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To: Transport Industry Operators

Which ship to blame?

The High Court of Hong Kong issued a Judgment on 26/8/2011 to determine which ship to blame in a collision case that occurred at Shanghai. [HCAJ 200/2007]

On 30/11/2007 the vessel "Pontodamon" and the vessel "He Da" collided at around 2125 hours in the port area of Shanghai. At the time the sky was overcast, but visibility was good for some 12 nautical miles. The sea was slight to moderate and there was a force 3 or 4 wind blowing in a north-easterly direction. The Pontodamon is a gearless, Panamax-sized bulk carrier of 38,684 gross tonnes. She is powered by a single diesel engine and has a single screw propeller with rudder. She is 224.95 metres in length with a beam of 32.24 metres. At the relevant time, she was in the course of leaving Shanghai port. She was in ballast, with drafts of 4.82 metres forward and 7.23 metres aft. The He Da (now named Lucky Nine) is a general cargo vessel of 4,083 gross tonnes. She is powered by 2 diesel engines. She has a twin screw propeller and rudder. She is 98.5 metres in length with a beam of 16.8 metres. At the relevant time, she was laden with a cargo of steel coils. She had drafts of 5.3 metres forward and 6.1 metres aft. As a vessel, the He Da was more maneuverable than the Pontodamon.

The evidence before the Court included 7 screen shots from the Shanghai Vessel Traffic Service (VTS). Both vessels' coordinates as shown on the VTS information derived from the AIS transmissions of the 2 ships between about 2115 and 2124. The VTS information indicated that, in the 10 minutes before the accident, the Pontodamon was in the No.2 anchorage to the south of the B2 traffic lane of the Shanghai port area and heading roughly eastward. The VTS information also suggested that the Pontodamon was drifting gently southwards, as it was heading east, in the direction of Shanghai port's C2 traffic lane. The Pontodamon was proceeding at a speed of about 16 knots. In relation to the He Da, the VTS information indicated that the vessel was heading in a south-westerly direction just skirting the edge of the C2 traffic lane. The He Da was proceeding at a speed of between 6 to 7 knots.

Had both vessels proceeded along the directions and at the speeds just mentioned, there would have been no collision. The vessels would simply have passed very close to each other (i.e. within a clearance of about 5 cables). But both vessels altered course in the minute or so before the collision. At around 2123 the Pontodamon turned 10 degrees to port. According to her master (Captain Zakkour) this was done, on the assumption that the He Da would be continuing along its heading at the same speed, so that there would be a greater clearance between the 2 vessels when they passed. Unfortunately, at almost the same time as the Pontodamon turned to port, the He Da turned to starboard. This was done, according to the latter's master (Captain Ma), to avoid hitting the Pontodamon on the assumption that ship would continue proceeding as she had been.

The collision occurred when the He Da's port bow made contact with the Pontodamon's starboard side shell plating. Both vessels were then oriented in a roughly northern heading with an angle of about 45 degrees between them.

Both parties alleged that, immediately before the accident, they each tried to contact the other repeatedly through the use of VHF, Aldis lamp, and whistle signals. Both parties claimed that their attempts at communication were in vain and that the other side failed to respond.

Captain Zakkour said that he decided to turn 10 degrees to port after he saw the He Da crossing the Pontodamon's bow. When he gave the order to turn to port, 25% of the He Da had crossed the Pontodamon's bow. Having given the order to turn to port, Captain Zakkour went to the starboard side of the bridge to observe the Pontodamon passing the He Da. He expected that the He Da would be continuing along her course.

But to his surprise, the He Da suddenly turned to starboard. Captain Zakkour then caused the Pontodamon to veer more sharply to port in an effort to avoid collision.

Captain Ma denied that the He Da had crossed the Pontodamon's bow before the He Da started to turn to starboard. When he then observed the Pontodamon suddenly turning to port, Captain Ma said that he stopped the He Da's engines and went full astern. Captain Ma further stated that "at about 2115" he was called from his cabin by the He Da's Third Officer. The Third Officer informed Captain Ma that there was a vessel heading towards the He Da. Having joined the Third Officer on the bridge, Captain Ma asked the Third Officer what action the latter recommended. The Third Officer suggested turning 10 degrees starboard to avoid collision. Captain Ma thereupon ordered the Third Officer to turn 10 degrees starboard "immediately".

The parties accepted that the VTS information provided the best evidence of the positions of the 2 ships as well as their courses and speeds in the minutes before the collision. But both parties cautioned against the Court treating the VTS information as absolutely accurate and definitive. This is because the plots obtained from the VTS information, even if done with the sophisticated software available today, will inevitably still be subject to margins of error.

The plots derived from the VTS information did not absolve the Judge from evaluating the credibility of the oral evidence from both masters of the circumstances of the collision. Nonetheless, the VTS information could assist the Judge as a touchstone against which to test the reliability of the witness evidence which the Judge had heard.

