MAY 2017 - 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. Legibility and tidiness were fair in the majority.
A general criticism of the answers is the lack of inclusion of authorities (i.e. cases and statutes), and the sometimes unstructured line of thought followed.
It was also noticed that numerous students would copy/re-write the actual question texts at the beginning of their answers. This is an unnecessary repetition and it certainly does not contribute positively to students' management of examination time.

Question 1 – Breach of Warranty of Authority

This was the least successfully answered question overall. Most answers appeared to be responding to a different question: "tell me everything you know on agency", or "what is a breach of warranty"! Only a couple of answers explained to whom an agent warrants his authority - a very important element in answering the question. Most were able to give an example of ratification of by principal.
An agent may by words or conduct represent to a third party that he has authority to act on a principal's behalf. This representation means that the agent warrants to the third party that he has authority.
Where an agent purports to contract without or in excess of his authority, his acts may nevertheless be ratified by the principal. But if they are not ratified, although the agent cannot be sued as principal, he can be sued, by a third party for damages for a breach of an implied warranty of authority, even if the agent *bona fide* believed himself to have authority. This is based on the premise that a person contracting as agent for another is deemed to warrant his authority.
In *Yonge* v. *Toynbee* [1910] 1 K.B.215, X instructed a firm of solicitors to sue Y for libel. Y instructed a firm of solicitors to act for him in the matter. Before the action commenced Y was certified as being of unsound mind. However Y's solicitors not knowing of this, entered appearances before the Court. Obviously the case was struck out (discontinued) but solicitors acting for Y were found personally liable to pay X for his legal costs for the period after his insanity. This was based on the fact that Y's solicitors had acted without authority-since they had impliedly warranted that they had authority to act when they had not.
The warranty of authority relates to a potential claim of a third party against the agent only (not a claim by the agent's principal against the agent).

Question 2 – Deviation

Quite a few answers unclear as to the meaning of "contract of affreightment". For some reason a number of students analysed cargo volume contracts and consecutive voyage charter-parties. Where a shipowner makes an agreement to carry goods by sea, or to furnish (equip and man) a ship for the purpose of carrying goods, in return for a sum of money to be paid to him, such agreement/contract is called a contract of affreightment.

Also some confusion on this being a legal subject and the term "deviation" is being used as a legal term - therefore one cannot say that deviation is allowed in order to save the common maritime adventure, or to effect repairs, etc., since deviation is only concerned with ship not following the agreed, or in its absence the usual trading route used by vessels operating between the particular ports, in normal circumstances, as opposed to exceptional circumstances, e.g. to avoid a hurricane, to effect necessary repairs.

A common error was that in outlining the implied terms in a charter-party, some included deviation/not to deviate. In time charter-parties. The implied term not to deviate only applies to voyage charter-parties.

Question 3 – Time Charter-Party – Safe Port – Off-hire - Seaworthiness

Students seemed to be aware of list of events triggering various different charter-party off-hire clauses, e.g. break-down of machinery, insufficiency of crew, etc. However, quite a few did not recall the very important prerequisite usually included with such list of events; if the vessel is unable to perform the service immediately required (e.g. Baltime).

Most thought that a strong swell was an Act of God, or a "natural calamity". Although the facts do not indicate this, for some reason also concluded that the swell was "unpredictable".

A safe port is one where, among other things, meteorological forecast warnings are available to ships using it. Further, a port that does not offer a system of tugs, or weather forecast warning, would be considered unsafe - such systems are generally expected to exist and operate in most ports.

Forecast/warning on impending war/war-like operations (the political risk) are not generally possible, so there is a possibility of a ship entering it whilst no such war/war-like operations have commenced (*The Evia 2*).

It was good to see some students being up-to-date with recently reported cases, such as *The Ocean Victory*. However, quite a few could not distinguish between facts of the question's scenario and that of the case; in the recent case, there was an adequate weather warning system in the port. Indeed, ships in the port (Kashima, Japan) were warned about the swell and bad weather. Some ships' Masters decided to leave port until weather condition improved. Whilst proceeding on this basis (i.e. leaving port) *The Ocean Victory* grounded and the question arose whether this loss was due to the charterer nominating an unsafe port. On the scenario facts there was no warning to the ship of the strong swell, something expected to be in place in most ports.

