EXAMINER'S REPORT

NOVEMBER 2020

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.

Question 1 – Hamburg Rules and Hague-Visby Rules

1. Under a carriage of goods contract subject to English law, and evidenced by a bill of lading, a carrier/shipowner agrees to carry a shipper's cargo, which consists of two pallets. The contract of carriage and the bill of lading incorporate the Hamburg Rules. The contract of carriage further states that the carrier:

a) is not liable for loss/damage arising from delay, and

b) may bring an action against the shipper within six years, and

c) can limit his liability for loss/damage arising from unreasonable deviation to the amount of the freight charges.

Discuss and analyse the issues that arise from the above carriage provisions in the given scenario. Would it make any difference if the contract of carriage and bills of lading incorporated the Hague-Visby Rules instead?

Not a well answered question overall. For some reason, a few students wrongly thought that the question mentioned carriage from the U.K., and went on to say that as Hague-Visby Rules have been enacted in England, the Hague-Visby Rules/Carriage of Goods Act 1971 is compulsorily applied to the carriage. Perhaps the difficulty was that "English law" was mentioned to be applicable to the contract of carriage.

English law could apply by agreement to any contract of carriage; there is nothing in it to contradict the application of Hague-Visby Rules, Hamburg Rules, or Rotterdam Rules. Simply, in interpreting any of such carriage regimes/rules, we, or the Court, if it ends before a Court, will use English law to resolve any interpretation of the carriage regimes/rules. For example, a carriage from the U.K. will be subject to the Carriage of Goods by Sea Act 1971/Hague-Visby Rules, but the contract of carriage, i.e. the agreement between carrier/shipowner and shipper, may well be subject to French or Chinese law.

As far as time-bar is concerned (clause (b) in the scenario). It is known that the Hague-Visby Rules create an imbalance between shipper and carrier:

- "the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered"; Article III r.6.

However, the Rules do not contain a similar special limit for claims made by the carrier against the shipper or receiver, e.g., for claims in respect of freight, or damage by dangerous goods. This means that although the time-bar for shipper v. carrier is one year, for carrier v. shipper claims the time-bar will be subject to normal national limitation periods - in the case where English law applies to the contract of carriage, it would be the usual contractual time-bar of six years! So, where the Hague-Visby Rules apply, clause (b) of the scenario would valid, since it does not relieve:

- "the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules"; (Article III r.8).

Whereas, under the Hamburg Rules which provide for a two-year time-bar applying to claims for both carrier v. shipper and shipper v. carrier, clause (b) of the scenario would be invalid.

2. Answer BOTH parts of the question. a) A bill of lading is said to be evidence of the contract of carriage of goods. Analyse whether there are any circumstances when a bill of lading may be/become the actual contract of carriage. b) Explain the term "once on demurrage always on demurrage" as compared to laytime.

The most popular question among students and a reasonably well answered overall.

For some reason some students put forward the point that the bill of lading is evidence of the sale contract (between the shipper/seller and the consignee/endorsee). The question's wording, and most text books, specifically state "evidence of the contract of carriage of goods". Whether the bill of lading is evidence of the contract of international sales is not part of the LPSB syllabus, and was not required to be considered by answers. Furthermore, it does not follow that because the bill of lading is evidence of the contract of sale, there are "circumstances when a bill of lading may be/become the actual contract of carriage"; it is a rather inapt conclusion indeed.

Quite a few answers in introducing the functions of a bill of lading, seemed to (wrongly) interpret "document of title" as meaning who is the owner of the goods, thereby showing a superficial understanding of the bill of lading holder's entitlement to the goods. A bill of lading is a document of title.

Ownership or more appropriately 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 best a possessory title, hence, it is a document of title. This does not mean that the holder is the owner. For example, a producer/manufacturer may wish to carry products to another country, where his/her agent will store them for a later sale.

The manufacturer will book space on board the vessel, and he/she will obtain a bill of lading and endorse it to his/her agent. Such agent would have a title to the goods, but would not be the owner of 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 is entitled to take possession/delivery of the goods described therein, from the carrier. Whether such person is the owner or otherwise of the goods is irrelevant to this bill of lading function.

Under current English law (Carriage of Goods by Sea Act 1992), ownership or lack of it 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 in the right to sue the carrier, but since 1992, any legitimate holder of a bill of lading can sue the carrier. This means, that candidates should refrain from discussing ownership of the goods, unless they feel that the question asks matters relating to the law of sales of goods-very unlikely, as it is not within the LPSB syllabus.

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 books.

3. A charter-party would usually contain a warranty on the part of the charterer that the vessel will only be traded between safe ports.

Explain how such warranty operates in practice, and discuss any practical difficulties that arise from the application of such warranty.

The best answered question of the set. Overall, those who attempted the question did well to outline the implied term and put forward the various safe port provisions found in practice. Just a mention, that a port suffering disruption to operations caused by strikes or similar action is unlikely to be considered unsafe in a legal sense.

