Examiners Report

MAY 2019

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. A preference towards essay-type questions was evident. Legibility and tidiness were fair in the majority.

Compared to previous years' results, this May's results indicate a clear increase in the marks candidates/students achieve, suggesting that students come better prepared for the examination – a welcome practice.

Comments on individual questions are as follows:

Question 1

100 drums of whisky are shipped by a shipper on board a vessel in the U.K.

The ship's Master upon discovering that one of the drums is leaking notifies the shipper that he intends to clause the bill of lading accordingly. The shipper, however, offers a letter of indemnity to the ship's Master if the bill of lading does not contain any remarks relating to the one whisky drum. The Master accepts the letter of indemnity, and clean bills of lading are issued to the shipper, who endorses the bill of lading and posts it to a buyer/endorsee in Greece.

Due to a postal strike, the bill of lading does not reach the buyer/endorsee when the ship arrives. The ship's Master refuses to deliver the drums without the production of bill of lading, and the buyer/endorsee to expedite things, offers a letter of indemnity to ship's Master, so that the drums are released. The letter is accepted and ship's Master releases the goods to the buyer/endorsee, who discovers the leaking drum, and writes to the carrier/ship's Master notifying that he will be claiming for this loss/damage.

The ship's Master in turn writes to the shipper stating that he will be seeking to be indemnified by shipper's letter of indemnity for any successful claim of buyer/endorsee.

Critically discuss the use of letters of indemnity as above, and instances when letters of credits may, or may not, protect the ship owner.

A well answered question overall.
Most students who attempted the question achieved high marks.
A clarification on the bill of lading being a document of title. This means that the holder of the bill of lading is entitled to take delivery of the goods described in the bill of lading. Nothing more, nothing less. It does not mean that such holder is the owner of the goods. Possession is a type of title, and that is all the bill of lading represents to the ship owner, i.e. the person presenting it is entitled/has a possessory title to the goods. He may or may not be the owner. For example, he may be an agent of the owner. Another example is where the buyer of the goods has bought the goods on credit and ownership of the goods has been withheld by the seller until full payment.

Again, in such situations the holder would not necessarily be the owner. Bottom line; a bill of lading does not represent ownership of the goods. Just the entitlement of the holder to have the goods delivered.
With regards to the first letter of indemnity, it is simple enough to realise that as such a letter of indemnity is based on a misrepresentation, it cannot be enforced. Even simpler, the receiver of the goods (holder of the clean bill of lading) will claim for the loss/damage from the carrier, who will have to pay up, according to the provisions of the Hague-Visby Rules which apply to the scenario. Once such claim is made, the carrier may try to claim for the monies paid/to be paid under the letter of indemnity, but if the shipper (the other party to the letter of indemnity) refuses, then the carrier cannot do much about it (e.g. litigate under the letter of indemnity).

Question 2

Critically discuss, using relevant case law, the issue of timely hire payment and owner's right of withdrawal under a time charter-party.

Reasonably well answered.
Most answers dealt with anti-technicality clause and *The Laconia*. Very few, however, discussed the various methods of payment and ship's withdrawal; e.g. *The Chikuma*α, *The Georgios C.*, *The Laconia*, *The Mihalios Xilas*, *The Afovos*, *The Astra, Spar Shipping v. Gran China*.

Question 3

Discuss offer and acceptance in the context of a simple contract. Using a shipping contract of your choice explain what other elements are required for the formation of a contract.

A quite reasonably answered question overall.
Contracts concluded by word of mouth ("verbal") and written ones, are *all* expressly concluded contracts, as distinct to implied contracts (by law, or by conduct).
A common error was that consideration in contract formation were expressed as being money, services, goods, barter, or any other things. This is not the correct way of looking at consideration. Consideration is a set of promises in a contract. For example, in the case of a sale of goods, the consideration for the buyer's promise to pay, is the seller's promise to deliver the goods, and the consideration for the seller's promise to deliver the goods is the buyer's promise to pay. It is the set of *both these promises* (seller's and buyer's) that make up the consideration element in such a contract – it is based on reciprocity of promises. Whether it is money, services, tangible or intangible property, or indeed barter, it does not matter – consideration is the price (note: "price" does not necessarily mean money) for which the promise is bought; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co.* [1915] A.C.847. So, the shipowner's consideration for promising to provide the ship, is the charterer's promise to pay freight/hire, and the consideration for the charterer's promise to pay freight/hire, is the shipowner's promise to provide the ship.

