JUS5450/JUR1450 Marine insurance, Exam Spring 2018

Some general comments on the student group, the course and the material

The course in marine insurance is not an ordinary elective course at the faculty. It is introduced to be included in the master programme Master of International Maritime Law at the Scandinavian institute of maritime law. In addition, the course is open to other students, also on bachelor level. This means that the group of students taking this course differs from the ordinary student group in elective courses in several aspects:

1. Several of the students do not have a legal background and therefore are not familiar with Norwegian or Scandinavian legal method. The master program is open for candidates with a bachelor degree or similar education in law or other areas. This means that there are clear methodological challenges to be met during the course, and that the expectations in relation to legal method on the exam cannot be too strict.

2. The students with legal background from other countries, even other Scandinavian countries, are not familiar with our way of doing exams. This is particularly true for the maritime law students from outside Scandinavia, but even within Scandinavia the way of examination differ. Many of the students will be used to shorter questions and less independent writing.

3. Several of the students have difficulties with the English language.

These problems has to be taken into consideration when setting the level of the grades.

Part I. Master and Bachelor level

Question 1:

Is the liability for damage to the two cables covered under hull insurance by AS Marine Insurance or under P&I insurance by Gard P&I insurance.

The topic is hull insurance for collision liability and treated in Wilhelmsen/Bull Handbook in hull insurance (Handbook), ch. 11. It has also been a topic under the lectures. Collision liability has not been given in the exams the last years and it may therefore come as a surprise for students having worked with exams from the latter years.

Clause 13-1 applies to collision and striking by the ship and its equipment and is addressed in Handbook p. 325 ff. The concept of collision means collision with another ship and is therefore not applicable here. This is emphasized in the Commentary, but it cannot be expected that the candidates refer to the Commentary. They should however see that striking is broad enough to cover collision, see

Handbook p. 325. The word “striking” means that the ship and its equipment hit the other object. The word striking however does not qualify in what way the equipment shall strike the other object. The wording thus implies that any movement by the anchor that results in physical contact with another object will be covered. In the exam the anchor struck the cables and this is therefore striking.

The good candidate manages to interpret the wording of 13-1, but a mere reference is acceptable to pass. Striking means that the ship touches another object, but the wording says nothing on the object of the damage. The only requirement is that the striking results in liability for the assured. Whether striking may take place under water is not addressed directly in the Handbook, but presumed at p. 327 in the reference to ND 1990.8 SAA Vinca Gorthon. This also follows from the Commentary:

> “(2) The object against which the insured ship strikes may be another ship or another object floating in the sea, e.g. logs from timber rafting, or an installation on shore, e.g. a quay, a bridge or a dock gate. Grounding is also “striking”.”

The cover is for “striking by the ship, its accessories, equipment or cargo, or by a tug used by the ship”. In this case, the striking was caused by the anchor. The wording does not require that the anchor causes the striking through the movement of the ship, but here the English wording departs from the Norwegian expression, see Handbook p. 327. The Norwegian translation is:

> Assurandøren holder sikrede skadesløs for ansvar som sikrede blir pålagt for tap som skipet med tilbehør, utstyr og last, eller slepebåt som skipet benytter, har voldt ved sammenstøt eller støtning.

According to this text, the striking must be caused by the ship «with accessories», which implies that it is the movement of the ship with the accessories and not the movement of accessories alone that causes the striking. The Handbook says the following at p. 327 with reference to the Commentary p. 314:

> “Striking damage caused by the independent movements of these objects must be covered by the ship’s P&I insurer. Thus, where a lifeboat, a derrick or the deck cargo juts out over the ship’s side, causing damage to a shore installation during the ship’s manoeuvring to go alongside a quay, liability will be covered by the hull insurer. On the other hand, where a crate or a bale slips out of a heave during discharging and hits a car on the quay, or a wire snaps with the result that a derrick falls down and damages a crane, liability will rest with the P&I insurer. However, the border line is not easy to draw, as illustrated by this quote from the Commentary p. 314: «Where equipment strikes against another object, there is nevertheless reason to be somewhat more liberal and cover the collision liability, even if the striking cannot be deemed to have been caused by the ship’s movements. An example of such a situation would be where the ship is lying with its engines switched off and the ship’s nets drift down onto another net and damage it.»