The International Regulations for Preventing Collisions at Sea 1972 (COLREGS) (as promulgated in Cap.369N) govern the manner in which vessels should navigate to avoid collisions. In COLREGS terms, the Pontodamon was the "stand-on" vessel, while the He Da was the "give-way" vessel.

In trying this case, the Court had the benefit of sitting with Captain John Simpson, Master Mariner, as nautical assessor. The Court recorded its gratitude to Captain Simpson for his expert advice on questions of a nautical nature arising in the course of trial.

The Judge was impressed by Captain Zakkour as a witness. Captain Zakkour's witness statement deposed that the Pontodamon was heading eastwards in the B2 traffic lane immediately before the collision. But at trial he accepted in light of the VTS information that the Pontodamon was actually to the south of the B2 lane (i.e. within the no.2 anchorage) moving eastward roughly in parallel to the B2 traffic lane. Captain Zakkour explained that he did not enter the B2 traffic lane because, when the Pontodamon dropped off the pilot at the station to the south of the B2 lane, the pilot had suggested to him that the Pontodamon should simply head eastward along the no.2 anchorage in a direction parallel to the B2 lane. According to Captain Simpson, who has had personal experience as a pilot, it is common practice for pilots to suggest that, in order (say) to avoid other ships in a congested lane, a vessel might not immediately enter a traffic lane but proceed in a relevant direction outside the lane. The Judge accepted Captain Simpson's evidence on this matter as supporting Captain Zakkour.

The He Da's owners noted that Captain Zakkour's report to the Shanghai Maritime Safety Agency (MSA) stated that, just before the collision, the Pontodamon was moving within the B1 and B2 traffic lanes. The report to the MSA also stated (wrongly) that the collision occurred in B2. Captain Zakkour replied that his report (made 3 days after the collision) was prepared in a rush before all details relating to the collision could be ascertained. It therefore should not be regarded as accurate in every respect, having been prepared in the heat of the moment. The Judge accepted Captain Zakkour's explanation for his report. In this respect, the Judge did not think that there was any reason to doubt Captain Zakkour's evidence that, before the collision, the Pontodamon was on a heading of 088 degrees.

The Judge was unable to infer from the Pontodamon's southward drift while proceeding eastwards that her crew were not keeping a proper look out.

The He Da's owners also queried Captain Zakkour's evidence in relation to unsuccessful attempts by the Pontodamon's crew to contact the He Da by VHF signal, Aldis lamp and whistle blast. But the Judge saw no reason to reject that evidence.

In any event, Captain Zakkour's evidence on the matter was itself qualified. He did not say that he gave every signal which might conceivably be required by COLREGS. For instance, Captain Zakkour accepted that, immediately before the Pontodamon steered 10 degrees to port, he did not order 2 short whistle blasts to be

sounded to indicate that the Pontodamon would be so turning. He did not do this, because to his mind, all he was doing at that stage was to ensure that there was a safer clearance between his vessel and the He Da. He had assumed (wrongly as it turned out) that, not having responded to the Pontodamon's previous attempts at communication by VHF signal, Aldis lamp and whistle blast, the He Da would continue at its then course and speed. On such assumption, he reckoned it would be pointless (and possibly confusing) to inform the He Da that the Pontodamon was turning to port.

The Judge further accepted Captain Zakkour's evidence to the effect that the He Da had crossed the Pontodamon's bow before he decided to turn 10 degrees to port. By the time that the Pontodamon was executing the 10 degree turn to port, 25% of the He Da had crossed the Pontodamon's bow. Captain Zakkour's evidence on this matter was corroborated by revised Plot 3 (adduced on behalf of the Pontodamon based on the VTS information). Revised Plot 3 indicated that the He Da crossed the Pontodamon's bow at about 2123 hours.

In contrast, the Judge did not regard Captain Ma as an impressive witness. The Judge's difficulty arose out of Captain Ma's repeated and adamant evidence at trial that at about 2115 he instructed his Third Officer to turn immediately 10 degrees to starboard. According to Captain Ma, at that time (about 2115) he had visually assessed the Pontodamon to be 5 nautical miles away. But the VTS information plainly showed that, from 2115 to just before the collision, the He Da never turned 10 degrees to starboard. From 2115 until just before the collision, the He Da instead proceeded in more or less a straight line along its south-westerly course at about 6 to 7 knots.

The He Da's owners sought to make light of this discrepancy. Captain Ma referred to the time of turning to starboard as "about 2115". The He Da's owners submitted that the turn to starboard being referred to by Captain Ma could have occurred earlier. The VTS information did not cover the period before 2115. But it appeared, on the evidence of the He Da's deck log and working chart, that the He Da altered course to 240 degrees at 2056. At that time the He Da was crossing precautionary area A of the Shanghai port's traffic separation scheme with a view to maneuvering into the C2 traffic lane. Such a 240 degree turn, however, was not the same thing as a 10 degree turn to starboard.

