EXAMINER'S REPORT

NOVEMBER 2017

LEGAL PRINCIPLES IN SHIPPING BUSINESS

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.

Answers should include authorities (i.e. cases and statutes), where appropriate and be well structured.

It was also noticed that numerous students would copy/re-write the actual question texts at the beginning of their answers. This is unnecessary repetition and it certainly does not contribute positively to students' management of examination time.

Q1. A shipbroker, receives from a shipowner instructions in relation to fixing a ship for 50,000 tonnes of grain as soon as reasonably possible, at $100 dollars per tonne. Having confirmed and accepted shipowner's instructions, the shipbroker observes the relevant markets and finds a more favourable fix than the $100 dollars per tonne. The shipbroker therefore fixes at $150 dollars per tonne, having thereby made the shipowner (principal) a considerable profit. When the shipbroker communicates the fixture to shipowner, explaining that he acted in shipowner's best interest, shipowner complains for not fixing at $100 dollars per tonne and explains that shipowner needed to show a lower profit in the shipping company's accounting books. Advise the shipbroker. Use relevant case law to support your answer.

Answers that mentioned agency of necessity missed the point as it would normally arise and relate to instructions in connection to perishable goods, not a principal's clear instructions (on the facts) or any "clarification".

The scenario actually gives rise to the legal issue relating to an agent's duties. Where an agent has specific instructions he must follow them; *Turpin v. Bilton* (1843) 5 Man.&G 455. Thus, the shipbroker having instructed to fix at a certain price and failing to do so, would be liable for not having acted as instructed; *Bertam Armstrong& Co. V Godfray* (1830) 1 Knapp. 381.

Answers that mentioned breach of warranty of authority also needed to identify who the claimant would be under this heading. The question is "to whom an agent warrants his authority". This is based on the premise that a person contracting as agent for another is deemed to warrant his authority. 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).

The "defence" that the shipbroker acted to the best interest of the shipowner (or in good faith), is not likely to "hold water" before a court in the circumstances.
Most were able to suggest the "defence" of ratification by principal. But if the principal does not ratify, although the agent cannot be sued as principal, he can be sued, by the third party for damages for a breach of an implied warranty of authority, even if the agent bona fide believed himself to have authority; *Yonge v. Toynbe*e [1910] 1 K.B.215.

Q2. Discuss why parties to a charter-party would agree to resolve their disputes by arbitration. What alternatives could be considered?

Answers should show a clear understanding of the main advantages of arbitration (eg. Finality of award, arbitrator's knowledge and experience in charter-party disputes etc.). The second part of the question expected answers to explain the alternatives to arbitration; mediation and conciliation.

Q3. Answer BOTH parts of the question a) Can a charterer deduct from freight payment by way of equitable set-off? b) Discuss the use of the anti-technicality clause in time charter-parties.

Freight only relates to voyage charter-parties, and deductions may only be made if the charter-party contains express rights of deduction: for example, clauses permitting deduction from freight in respect of the value of cargo short-delivered or of the amount of damage to cargo.
In *The Dominique* (1989], the charterers argued that they were entitled to set-off their claim for damages flowing from the owners' repudiatory breach of the charter-party against their liability in respect of freight payable to the owners. The House of Lords, however, held that the owners' right to freight was unimpeachable and that charterers cannot exercise a right of set-off in equity in respect of damages for repudiatory or non-repudiatory breach of charter-party on the part of the owners. The position is different however, under time charter-parties where charterers may, in certain circumstances, deduct from hire by way of equitable set-off.
In the second part, as was expected most candidates dealt with such clauses, explaining that they allow the charterer a period of grace to rectify any non-payment of hire before the ship is withdrawn by the owners. However, only a couple of answers involved use of authorities, e.g. *the Laconia, the Afovos*.

Q4. Outline and explain the main differences between any TWO of the current International conventions applicable to the carriage of goods by sea.