In this case the anchor rushed out of the hawse pipe due to a defect in the winch and struck the cables when it was dragged along the seabed. The movement of the ship

is therefore transmitted via the anchor in the moment the damage occurs. The immediate cause of the movement of the anchor is the movement of the ship even if it did rush out accidentally from the hawse pipe before it was dragged, and thus it seems natural to say that it is the ship with the anchor that hit the cables.
The Commentary also seems to advise a wide scope of liability for striking by equipment and since striking in this case involved mutual damage as the anchor was damaged, the hull insurer will be involved. A good argumentation on this issue should be credited but cannot be expected.

Clause 13-1 sub-clause 2 letter (h) excludes

> liability for loss caused by the ship's use of anchor, mooring and towing gear, loading and discharging appliances, gangways and the like, and liability for damage to or loss of these objects.

The clause excludes liability for loss caused by the ship's "use of anchor". A good candidate points out that the word "use" implies an activity by people onboard the ship, i.e. that someone decides to send out the anchor and deliberately do so. In this case, the anchor rushed out without any such decision or act. According to Handbook p. 340 the anchor must have been used according to its purpose:

> "Lastly, the wording «the ship's use of» presupposes that the relevant object is used in accordance with its purpose. Mooring lines must be used to moor the ship, not e.g. to secure deck cargo. However, if the object has been used in accordance with its purpose, it must be deemed to be in use from the time preparations for use commences and until the use is completed, cf. ND 1976.263 NA *Mosprince/Biakh*."

In this case the anchor is not used according to its purpose as it rushes out without the crew's knowledge. The conclusion should therefore be that the damage to the cables is not caused by the ship's use of the anchor.

Question 2

(a) Is there a breach of the duty of disclosure
(b) If so, may the insurer invoke this breach against the owner of MS Unlucky?

The duty of disclosure is regulated in NP Cl. 3-1 ff., and addressed in Handbook ch. 6.2. It has also been a topic in the lectures. This is a main part of the mandatory reading. A good candidate makes a clear distinction between the question of breach and the question of fault/sanction, cf. letter a and b in the question.

Question a)
The candidates must be expected to find the relevant rules and emphasize the starting point of active duty of disclosure in Cl. 3-1. The main question is then whether the failure to follow the maintenance program is a "material" circumstance.

This circumstance is not directly addressed in the Handbook, but a good candidate points to the regulation in Cl.12-3 to emphasize the importance of lack of maintenance. As the insurer claims he would have added 20 % to the premium for the insurance according to normal branch practice if information was provided, the exam text implies that the information was material. A good candidate points out that the insurer has the burden of proof, but the reference to ordinary branch practice here must suffice in particular when seen in the context of Cl. 12-3. The conclusion thus should be that there is a breach of the duty of disclosure according to Cl. 3-1. It must however also be accepted that the main information for the insurer is classification, and this is in order according to the text. If so, there is no breach according to Cl. 3-1.

Question b)
The rules on the duty of disclosure is directed at the person effecting the insurance, here the owner, and he claims he did not know about the failure. From the text there is no reason to say that he in fact did know or should have known. In this situation NP Cl. 3-4 on good faith applies.

Presuming the owner did know, NP Cl. 3-3 applies. As there is causation between the circumstances that is not disclosed and the damage to the winch and loss of anchor, the insurer would be free from liability.

The text does not address the question of identification, but some candidates may mention it. As there is no claim concerning breach of the duty of due care, the identification rules in C. 3-36 are not relevant. The relevant question is of identification during the negotiation of the contract, and this issue is not regulated in the Plan but follows from ordinary contract law. cf. Handbook p. 212. The rule is that the owner may only be identified with his agents/servants during the negotiation process. There is no information in the text that indicates that the master was in any way involved with entering into the contract. Thus, there is no identification.