Cross-examined on the matter, Captain Ma did not make much sense. He seemed to be suggesting that the turn at 2056 was the 10 degree starboard turn to which he was referring. According to Captain Ma, because of the "dangerous currents" around precautionary area A, the turn at 2056 had been premature. So, by around 2115, the vessel was back on its former course. That explanation arose more questions than it answered. For instance:-

- (1) How did the course alteration to 240 degrees amount to an "immediate" 10 degree turn to starboard?
- (2) If at 2056 Captain Ma believed that the Third Officer should "immediately" turn 10 degrees starboard to avoid the Pontodamon and if the He Da somehow resumed its previous course despite such action, why did Captain Ma not urgently order the Third Officer to turn 10 degrees to starboard again at (say) 2115 or shortly after?
- (3) Why, for the purposes of avoiding the Pontodamon, was there no turn to starboard by the He Da until the minute or so before collision at 2125?
- (4) Earlier in his oral evidence, Captain Ma had suggested that current was unlikely to affect his vessel by any significant extent as she was laden with cargo. If so, how could Captain Ma suddenly claim that the current in area A significantly affected his vessel?

The He Da is highly maneuverable. Had the He Da executed a 10 degree turn to starboard at around 2115 (when the Pontodamon was still 5 nautical miles away), she would have readily swung out of the Pontodamon's course and easily avoided passing anywhere near the latter ship. From the VTS information, it was plain that no such turn at around 2115 happened. Instead, the He Da merely proceeded on a straight course at a relatively constant speed. It seemed to the Judge therefore that in all likelihood Captain Ma did not order a 10 degree turn to starboard at 2056 or 2115. In all likelihood, he did not order any turn to starboard until the minute or so before the collision.

The Judge's doubts over Captain Ma's evidence on the alleged 10 degree turn meant that the Judge could not accept as reliable his account of what happened in the 10 minutes or so before the collision. For example, an implication of Captain Ma's testimony was that, insofar as he realised at about 2115 that the Pontodamon and the He Da were heading towards each other, he would have ordered an immediate turn to starboard. The fact that no such turn happened suggested that Captain Ma might not actually have realised or known at about 2115 that the 2 ships were heading towards each other. That would suggest that there had been no proper look

out on board the He Da and, in consequence, there might well not have been attempts on the He Da's part to communicate with the Pontodamon. That would also explain why the Pontodamon's attempts at communication with the He Da had no result. In other words, no one might have been properly monitoring the situation from on board the He Da until too late. Otherwise, why was there not the "immediate" turn which Captain Ma repeatedly stressed in Court he thought should have been made in the relevant situation?

For those reasons, the Judge rejected Captain Ma's evidence.

What probably happened was the Pontodamon's crew noticed the He Da at around 2105. The Pontodamon then attempted to contact the He Da to ascertain her intentions. Those attempts proved futile. The He Da continued on her course at a speed of about 6 to 7 knots. Captain Zakkour appreciated that the 2 vessels would not collide if they proceeded at their then current courses and speed. But he also appreciated that, on their then courses and speeds, the passing distance between the 2 ships would be close. The He Da crossed the Pontodamon's bow at about 2123. Captain Zakkour saw this. At that time, Captain Zakkour decided that, to be on the safe side, he would cause the Pontodamon to turn a gentle 10 degrees to port. This (Captain Zakkour thought) would ensure a wider clearance between the 2 vessels. But as the Pontodamon was executing its maneuver to port, the He Da's crew belatedly realised that the Pontodamon was heading very close to their vessel. The He Da then suddenly executed a starboard turn, in all probability by way of a desperate last-minute attempt to pass the Pontodamon on the latter's port side. But that turn to starboard by the He Da was too late. It exacerbated the situation and caused the He Da to run into the Pontodamon.

It followed from the Judge's findings that the He Da should be held wholly responsible for the collision. The He Da's owners had submitted otherwise. But the Judge disagreed with the He Da's owners.

First, the He Da's owners argued that all or most of the blame for the collision should be attributed to the Pontodamon. This was because the Pontodamon put itself in a dangerous position by proceeding in the no.2 anchorage area, rather than the B2 traffic lane. In short, the Pontodamon was travelling where it ought not to have been.

Assume for the sake of argument that the Pontodamon should have been in lane B2. Even then, the Judge did not think that the Pontodamon's presence in the no.2 anchorage was causative of the collision. The He Da should have spotted the Pontodamon from at least 5 nautical miles away. At that distance there was more than ample time, and the He Da was sufficiently maneuverable, for the He Da to steer clear out of the Pontodamon's way. There was enough time for the He Da as the give-way vessel to avoid a collision.