With the inadequacy/insufficiency of Master and crew training, most students were able to identify the potential breach of the implied term of seaworthiness, and that during such delay the ship would be off-hire.

Question 4 – General Average

A well answered question overall.

In the context of "common danger", such danger must threaten the three maritime interests, namely, ship, cargo and freight. Danger to human life/crew is no consideration in determining whether a general average has been established.

Numerous answers erroneously concluded that where the danger has arisen through a party's fault there can be no general average. Where the common danger has arisen though the fault of one of the parties claiming contribution, that particular party/interest will not be entitled to receive any contribution; in the contrary, such party will have to contribute towards general average losses suffered by other parties claiming contribution.

A tendency was noted to define general average only in relation to sacrificing property, thereby omitting to include extraordinary expenditure.

Question 5 – Remedies for Breach of Contract

A reasonably well answered question. Numerous answers concentrated on whether the broken term was a condition/a warranty/an innominate term, which is the correct angle for an introduction. However, as far as Common Law is concerned (not Equity) the main remedy is damages.

Of course, there is the "self-help" remedy of repudiation, but it is not strictly a Common Law remedy sought by an injured/innocent party before a Court. It is correct to put it forward nevertheless for the sake of completeness, and it was good to see a few answers mentioning it.

Question 6 – Hague-Visby Rules

On the facts it was clear that the contract of carriage was governed by the Hague-Visby Rules, and that the same contract provided that the vessel would proceed directly to New York. *The Ardennes* case is mostly used to indicate that the contract of carriage is concluded before the bills of lading are issued, and therefore the terms of the contract of carriage take precedence over subsequently issued documents (i.e. bills of lading) and their contents. Therefore, on the facts, the insertion of a liberty to deviate clause would have no effect, and give to carrier/shipowner any legitimate excuse not “to proceed directly to New York, with no intermediate ports of call”.

An issue to consider was whether the ship made a deviation from its contractual route not permitted by Article IV, rule 4. This Article allows, among other things, "any reasonable deviation" to be made, however, deviation for picking up the shipowner's documents, would not be considered reasonable. In *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.* (1932), a vessel deviated from the contractual route in order to land some engineers who had been testing some machinery, and the Court held the deviation not a reasonable one.

Most students seemed not to be aware of the effects of deviation on the contract of carriage of goods, and on the facts where the Hague-Visby Rules applied. Simply, carrier/shipowner cannot rely on the Excepted Perils provisions of the Rules, and in case of a general average act being declared following deviation, the carrier/shipowner will not be entitled to receive any contribution although he will be liable to contribute towards the losses of the other interests (cargo and freight).

About half of the answers correctly identified that the limitation of liability clause contained in the bill of lading was not valid, i.e. null and void, since it is an attempt by the carrier/shipowner to reduce his liability to lower limits than those provided by the Hague-Visby Rules.

Question 7 – Misrepresentation Act 1967

A straightforward essay-type question, albeit not a popular one. Those attempting it however obtained reasonably good marks overall.

Question 8 – Cargo Delivery without Bill of Lading

This was a well answered question, with most students attempting it gaining high marks. Answers identified the role of P.& I. Clubs, and numerous students were aware of the difference of the type of letter of indemnity the question required them to consider, to the letter of indemnity given to carrier for issuing a clean bill of lading.

There seems to be some confusion with ownership of the goods and the holder of the bill lading. Whether and to what extend property in the goods has passed to the holder of the bill of lading depends on the intention of the parties. So, if no further information relating to the goods and their sale/transport is given, the correct assumption is that the holder of the bill of lading is entitled to have the goods delivered to the exclusion of other persons. It is thus in the same commercial position as if the goods were in his/her physical possession. Hence, we say that a bill of lading is a document of title: on this assumption therefore, the minimum entitlement of a bill of lading holder is possessory title.

As a practical example where a cargo owner ships his goods to his agent elsewhere in order to sell them on to a buyer; the receiver/consignee/agent normally would not be intended to become the owner of the goods. Nevertheless, such agent would be entitled to have the goods delivered by presenting the bill of lading. His title is limited to possession of the goods only - he therefore should not be presumed to be the owner of the goods.