Comments and guidance to the examiners in Marine Insurance (JUR1450/JUS5450)

General comments

The students that have followed the lecture series and read on their own should be well equipped to answer this exam. The issues raised are in general not particularly difficult and many of them mentioned explicitly in the lectures. Students that have only read in the last days before the exam will likely struggle with this exam because I have included information in the facts that are not relevant, e.g. the point that Audun was a part of a hacker group supported by the Ukrainian government. This has been done on purpose to make it easier for you as examiners to distinguish the best students from the not so good students.

What it is difficult with this exam, is to structure and answer the different issues efficiently and clearly. The bachelor students only have 2000 words available and the master students 3000. In comparison, the guidance to part 1 below equals 1921 words.

Students that presents the issues clearly and argues reasonably. The students that show ability to prioritise the discussion of difficult issues and confidently rejects untenable arguments should be rewarded. This is the real test in this exam, to identify the relevant and difficult issues.

Contrary to previous years, the exam does not explicitly list the questions to "be discussed". I mentioned that the exam could be made in this way in my Q&A-session on the exam format, so this should not be surprising for the students. My thinking has been that this makes it easier for you to distinguish the students that are able to, based on the parties' arguments, identify the relevant questions from the students that struggle with this.

PART 1 – DISCUSSED BY BOTH BACHELOR AND MASTER STUDENTS

Issue 1 – Duty of disclosure

The first objection from the H&M insurers is that FastShips have breached their duty of disclosure because the insurers were not informed about the potential "cyber weakness" explicitly highlighted by the yard when FastShips took delivery of the four vessels.

Identification

Whether it is dealt with before referring to the Plan's conditions in Chapter 3 Section 1, or at the end, the students should deal with the consequence of the broker Sander Vaule negotiating and entering into the insurance contract on behalf of FastShips. Sander Vaule forgot to mention the information from the yard. Here we should expect the students to efficiently deal with the identification issue and simply state in a short paragraph that when insurance is entered into through a broker, any acts or omissions by the broker is attributable to the person effecting insurance, i.e. there shall be full identification. This is not regulated by the Plan but follows from general contract law principles. We can expect the students to refer to the Plan's commentary pp. 93-94 and p. 139 as basis for this principle.

Identification is explicitly raised as an issue in the parties' submissions and accordingly, students that do not deal with this should be penalised in the marking. Students that deal with this issue efficiently and clearly should on the other hand be rewarded.

Duty of disclosure

Breach of Cl. 3-1 and Cl. 3-3?

The students will have to discuss whether the information by the yard is "circumstances that are material to the insurer …", cf. Cl. 3-1. In my opinion, this falls within what must be considered as material for the insurer. Any particular vulnerability in the vessel that the person effecting insurance has been informed about from the yard should be passed on to the insurers. This should be sufficient to conclude on this issue (it could also be mentioned that the vessels are "super-modern and high tech").

We do not have any indications that makes Cl. 3-2 (Fraudulent misrepresentation) relevant. The students should refer to Cl. 3-3.

Here the first question is whether FastShips (through Vaule) have "failed to fulfil [their] duty of disclosure". Forgetting to mention material information must be considered as a failure under Cl. 3-3 (1). This should be straightforward.

Similarly straightforward is the information that the H&M insurers would have accepted the insurance but with a higher premium. Here the students should refer to sub-clause 2 of Cl. 3-3 and see, at least arguably, the relatively harsh effect in an instance like this. According to the wording, the insurers are free from liability if there is causal connection between the loss and the matter that should have been disclosed. See the Commentary pp. 96-97 and Wilhelmsen/Bull (2017) p. 161. As far as I can see, the "cyber weakness" is what makes it possible for Audun to carry out the hacking of MS "Unlucky" that leads to her collision with "Wind Installer" and the later "hooking" of the array cables, and accordingly there seems to be a causal link here. Leading to the insurers being completely free from liability unless the conditions in Cl. 3-5 are met, even though the insurance would have been accepted but with a higher premium.

> *Maybe it could be argued that it is Audun's hacking that is what causes the collision, and as one could hardly consider Johan having a jealous techie brother to be circumstances that are material to the insurer …", cf. Cl. 3-1, there is no causal link according to Cl. 3-3 (2). I am doubtful about this.*

Students might find Cl. 3-3 (2) and the relevant comments in the Commentary confusing. Students that identify the issue and present the effect of the condition clearly should be rewarded.

Are the insurers barred from invoking the breach, cf. Cl. 3-5?

The students should here address the fact that the insurers had heard about "the potential software issues from the broker of another assured", cf. the facts. The issue is whether this is sufficient to say that the insurers "knew or ought to have known of the matter", cf. Cl. 3-5 first sentence, with the latter alternative being most relevant.