Most answers compared the Hague-Visby Rules with the Hamburg Rules.
A point to be made in relation to seaworthiness, is that under the Hague-Visby Rules the carrier does not undertake to provide a seaworthy ship, but to exercise due diligence to do so.
Some slight confusion was noted in respect of deck cargo; in order for the Hague-Visby Rules not to apply the particular cargo must have been agreed between the carrier and the shipper to be carried on deck, and such cargo is in fact carried on deck.
A couple of answers did not read the question appropriately, digressing into health & safety international conventions relating to ships (e.g. SOLAS), rather than international conventions relating to the carriage of goods by sea.
Also, notice of loss or damage periods are not "time-bars", as some answers suggested. Failing to notify within the prescribed time would not bar a shipper's/cargo owner's claim; in other words a submission of a notice of loss/damage of goods received after the stated periods stop ("bar") a claim against the carrier for the loss/damage.

Q5. Answer BOTH parts of the question. a) What is the difference in a voyage charter-party between a berth/dock charter and a port charter? Explain which of the two is more beneficial to (i) the owner, and (ii) the charterer. b) Explain and discuss the difference that the 'Reid test' made in relation to 'arrived ship'.

Good answers pointed out that in a port charter-party laytime can start as soon as the ship, *inter alia*, has arrived in the commercial area of the port and is at the immediate and effective disposition of the charterer within the port area where waiting ships would normally lay-within the geographical, legal and administrative area of the port. Whereas where the charter provides that the ship shall proceed to a named berth/dock, the vessel is an arrived ship, and laytime can commence, only when she gets into that berth. So, it would seem that a berth charter-party is more beneficial to the charterer, whereas a port charter-party to the shipowner. So, the former will more beneficial to the owner, whereas the latter will be more beneficial to the charterer.

(b) The best answers were those which tend towards a "compare and contrast" approach of the "Reid test". Good marks were awarded to answers that include some information on the development of the test.

Q6. Discuss the meaning of vicarious liability. What is its relationship with the Himalaya clause?

To achieve a pass mark candidates had to clarify that vicarious liability relates to torts committed by an employee, not to other wrongdoings – it does not make an employer liable for all acts of his employee but only for torts committed by such employee. It should have also mentioned the difficulties in identifying an employee (as opposed to an independent contractor).
The *Himalaya* case should have been identified, it was also expected that an explanation was given on how the so-called 'Himalaya clause' extends the categories of persons entitled to the benefit(s) of the carrier's exclusion/limitation of liability beyond the scope of vicarious liability.
Most answers identified that the Hague Visby Rules provide (Article IV bis rule 2) for the defences and limits of liability of the Rules to extend to servants or agents of the carrier as long as the servant or agent is not an independent contractor.

Q7. Answer BOTH parts of the question The English legal system uses many Latin-based expressions. Define and explain: a) ejusdem generis b) obiter dictum. Give examples on when they will be used.

Ejusdem generis are particular words followed by general words - general words are construed as falling within the scope as the particulars words.
Examples - "war, disturbance or any other cause", "port charges, towages, agencies and all other charges".
Obiter dictum is the judge's expression of opinion, is not necessary/essential to the decision, is not binding and is persuasive in nature.

Q8. Answer BOTH parts of the question. Explain general average in relation to the following: a) The danger must not have arisen through the party/interest claiming contribution. b) The Amended

Jason Clause should be inserted to bills of lading for voyages to and from the United States of America.

An exposition of the particular requirement of general average is expected. The association between the notion of "legal fault" under the contract of carriage, and how exemptions under the carriage of goods regimes interact with the requirement - e.g. damage to goods due to faults in navigation or management of the ship under the Hague-Visby Rules would not preclude a carrier from claiming general average, whereas damage to goods due to want of due diligence would do. Good answers showed an understanding on the party's fault precluding receipt of general average contribution – but that such party will have to pay general average contribution towards losses suffered by the other interests involved.
A tendency was noted to define general average only in relation to sacrificing property, thereby omitting to include extraordinary expenditure. Also many answers forgot to mention that General Average is not a rule of equity - it is a principle of maritime/carriage of goods by sea law, and it applies even if no agreement on applicable adjustment rules (e.g. Y/A Rules) has been made.

The second part of the question was straightforward, requiring candidates to answer it with reference to a brief summary on the effect of English and American law on liability from negligent navigation.