Question 3
Is AS Marine Insurance liable for

a) *The loss of the anchor and the chain*
b) *Costs of repairing the winch*

The candidate should see that this is regulated in NP 12-3:

> The insurer is not liable for costs incurred in renewing or repairing a part or parts of the hull, machinery or equipment which were in a defective condition as a result of wear and tear, corrosion, rot, inadequate maintenance and the like.

The insurer is thus not liable for any part being “in a defective condition” due to i.a. “inadequate maintenance”. It follows from the exam text that the maintenance program for the winch is not followed, and thus it must be presumed that the winch is “in a defective condition”. There is nothing in the text that indicates that the anchor was in a defective condition. The question is therefore whether the winch and the anchor must be seen as the same part, cf. Handbook p. 297-298. As it is technically

possible to restitute the anchor and chain this must be seen as a separate part from the winch.

Question 4

How many deductibles is the owner responsible for?

The candidates should here find the rules on deductibles in Cl. 12-18 and 13-4, cf. Handbook p. 70 ff., p. 317 ff. and p. 346. The deductible for hull damage applies for "each casualty". In the exam, there are two instances of striking cables, but they are caused by the same peril/cause. i.e. that the anchor rushed out of the hawse pipe and was dragged along the seabed. The situation is parallel to the situation described under no. 2 at p. 71. A good candidate applies the guiding lines referred from the Commentary at p. 71-72:

> «1 Is there a close connection in terms of location and time between the successive incidents of damage, or are the new accidents of a totally independent nature? Taking the two limitation of liability judgements referred to above as a point of departure, it is nevertheless hardly possible to stipulate very strict requirements as to connection in time and place in order for several incidents of damage to be regarded as one casualty. As long as the incidents occur within a limited area, it must be accepted that they occurred at certain intervals.
> 2 What possibilities did the assured have of averting the last damage? As regards this element, a distinction must, however, be made between the number of deductibles and the number of sums insured. If it is a question of whether new damage shall trigger several deductibles, the assured's negligence must be regarded as a new and independent cause that breaks the chain of causation from the first incident. This follows from the view that the deductible shall have a deterrent effect. However, in relation to the number of sums insured, the deterrence aspect may suggest that negligence on the part of the assured does not give rise to a new sum insured. Deterrence considerations might, in other words, suggest that the distinction between one and several casualties varies depending on whether it is a question of more than one sum insured or more than one deductible.
> 3 Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a 'generally prevailing risk of damage' which would have occurred with the same effect independently of the first damage or its cause?»

The conclusion here should be that there is one casualty. The next question is whether one or two deductibles apply. There is one deductible for hull insurance according to Cl. 12-18. There is an additional deductible for collision according to Cl. 13-4. A good candidate sees that this is a separate cover with a separate sum insured and thus there must be a separate deductible, but it may be accepted if they say that the striking is part of the same casualty as the hull damage and therefore only one deductible shall be applied.

Part II only for master level:

Explain the concepts of insurable value, the sum insured and the relationship between them according to the Nordic Plan 2013 version 2016 and the Norwegian Cargo Clauses: Conditions relating to Insurance for the Carriage of Goods of 1995, Version 2004, Cefor From No. 261.

This is merely a control question and the candidates should find the relevant regulation in NP Cl. 2-2 to Cl. 2-5 and the Cargo Clauses §§ 29-31, addressed in Handbook p. 66 ff. and Wilhelmsen/Bull, Norwegian Cargo Insurance pp. 27 ff. It must be expected that they explain the concepts of "insurable value", "sum insured", "under insurance" and "over insurance" and that as the insurable value in hull insurance normally is agreed, under/over insurance is no issue. Normally, the candidates have little time for this part and not much can be expected of the answers.