Students that say something about the relationship between Cl. 3-1, cf. Cl. 3-3 and Cl. 3-5 should be rewarded. The issue here is to strike a balance between what can be expected of the person effecting insurance on the one hand and what can be expected by diligent insurers on the other. In my head, it could be sensibly argued that the insurers should have asked further questions to Vaule in the negotiations when they had heard about the software issues from another broker. Had the issue been raised by the insurers, he would most likely have remembered about the information from the yard. Clever students might also raise the issue that it would probably be relevant to ask the insurers what conditions the other assured got. This shows understanding and should be rewarded generously.

I am leaning towards the insurers being precluded from invoking the breach due to Cl. 3-5 but it is open for the students to conclude the other way as long as they argue reasonably. The conclusion in itself is not that important. The students that conclude that the insurers can invoke the breach of Cl. 3-1 against FastShips will have to carry out the rest of the *discussion as if the* insurers were precluded in accordance with Cl. 3-5.

Issue 2 – Is the peril covered by the H&M insurance?

This issue can be dealt with efficiently by the students. This issue is a part of the exam mainly to confuse the students that are not prepared.

The cyber attack is being carried out by Audun as revenge against his father. This is does not fall under any of the perils listed in Cl. 2-9 (1) letters (a)-(e).

Here the students should refer to the marine cover under the Plan being based upon the all-risk principle and as long the cyber-attack cannot be considered to be a war risk, as none of named perils are relevant, or otherwise excluded in the Plan, the peril is covered by the marine (civil) insurance, cf. Cl. 2-8 (1).

Students that spend much time discussing this issue should not be rewarded. Students that show confidence and deal with this issue efficiently should be rewarded.

Issue 3 – Defective part? Cl. 12-4

The insurers argue that this is an easy issue that can be solved by "just reading the Plan". In my opinion, this is the most difficult issue in part 1 of the exam. The argument from FastShips should point the students in the right direction, namely Cl. 12-4.

Scope of exclusion

Several points could, and should, be mentioned here. The students should see that the H&M insurers' argument that this is a "full and complete" exclusion clause for all losses is obviously untenable. It should be sufficient to refer to the wording of the clause to show this. Students that mentions this explicitly and do so efficiently, should be rewarded.

Classification

Furthermore, some students might be misled by the fact that the vessels are classed by DNV. The exclusion of the exclusion is only applicable if the relevant "part or parts in question had been approved by the classification society". This could also be dealt with efficiently.

Part?

The more difficult questions under this issue is whether the software can be regarded as "part or parts of the hull, machinery or equipment". Here we could expect the students to refer to Wilhelmsen/Bull (2017) pp. 297-298 and the Commentary pp. 298-299. The Commentary might be said to support an argument that for something to be considered as a "part" it must be a physical object and I am leaning towards that conclusion. On the other hand, the Commentary refer to "replacement" of the part, and software could be changed or updated as in this case. The conclusion here is not that important. This is an issue where better students can be distinguished from the weaker.

Error or faulty?

Another difficult question, at least in my opinion, is whether the issues could be regarded as an "error in design". Here the yard knew about the problem but were seemingly unable to rectify it because the new software was under development. Here we could expect the students to refer to the third paragraph of the Commentary p. 300 and Bull/Wilhelmsen (2017) pp. 301-305.

Practical relevance?

The best students will point out that whether software could be regarded as a part or not is of less practical importance in this case. The only cost excluded is the replacement cost of the software, and we know from the facts, or it is at least one possible (and in my opinion, reasonable) understanding of the facts, that the yard was going to install the software in December 2023 for free as a part of the delivery of the vessels. (This could in a sense be seen as the yard rectifying defects as a part of the yard's warranty obligation, compare SHIP2000 Art. X no. 3 – this point is not relevant for the exam). If that is the case, well then there are no costs to exclude by the H&M insurers.

The issues discussed above should give room to argue and show understanding. I hope that the examiners will have a good basis to distinguish the candidates on this issue.

Issue 4 – How many deductibles for the repair costs?

The relevant clause is Cl. 12-18 and students will firstly have to discuss whether the collision with "Wind Installer" and the later cable-hook are two casualties.

In my opinion, this is not an easy question. There should be room to show understanding under this issue.

The (first) interpretation issue is how "each casualty" should be understood. We can expect the students to refer to Wilhelmsen/Bull (2017) pp. 318-319 and the Commentary pp. 326-330.

Some students might argue that since the first incidence is a collision and the second a cable-hook the two incidences must be considered to be two different casualties. Here the students might also point to the time and place difference. Some students might also refer to the collision with "Wind Installer" having effect on the direction of the vessel (the facts are partly inspired by the Julietta D incident). Students might also put much emphasis on the different incidences being a result of the same peril, i.e. the lost control of the vessel because of the hacking.