Second, the He Da's owners argued that the Pontodamon was moving too fast. The He Da's owners originally suggested that the Pontodamon should have been moving at a speed of 7 knots. But Captain Simpson pointed out (and the Judge accepted) that such a speed would have been far too slow. The He Da's owners later revised her suggested speed to 11 knots. Captain Simpson's view on this was that 11 knots was an acceptable speed. But this did not mean that 16 knots was an unreasonable speed. Given the good visibility and given the presence of slower fishing vessels in the vicinity, Captain Simpson did not think that 16 knots was an unreasonable for the Pontodamon. If anything, a speed of 16 knots would enable the Pontodamon to overtake slow fishing vessels and to make clear her intention to proceed out of the port area as soon as practicable.

COLREGS r.17(a)(i) provides that, where one vessel (the give-way vessel) is to keep out of the way, the other (the stand-on vessel) shall keep her course and speed. That was precisely what the Pontodamon (as the stand-on vessel) did. It was for the He Da to give way, if necessary by slowing down or altering her course. See COLREGS r.16 which states that the give-way vessel shall, so far as possible, take early and substantial action to keep well clear.

Third, the He Da's owners said that the Pontodamon failed to take early action. But as the stand-on vessel it was for the Pontodamon to maintain her course and speed. Further, any other action by the Pontodamon might have been confusing. The He Da would not have known whether the Pontodamon was intending to proceed (as the Pontodamon was bound to do under COLREGS r.17) or to give way.

Fourth, the He Da's owners submitted that the Pontodamon wrongly veered to port in violation of COLREGS r.17(a)(ii) and (c). The former sub-rule provides that a stand-on vessel may (not must) take action to avoid collision. But the latter sub-rule qualifies this. If the circumstances of the case admit, the avoidance action taken by the stand-on vessel should not involve altering her course to port for a vessel on her own port side.

The Judge did not think that the Pontodamon violated the sub-rules cited by the He Da's owners. When the Pontodamon veered to port, the He Da had crossed the Pontodamon's bow and 25% of the He Da was to the starboard side of the Pontodamon. In other words, at the time of the Pontodamon's maneuver, the He Da was no longer just to the Pontodamon's port side.

Fifth, the He Da's owners submitted that the Pontodamon failed to give adequate warning before executing its maneuver to port. For instance, the Pontodamon did not give 2 short whistle blasts before turning to port.

But, on the Judge's findings, the Pontodamon attempted to contact the He Da by VHF, lamp and sound signals. It is true that the Pontodamon did not sound 2 short whistle blasts before turning to port. That was justifiable in the circumstances. Captain Zakkour reasonably inferred from the He Da's failure to give way that the latter ship would simply proceed in the same direction and at the same speed. Captain Zakkour was only turning to port to ensure sufficient clearance. The Judge therefore did not think that the failure to make 2 short whistle blasts before the 10 degree port turn constituted a source of blame.

Sixth, the He Da's owners suggested that the He Da had limited options to avoid collision. The starboard side of the He Da was close to the western fringe of the C2 traffic lane (where there were some vessels) and there was an overtaking vessel to port.

But the Judge was not persuaded by this submission. Taken at face value, Captain Ma's evidence implied that the He Da could have turned (and allegedly did turn) to starboard when the 2 vessels were still about 5 nautical miles apart. On the assumption of a proper lookout on the He Da, the thrust of Captain Ma's evidence was that there was more than enough room and time to maneuver the He Da to starboard and avoid a collision at that point. Further, it was unclear why any overtaking vessel to the He Da's port side should pose a real difficulty. COLREGS r.13(a) provides that an overtaking vessel shall keep out of the way of the vessel being overtaken. Assume that the He Da was for some reason minded to turn to port to avoid collision with the Pontodamon. In such circumstance, the He Da could have signalled that intention to the overtaking vessel. It would then have been for the overtaking vessel to keep clear of the He Da as required by COLREGS r.13(a). The bottom line was that the He Da ought to have given way by turning to starboard much earlier than she actually did. The He Da did not turn starboard at an earlier stage, although it had sufficient opportunity to do safely. The He Da only turned to starboard after crossing the Pontodamon's bow. By then, it was too late and dangerous for the He Da to turn to starboard.

The He Da was wholly to blame for the collision. There would be judgment on liability against the He Da's owners in favour of the Pontodamon's owners accordingly. There would be an Order Nisi that the He Da's owners pay the Pontodamon's owners' costs of this action in relating to the question of liability. Such costs would include the costs of the trial on liability. The quantum of the Pontodamon's owners' loss and damage remained to be assessed. The parties were to agree directions for the assessment of quantum and for the further conduct of this action.

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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