2014 ICS Examiner's Report

LEGAL PRINCIPLES IN SHIPPING BUSINESS (LPSB)

GENERAL COMMENTS

Overall the standard displayed was fair, given the objectives of the examination, with over half of the candidates displaying competence in identifying legal problems.

Both the essay and problem-type questions were answered reasonably well by a large number of candidates, with a clear and well-informed presentation from a significant number of candidates. Legibility and tidiness were fair in the majority of cases.

Over the last five years, candidates' examination performance has been steadily improving. However, in this year's overall performance a small drop was noted. There was nothing particularly difficult with the examination questions, and therefore such a result may safely be attributed to insufficient preparation, rather than as a clear shift in the current examination trends.

A general criticism of the answers is the lack of inclusion of authorities such as cases and statutes; and sometimes an unstructured line of thought followed.

Questions 7, 1, and 5 were the most popular ones, whilst questions 8, 3, and 5 were the most successfully answered ones.

Question 1

This question was reasonably answered overall. No cases were cited, and generally this question was not favoured by many candidates. Numerous answers dwelled on seaworthiness, deviation, dangerous goods and reasonable despatch, thereby devoting an equal amount of time and effort to the safe port term.

Question 2

This question was not very well answered. There seemed to be some confusion about the difference between applicable law and court jurisdiction. A common error was the consideration of the carrier's or ship's nationality relating to the application of Hague-Visby Rules. A simple application of article X of the Rules would have been sufficient here, to conclude that in the absence of clause 1, the Rules would not apply.

On the second part, numerous answers focused on the Hague-Visby Rules' limitation of liability and SDRs. This led to erroneous conclusions that the delay clause was not enforceable. The scope of application of the Hague-Visby Rules covers only loss or damage to the goods, but not delays, as the Hamburg Rules do. In fact, the word delay is not to be found in the Hague-Visby Rules' text.

Question 3

This was a popular essay-type question and a well-answered one overall. The question required answers to fully analyse the ingredients of negligence, as well as the elements required by the courts for successfully maintaining such a claim. Some inaccuracies on the meaning of negligence were noted, for example that it applies where the claimant and defendant have no contractual relationship. A contractual relationship may or may not exist between the two; liability for negligence may arise irrespective of whether a contract exists or not.

The second part of the question related to the defence of contributory negligence; it is not a complete defence, because once successfully established, its effect would be to reduce the claimant’s amount of damages. It is really the defendant's negligence which contributed to their own loss or damage.

Question 4

This was quite reasonably answered overall. Most omitted to explain the meaning of consideration and the effect of its absence in a contract. Only a couple of answers included a mention of *The Vistafjord*, and an outline of equitable criteria.

Question 5

This was reasonably answered overall. A common error in relation to liquidated damages was the assertion that they apply or are agreed to be paid in case of a breach of warranty. Some answers confused unliquidated damages with equitable damages and injunctions, etc. The second part of the question was generally well answered.

Question 6

This was the least successfully-answered question. The test laid down by courts is whether the relevant clause constitutes a genuine pre-estimate of owners' losses; *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* On the facts, the owners could have elected to perform charterers' illegitimate voyage order or they could treat the order as repudiatory and bring the charter at an end. On the facts, owners elected to perform, and therefore they are entitled to a claim in damages for hire at current market rate for the excess period. The clause however, seems to be rather penal, as it extends the applicable compensation beyond the period of excess of six days. That is for a loss that would not be recoverable, 30 days into the charter-party period. There is a similar case with comparable facts, *The Paragon* [2009] EWHC 551 (Comm.). It was surprising that about 50% of those who attempted this question had also answered question 5 expressing correctly in that question the view that liquidated damages cannot be used as a penalty or to penalise, but on the facts all failed to identify the very ingredients of liquidated damages.

Question 7

This question was well answered overall. Some candidates were not clear as to ratification, and although they recalled the correct conditions for a valid ratification, omitted to show an understanding of when ratification may be exercised by the principal.

It is notable that there was some confusion regarding agency of necessity and ratification. If a master acts as an agent of necessity, fulfilling the non-communication with cargo owners' requirement, no ratification is needed, since the agent is covered by law with authority to act in such an emergency.

A few answers erroneously assumed that a principal could be undisclosed or unnamed, since an undisclosed principal cannot ratify; *Keighley, Maxsted & Co.* v. *Durant* [1901] A.C.240.

Question 8

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

A maritime adventure consists of ship, cargo and freight and the danger must be common to these interests. A ship's crew therefore falls outside the scope of general average.