Another point on the time of conclusion of the contract, with reference to acceptance; the contract is to give a complete/concluded when the acceptance is *communicated* to the offeror not when is transmitted or received. It is communication to the offeror that is important.
Simple example, if an acceptance was transmitted on a Saturday night, it would be received in the offeror's offices at a time when these were closed. It would be effective when the acceptance would be read by a person responsible in the office during office hours in the next working day. Again, the cases clearly indicate that it must be communicated, rather than received.

Question 4

Explain the advantages associated with arbitration outside the Court system. Explain the reasons why a party would not wish to resolve a dispute through arbitration.

A reasonably well answered question overall.
Although most answers explained the advantages of arbitration over litigation, they could only identify as reasons to avoid arbitration the time it takes and high cost. Furthermore, some did not seem to have read the question well, and responded as if the question asked why a party would wish to avoid arbitration *and litigate.* Issues such as publicity, the involvement of complicated legal issues, legal costs not being awarded always to winning party, finality of the award/limited grounds of appeal, alternative dispute resolution methods, were not put forward by numerous students as reasons not to arbitrate.

Question 5

Discuss the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules), and explain some of the important changes under these rules, should they come into force.

A well answered question overall.
Most students were aware of the main provisions of the Rules.

Question 6

Case law has established an absolute obligation implied on the ship owner to provide a seaworthy ship. Under the Hague-Visby Rules this absolute obligation is replaced by a duty to exercise due diligence to make the ship seaworthy.

Discuss the seaworthiness obligation using case law and the Rules, to the extent that such obligation may be excluded.

A well answered question overall.
Students should be clearer on the difference of seaworthiness, so that they can deal with loss/damage upon arrival of the goods at destination.

- Under Charter-Party: there is an implied absolute duty on shipowner to provide a seaworthy ship. Hence, owner liable. Shipowner's liability can be excluded by a clearly worded clause in the charter-party.
- Under Hague-Visby: the owner is bound to exercise due diligence before and at the beginning of the voyage to do a number of things, including to make ship seaworthy. Therefore, although goods were damaged as a result of unseaworthiness, the carrier/owner will **only** be liable if it is shown that he did not exercise due diligence. If goods were damaged despite carrier having exercised due diligence, then carrier is not liable. Carrier's/Shipowner's liability for not exercising due diligence cannot be excluded.

Question 7

Define general average and how the York-Antwerp Rules apply to the contract of carriage.

A well answered question.
Most answers included a brief definition of general average, and its requirements. Some confusion was evident on how the York-Antwerp Rules apply. If the York-Antwerp Rules are not mentioned in the Charter-Party/Bill of Lading, then they do not apply. In such case, general average contributions and the whole process of adjusting it will be subject to the law applicable at the place where the adventure ends (i.e. place of delivery of the goods). As this is unsatisfactory, nowadays, all charter-parties/bills of lading contain a clause incorporating the Rules.

Question 8

Critically discuss and consider actual and apparent/ostensible authorities in the law of agency. Explain this in the context of a shipbroker.

A reasonably answered question.

I feel that a couple of clarification points are needed on the consequences of an agent's lack of authority, implied warranty of authority and ratification, considering that a few answers were unclear:

- If the agent is found in breach of his authority, clearly the agent is in breach of the agency contract with his principal. If principal does not ratify agent's action, he will be bound by the contract with the third party, but principal can claim damages from the agent. Ordinarily, the agent, in such a case would not be entitled to any remuneration or commission.
- As a general rule, if the third party does not know of the agent's lack or withdrawal of authority, the contract binds the principal.
- If the third party knows of the agent's lack or withdrawal of authority, he does not obtain a contract with the principal, but with the agent.
- Where an agent exceeds his authority (concludes a contract on behalf of his principal with a third party) he would liable to *the third party* for 'breach of implied warranty of authority'. The agent would be liable for impliedly warranting that his authority exists – such liability is strict and does not depend upon the agent's fraud or misrepresentation; *Starkey* v. *Bank of England* [1903] A.C.114; *Yonge* v. *Toynbee* [1910] 1 K.B.215.
- If an agent accepts an offer by a third party 'subject to ratification' by his principal, the third party is not bound by this acceptance until ratification actually takes place. Note, however, that in such a case we do not have a valid acceptance because acceptance must be unconditional. This situation is the only exception where ratification does not relate back to the original acceptance. Simply, this rule does not apply where the third party who is dealing with the agent, knows that he is dealing with an agent who requires the ratification of his principal; *Watson* v. *Davies* [1931] 1 Ch.455.