JULY 2020 - ICS Examiners Report

LEGAL PRINCIPLES IN SHIPPING BUSINESS (LPSB)

DR. NICHOLAS KOULADIS

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 – Arbitration

The most popular essay-type question and a well answered one overall. Most answers showed a good understanding of the operation and procedures followed in arbitration, although most omitted to mention the Arbitration Act 1996.

Question 2 – Negligence

A well answered question overall. It required answers to fully analyse the ingredients of negligence, using cases. Answers showed a reasonable understanding of this principle of tort law, and its necessary ingredients.

Question 3 – Action *in rem*/*ratio decidendi and obiter dictum*/innominate terms

Although the question was not favoured by the majority of students, those who attempted answering it seem to have done rather well, averaging the higher marks, compared with the rest of the questions. A common error was noted in the discussion on 'innominate terms' and available remedies to the innocent/injured party; where there is a breach of a condition the innocent party not only does it have the right to repudiate (avoid) the contract, but also to claim damages for any loss suffered.

Question 4 – Agency (ratification/ostensible authority/warranty of authority)

A reasonably well answered question overall. With regards to agency ratification, a number of answers erroneously thought that this is method used for good practice, giving examples that the agent in doing so (whatever the example suggested) exceeded his authority and should have sought ratification prior to carrying out the act described in the given example! 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!

Another common omission was in relation to the implied warranty of authority; no answer included the pre-requisites for an unauthorised agent (exceeding his authority) to be made liable by a third party. It is necessary that (a) the third party did not know of the agent's lack of authority, and (b) the third party suffered loss as a result of this lack of knowledge.

Question 5 – Hague-Visby Rules (deck cargo)

A reasonably answered question overall. It was noted that a number of answers rushed to conclude that "heavy weather" was an Act of God. An Act of God may be said to be something exceptional, unforeseeable, inevitable and irresistibly violent. Heavy weather/seas are not an Act of God. As a defence, an Act of God appears to be granted only in the most extreme examples of severe and unprecedented weather events, and even then, only when no reasonable precautions could have been foreseen and taken by the defendant to lessen or prevent the resulting damages. Even in extraordinary cases such as earthquakes, or hurricanes, to rely on such defence, it must be shown that there was no contributing human negligence. A gale/strong gale, or heavy seas, would not generally be considered an Act of God, although brought about by forces of nature. It is not unusual an occurrence for ocean going vessels to encounter such weather, nor is it unusual that such weather conditions exist in certain ocean routes.

A number of answers did not explain why the Hague-Visby Rules apply to the scenario facts, but they just presumed they applied!

With regards to the buyer/indorsee of the clean bills of lading, quite a few answers concluded that the buyer/indorsee should file a claim against the seller/shipper. Under the Hague-Visby Rules the statement on the bill of lading that the goods were shipped in apparent good order and condition, in the hands of a third-party indorsee (transferee) becomes conclusive evidence as to the condition of the goods when shipped. Why would such indorsee on the scenario facts (with a clean bill of lading at hand) pursue a claim against the seller/shipper when the goods were shipped in good condition and were delivered in damaged condition by the carrier?

Question 6 – Deviation

This was the least favoured question by students. A confusion seemed to reign in some answers, considering that the implied term that the ship will proceed to destination with no deviation is similar to the implied term that the ship will proceed with reasonable despatch. The latter relates to time of operation performance, whereas deviation relates to the agreed or (if not agreed) the usual/customary sea route. If there is a ship in distress, then the doctrine of deviation allows the change of the ship's course to save lives. Changing course to avoid a hurricane, or calling to a port of refuge to carry out necessary repairs, etc. would not even touch upon the doctrine of deviation, since they are matters of safety and navigation of the ship.

Question 7 – General Average/Total Loss of Adventure

A quite reasonably answered question.

There was some confusion with some answers, in relation to Master's declaration of general average. The problem did not ask candidates/students whether a general average could be declared by the Master, but whether a general average may be established following the scenario facts; could a general average contribution be claimed by the parties whose property/ies were sacrificed?

It is obvious that the concept of maritime adventure in relation to general average has not been established properly in the minds of students. The carriage of each shipment of goods has a departure and a destination; this is the adventure. All intermediate unscheduled emergency/necessity ports, e.g. port of refuge to effect necessary repairs to continue the voyage/adventure, are not part(s) of the adventure – they are not scheduled ports of call. General average law requires that to be entitled to claim a general average contribution the maritime interests (ship, cargo, freight) must have been benefitted (i.e. somehow survived) by the general average sacrifice/extraordinary expenditure. Whether a benefit was derived is determined at the port of destination (not the port of refuge). It is at the port of destination that the lien on the cargo can be exercised by the shipowner, the average adjustment is prepared, etc. Unless some of these interests have benefitted and make it safe and sound to this point of the adventure (port of destination), there cannot be any claim in general average. General average contribution is based on the adventure's arrived value at destination; if this is zero, then there can be no general average contribution.

Another point that should be taken into account, when trying to establish what sort of loss a ship/cargo has suffered, is that the word "average" in marine insurance law means a partial loss. Such partial loss may be general, or particular, and should be distinguished from a "total loss".

Question 8 – Time Charter-Party/withdrawal of vessel/anti-technicality clause

A well answered question overall. Most answers showed a good understanding of the difficulties shipowners face when considering ship withdrawal from charter, and the practical use of anti-technicality clauses where hire is paid late.