply therefore, if the two vessels came in sight of one another at a range of more than 9.5 miles, but would not apply if they came in sight of one another at closer ranges and notwithstanding the situation has not changed.

PT/HD cite again, the point they raised in Section 1 of their paper: that as most all power-driven vessels carry sidelights but significantly fewer are obliged to carry two masthead lights, this test (i.e. their interpretation of the “both sidelights” test) is to be preferred. They believe the decision in this case has caused a “disparity” to now exist “*between vessels above and below*” 50 metres in length “*applying Rule 14*”. As we have noted, Rule 14 applies to all power-driven vessels which are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision; and the same visual tests in Rule 14(b) are to be used by all such vessels. There is therefore, no disparity in the application of this Rule and the visual tests to be applied. Rather, we believe the disparity and the point which PT/HD are trying to make, is that as a result of the decision in this case a situation which could now be considered head-on for vessels over 50 metres in length may not be considered head-on for vessels less than 50 metres in length. But is there really any such disparity? And if there is, does it matter?

In this case Bryan J determined that Rule 14(a) defines a head-on situation whilst Rule 14(b) is only a deeming provision and the visual tests therein do not have to be satisfied in order for Rule 14 to apply. Accordingly, a head-on situation will exist whenever two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision, irrespective of their lengths overall - whether they are displaying one or two masthead lights - and what lights of the other vessel they can see. We question therefore, whether there is really any such disparity.

Obviously, a vessel cannot apply the “both masthead lights” test if the other (approaching) vessel is only displaying one masthead light. In these circumstances the vessel must

⁷² i.e. to include situations where the closest point of approach (“CPA”) is greater than zero.

⁷³ At page 383 (8th Edition).

⁷⁴ Bryan J found this was the minimum safe CPA in *The Kiveli* (at paragraph 129).

⁷⁵ Range = CPA (0.5 miles) / sin (bearing) = CPA/ cos (90° - bearing)

necessarily place greater reliance on the “both sidelights” test when deciding whether the situation is head-on or crossing. This does not mean however, that the situation will only be head-on if this test is satisfied and the vessel can see both sidelights of the other.⁷⁶ The vessel may still consider the situation to be head-on even though she can only see one sidelight of the other, and especially (we believe) in circumstances where the other vessel is bearing within 6° of right ahead and is on a course which is within 6° of reciprocal.⁷⁷ At the very least, she may harbour doubts in such circumstances and consider the situation to be head-on pursuant to Rule 14(c).

It is also possible of course, that a vessel in these circumstances will only consider the situation to be head-on if she *can* see both sidelights of the other; and PT/HD question how this case would have been decided if the *Afina I* had been under 50 metres in length. For the reasons we have set out we believe the decision would have been the same. We accept however, that in another case in similar circumstances albeit involving a vessel of less than 50 metres in length displaying only one masthead light, there could be scope for the English court to decide the situation was not head-on but crossing. But even if it were to so decide we question whether the disparity between such a decision and the decision in this case would matter. We say that because all collision cases are fact sensitive and we believe the disparity between the decisions could properly be said to reflect the disparity between the facts. This is the reason why we believe the exact boundary - the precise visual and legal division - between a head-on situation and a crossing situation will always be somewhat blurred.

CONCLUSION

PT/HD conclude their paper by noting that the travaux “*suggest that [the application of Rule 14] is all about the sidelights*” and in their view, the travaux “*support the view taken by Teare J in The Apollo and go against Bryan J’s finding in The Kiveli.*” For the reasons we have set out in this paper however, we do not agree with their interpretations of Rule 14 and the travaux, and with their conclusion.

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⁷⁶ Rule 14(b) is only a deeming provision.

⁷⁷ See Hirst: *Collisions at Sea - Volume 1: Liability and the Collision Regulations* - at pages 128-147.