In my opinion, it is also relevant to refer to Cl. 12-18 (3). It could be argued that the dropping of the anchors is an act carried out by the master to "avert and minimise the loss", ref. discussion below, with the consequence that no deductible is applicable for the costs related to the dropping of anchors (if any, ref. below).

Clever students might also highlight that it is unclear whether the cable-hook caused any damage to the vessel that were repaired at the yard. Maybe it could be highlighted that the only damage to MS "Unlucky" was caused by the collision with "Wind Installer". That this incidence might be regarded as a consequence of a mitigation action by the master supports in my opinion that this might be raised as a question.

I am leaning towards only one deductible being applicable here mostly because of Cl. 12-18 (3).

However, what we are testing is the students' ability to identify the issues and argue reasonably, not their conclusions.

PART 2 – DISCUSSED BY MASTER STUDENTS ONLY

Here the students are tested in the relationship between H&M insurance and P&I. This has been discussed in several lectures by bot and Mads Schjølberg and myself. As the students here meet arguments from three parties and not two, some might find it difficult to structure their answer here.

Issue 1 – Does H&M insurance cover collision liability?

Liability towards "Wind Installer"

This is straight-forward. Students that are prepared should see that there is an overlap between the Plan and P&I cover (here Gard Rules 2023). They should identify Cl. 13-1 (1) and efficiently conclude that the collision is covered.

After having concluded on this issue they should also point to the H&M insurer's liability being limited to the sum insured, i.e. MUSD 20 (but remember here the deductible issue touched upon below), cf. Cl. 13-3.

In relation to this liability Gard will be held liable for the remaining liability, ref. Gard Rules 2023 Rule 36. Accordingly, Gard are liable for MUSD 50.

Liability towards the wind farm owner and operator

Under this issue there should be room to distinguish the students.

The liability towards the wind farm operator is as a starting point excluded from the H&M cover under the Plan, cf. Cl. 13-1 (2) letter (h) and accordingly Gard seemingly will have to cover this liability.

However, the liability is arguably a result of the master trying to avoid the vessel from sustaining further damage (that would be covered by the H&M insurers), i.e. an action to avoid or minimise further loss, cf. Cl. 4-7 read together with Cl. 4-12.

Accordingly, clever students should see that a third party liability excluded by the H&M insurance could still be recoverable if the liability could be regarded as "mitigation costs".

I refer to the general comments on this issue in the Commentary pp. 157-161 and Wilhelmsen/Bull (2017) pp. 239-248 and pp. 255-257.

In addition I highlight the below:

The students will have to comment on whether the action was of "an extraordinary nature and must be regarded as reasonable".

In light of the argument from Gard, the students will have to discuss whether the master's act was intended to avoid further damage to the vessel or whether to avoid incurring further third party liability. The students do not have much information to base their discussion on here.

When discussing this we notice a "problem" in relation to the sources available for the students. Here it would in my opinion be relevant to refer to the discussions in ND 1978 p. 139 (NV Stolt Condor) and ND 1981 p. 329 (NV Lindtind), both referred to in the Commentary on p. 159. We cannot expect the students to refer to these cases. Firstly, they are not easily available. Secondly, they are written in Norwegian. This course is taught in English. The reason why I highlight this here is because this is in my opinion a weakness with the Plan and its Commentary. The "product", insurance on Plan conditions, is sold internationally, but the clauses will have to be read in light of the Commentary. The Commentary refers to arbitration cases that are written in Norwegian. For international users of the Plan, this is in my opinion unfortunate.

By referring to the Commentary and the textbook, the students should be able to discuss the issue. I am leaning towards regarding the act by the master as an act to avoid further damage to the vessel. It is the reasoning we are testing, not the students' conclusion.

Some clever students might also raise the question whether Cl. 4-12 (2) could be used to apportion the costs between the H&M insurers and Gard as P&I insurer. Students that refer to this clause and argue that both the wording and the Commentary could support apportionment in this case should be rewarded generously. (The relationship between H&M and P&I has been covered by both Mads Shcjølberg and myself in the lecture series as mentioned above. Mads' mentioned the point that the questions/issues on deciding whether it falls under H&M or P&I is decided on the basis of the Plan).

Issue 2 – Deductible

I refer to the points made under Part 1. Here the students should see that a separate deductible is applicable for the collision liability, cf. Cl. 13-4. This applies in addition to the one (or two) deductible the students conclude that applies above in part 1.

If the students conclude that the liability towards the wind farm owner and operator is a mitigation cost recoverable under the Plan, no separate deductible applies for this liability, cf. Cl. 12-18 (3).

Under part 2 the students should have more than enough words available to discuss the issues raised.

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