MAY 2021 - ICS Examiners Report

LEGAL PRINCIPLES IN SHIPPING BUSINESS (LPSB)

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Overall Comments

Overall the standard displayed was fair, given the objectives of the examination, with students displaying competence in identifying legal problems.

Both the essay and problem type questions were answered reasonably well by a large number of students, with a clear and well-informed presentation from a significant number of students. A preference towards essay-type questions was evident. Legibility and tidiness were fair in the majority.

Comments on individual questions are as follows:

Question 1 – Agency

A quite reasonably answered question.

Breach of warranty of authority: A common error was to omit to state to whom the agent would be liable for this breach.

Irrespectively of whether the shipbroker knew or not that his/her authority was withdrawn by the shipbroking firm, such shipbroker would be liable for impliedly warranting to the third party that his/her authority existed at the time; *Yonge v. Toynbee* [1910] 1 K.B.215.

Provided that the ship owning company or its director did not know of shipbroker's lack or withdrawal of authority, the contract still binds the shipbroking firm.

Clearly, an employer/principal, such as the shipbroking firm, who dismisses or withdraws the employee's/agent's authority, should notify this dismissal/withdrawal to all third parties who have dealt or are likely to deal with the agent.

On the facts, the shipbroking firm has not notified the ship owning company's director of the shipbroker's lack of authority, and therefore are likely to be bound by the contract for the crude oil fixture entered on their behalf.

Furthermore, the shipbroking firm held out the shipbroker by allowing him/her to be present in their premises, and thereby to make the ship owning company's director rely on that fact. Ostensible/apparent is the "authority of an agent as it appears to others"; *Hely-Hutchinson v. Brayhead Ltd.* [1968] 1 Q.B.549, 593, C.A.

Answers would have been awarded full marks, if identified that the instructions given by shipowners to shipbroker allowed some discretion, i.e., to use reasonable skill and diligence to make the fixture "at any price up to £110 per tonne". In practice, this would mean, that shipowners should not insist under the wrong impression that their vessel

Question 2 – Freight/Demurrage/Seaway Bills

A well answered question overall.

Question 3 – Letters of Indemnity

A well answered question overall, with students achieving high marks.

With regards quantity statements, it would be particularly inadvisable for a letter of indemnity to be used. This is because of Art.III Rule 5 of the Hague-Visby Rules, which is an indemnity by the shipper to the carrier relating to the number, quantity, figures, etc., which would make the burden of proof that the carrier acted fraudulently even lighter for the claimant/receiver/consignee/endorsee, as well as the shipper who gave the letter of indemnity to the carrier! This would mean, that a Court/arbitration panel should not even hear the carrier's "claim" under such a clearly fraudulent agreement (letter of indemnity).

The rule is that any letter of indemnity would be unenforceable if the carrier/master/owner knowingly inserted wrong figures, description, etc. when issuing a bill of lading, due to fraud.

The main reason a shipper wants to have a clean bill of lading is that he/she will get paid much sooner than if the bill of lading is claused. In the latter case, the shipper will have to wait until the goods' receiver has agreed to accept them and the price is re-negotiated in view of any sale contract. This is true, irrespectively of the existence or not of any finance arrangement (e.g., letter of credit).

Question 4 – Time Charter-Off-hire and Illegitimate last voyage

A reasonably well answered question. On illegitimate last voyage, some answers were not complete, stating that the charterers will have to pay the current market hire rate for delay beyond the agreed time of re-delivery. However, this is only if the market hire rate is higher than the contracted one. If the market hire rate is lower than the contracted one, charterers will have to pay the contractual rate. For some reason, most answers omitted identifying the potential off-hire during the ship's repair.

Question 5 – Bills of Lading (document of title)

A reasonably well answered question. A bill of lading is a document of title. Ownership or property in the goods passes when the seller and buyer intend it to pass. As far as a bill of lading is concerned, the holder of the bill of lading has at minimum a possessory title, hence, it is a document of title. With this document at hand a person can take/is entitled to possession of the goods described therein. Whether such person is the full owner and to what extent, of the goods is irrelevant to this bill of lading function. Therefore, it cannot be asserted with certainty that by transferring a bill of lading to a party, in effect ownership is transferred.

It is the key to the warehouse, so the holder can have physical possession of the goods, and deal with them as the holder agreed with the goods' owner. But as far as the shipowner/carrier is concerned, the bill of lading holder has the key, so the carrier has to deliver the goods only to such bill of lading holder, irrespectively of the type of title such bill of lading holder holds.

For example, a producer/manufacturer may wish to carry products to another country, where his/her agent will store them for sale. The manufacturer upon shipping the goods on board the vessel will obtain a bill of lading. He/she will then endorse it to his/her agent, who would not be the owner of the goods. Such agent would have a title to the goods. What type of title would the agent have? He/she would have a possessory title; with the bill of lading at hand the agent can take/is entitled to possession of the goods described therein. Whether such person is the owner or otherwise of the goods is irrelevant to this bill of lading function (and the master/carrier).

Under current English law, ownership does not prejudice a holder of the bill of lading in pursuing a claim for loss/damage against the carrier. In previous legislation (Bills of Lading Act 1855) ownership was relevant on who has the right to sue the carrier, however, since Carriage of Goods by Sea Act 1992, any legitimate holder (as opposed to "owner") of the bill of lading can sue the carrier. This means, that candidates should refrain from discussing ownership of the goods.

In a nutshell, a bill of lading is a document of title, entitling the holder to demand possession/delivery of the goods from the carrier. Such possessory title is what is described in the various textbooks.

Question 6 – General Average

Reasonably answered essay-type question. A common error was omitting to discuss how the York-Antwerp Rules apply.

It was noted that some answers attempted to differentiate particular from general average on the basis of damage suffered by only one of the three interests (ship, cargo, freight). This is not the correct approach, since theoretically it is possible that one interest (e.g., cargo) is totally lost, but the remaining interests (e.g., ship) benefit by the sacrifice.

With regards to the York-Antwerp Rules, these indeed facilitate in preparing the general average adjustment, and avoid the application of local/national maritime laws at port of destination. So, uniformity is achieved.

Question 7 – Oil Pollution

A well answered question. The CLC convention was not mentioned by a few answers, although all students were aware of the USA OPA 1992.

Question 8 – Hague-Visby Rules/General Average

Quite reasonably answered question. Quite a few students were not able to differentiate between particular from general average damage in the scenario. Perhaps, a simpler example in differentiating between the two, would be where a fire has broken out on board a vessel, and cargo X is on fire. Without considering seaworthiness and exemptions under the Hague-Visby Rules, there is clearly a danger common to the whole maritime adventure, ship, cargo, and freight (at risk). In order to put out the fire water is poured on cargo X, thereby damaging it. In such example, damage by fire would be considered a particular average, whereas damage caused by water would be considered general average. The damage caused by the water to extinguish the fire is cargo X's sacrifice for the benefit of all other properties/interests (ship, cargo, freight). Similarly, in the scenario any damage caused by the grounding itself, would be considered a particular average, whereas loss/damage caused by efforts to refloat the ship (e.g., excessive use of engines, jettison of cargo, engagement of tugs, etc.), and benefit all interests/properties in the adventure, are considered general average.