4. Does the doctrine of vicarious liability transfer liability from the tortfeasor? Discuss and use your own examples in answering the above.

A well answered essay-type question.
The short answer is that vicarious liability does not transfer liability from the tortfeasor, who remains liable, but it rather adds a defendant. Most answers mentioned that vicarious liability is a rule of convenience, not of strict law. Indeed, it is based on the notion that an employer would be financially in a better position to compensate an injured claimant, who will have a choice as to whom to sue.
What if the employee is financially better off than the employer? If vicarious liability transferred the employee's liability, then such injured person would have no choice in claiming damages from the tortfeasor-employee.
This is a simplistic example, but I hope it serves to show why vicarious liability does not transfer liability from the tortfeasor.

5. Answer BOTH parts of the question.

Just over a year ago, a shipper shipped the following cargoes on board a vessel:

- **i. 20 donkeys**
- **ii. 20 containers, having agreed with the carrier/shipowner to be carried on deck**
- **iii. 20 pallets of flammable painting materials**

The goods were shipped on the vessel in the U.K., in apparent good order and condition. However, due to bad ship's maintenance a fire broke out and the ship was lost with all the cargo on board.

a) Identify and briefly discuss the legal issues that arise from the facts of the above scenario.

b) Explain how your answer would be different in any way if the U.K. had ratified the Hamburg Rules 1978?

A reasonably well answered question. Some answers just started by stating that the Hague-Visby Rules apply (which is correct) on the scenario fact, offering no further explanation. A few students just stated that live animals are not included with no further qualification.
By giving such short answers, candidates unnecessarily missed a couple of available marks. Most answers missed the fact that the shipments took place "just over a year ago", which meant that claims against the carrier under Hague-Visby Rules would be time-barred (one year), whereas if made under the Hamburg Rules they would not (two years). A couple of answers even stated the correct time-bars in the introductory part, but did not apply them to the facts at hand!

6. Answer BOTH parts of the question.

a) In the English law of contract, the "postal rule" may be considered to be the exception to the general rule that acceptance must be communicated to the offeror. Explain and discuss the law in this area, giving examples on how the effect of the postal rule may be avoided.

b) **It is frequently said that equitable estoppel "is a shield rather than a spear". Explain, giving examples as appropriate, how this legal doctrine may in practice apply to the law of contract.**

This was the least favoured question, but overall a reasonably answered by those who answered it. One or two answers confused the Postal Rules with offers - it does not relate to offers, but only to acceptances.
It is an exception to the general rule on acceptance which states that a contract is made/concluded when acceptance of the offer is communicated to the offeror. In contradiction to this rule, the postal rule states that a contract is made/concluded when acceptance is posted by the offeree.

7. Answer BOTH parts of the question.

a) Outline and briefly explain the requirements that need to be fulfilled for a claim of general average contribution to be established.

b) Briefly outline the civil court structure in England.

A popular question with students, and reasonably well answered overall. A straightforward question requiring a good exposition of the requirements of general average.
General average is a maritime law principle not dependant on York-Antwerp Rules. It is a legal principle that applies to carriage of goods by sea. Its adjustment/calculation is based (a) if the parties have not agreed, on maritime law at the port of destination, or (b) on what the parties have agreed in the contract of carriage.
So, the York-Antwerp Rules (or indeed any other similar set of rules) apply to the adjustment/calculation of general average, only if the parties have agreed it.

8. Answer BOTH parts of the question.

a) Discuss giving appropriate examples the principle of ratification in the law of agency.

b) The Master of a ship may be generally considered to be an agent of the shipowner. Explain and discuss the circumstances under which the Master may become an agent of the cargo owners.

A reasonably well answered question. Ratification is an important part of the law of agency, relevant to practice. One or two points relating to some answers should be made here. The Principal cannot sue his/her agent for breach of the implied warranty of authority; only the third party can do this. Ratification can only be retrospective, which means that it relates back to the time when the contract was concluded by the agent as if the agent had the authority at the time of conclusion. Therefore, it cannot be sought in advance by the agent; a principal cannot say to his agent in advance, 'I will ratify all your future contracts'. A contract "subject to ratification" is no contract at all. Ratification is retrospective in its operation; if an ("unauthorised") agent agrees with a third party 'subject to ratification' by the principal, the third party is not bound by such agreement until authorisation actually takes place! Simply, where the third party who is dealing with the ("unauthorised") agent, knows that is dealing with an agent who requires the authorisation of his/her principal, there could not be an enforceable agreement, and third party's "agreement" is not binding.

A good example where the ship's Master can become the agent of the cargo owners, is where, by the operation of law, he/she becomes an agent of necessity. Most bills of lading are signed by the master, or by the agent of the ship. A master in a time-chartered vessel is the servant/agent of the shipowner. He/she signs bills of lading presented by the charterer, but he/she would sign them on behalf of the shipowner. In general, the master is not the agent of the cargo owners.