

Marine Insurance – autumn 2023 (JUS5450/JUR1450) – Problem question

The proud ship-owner, Hjalmar Rockfjell, decided in 2022 to step down as owner and CEO of his Norwegian registered bulk carrier company FastShips. He had decided to leave the business to the eldest of his two sons, Johan Rockfjell. The same year the company took delivery of four super-modern and high tech Handymax carriers. The vessels were semi-autonomous and had been built at an Italian yard usually specializing in building high tech naval vessels.

When FastShips took delivery, the yard had noted that there could be a minor weakness in the software operating when the vessels were sailing autonomously: the software could be vulnerable to hacker attacks if the hackers were sophisticated and had the right technology. “This should however not be a problem for commercial vessels such as these” the yard said, and continued, “our fear is mainly related to naval vessels being hacked by state supported cyber warriors. We are however developing new software that will be finished in late December 2023. This new software can be installed in your vessels then.” The vessels were classed by DNV.

After having gained control of FastShips, Johan decided to change the company’s insurance broker. Johan wanted to help his insurance broker friend Sander Vaule and agreed with him that he should act as broker ensuring that the company had the necessary marine insurance cover for all parts of the business from 2023 onwards. Vaule’s ambitions were high, his abilities not so much. When Vaule was instructed, Johan mentioned that Vaule should probably say something about the information from the yard regarding the software to the insurers. “Trust me my friend, I will find you the best and cheapest cover there is” Vaule replied.

Vaule managed to negotiate competitive H&M-insurance, with both marine and war risk cover, with the Nordic Plan 2013 version 2023 referred to in the policy as the applicable conditions (without any changes or additional clauses). Separate insurance cover was provided for each ship. The insurable value was agreed to be MUS\$ 20 per vessel, and the sum insured MUS\$ 20 per vessel. The deductible under each policy was set to US\$ 250,000. P&I insurance was provided by Gard under the Gard Rules 2023. In his negotiations with the H&M insurers, Vaule forgot to mention the software information from the yard.

In 2023 everything seemingly went well for FastShips. What Johan did not know was that his techie younger brother Audun Rockfjell, who had been a part of a hacker group supported by the Ukrainian government launching attacks against Russia during 2022 and 2023, planned to attack one of FastShips’ vessels as revenge against his father for letting Johan have control over FastShips. One day in November 2023 when FastShips’ MS “Unlucky” was sailing towards Europe, Audun hacked the vessel’s control system and set the vessel off course. The master on board MS “Unlucky” tried unsuccessfully to override the autonomous sailing.

After having sailed off course for several hours, without being able to override the hacked system, MS “Unlucky” was sailing in to an offshore wind park where the wind farm installation ship “Wind Installer” was anchored. The MS “Unlucky” ran down “Wind Installer”. The “Wind Installer” was severely damaged and considered a total loss. The “Wind Installer” was worth MUS\$ 70.

The collision with “Wind Installer” slowed MS “Unlucky” down, but she did not stop completely. She continued into the wind farm area. At this stage, the master managed to manually override the software system by dropping the anchors in an effort to stop the vessel from keep on sailing. On their way down to the seabed, the anchors hooked one of the array cables connected to one of the wind turbines. The cable was damaged. Because of the cable damage the wind turbine was inoperative for a long period. The cable-hook stopped MS “Unlucky” and she was later towed to a repair yard.

The H&M insurers of “Wind Installer”, being subrogated into the position of the owners, made a claim for damages for the loss of the vessel. The claim amounted to MUSD 70. There was no dispute as to MS “Unlucky” being fully liable for the loss.

It didn’t stop there however. The owners and operators of the wind farm made a claim for the damage to the array cable and for the loss of income due to the downtime on the turbine. FastShips accepted liability for both heads of loss claimed by the wind farm owner and operator. The total claim amounted to MUSD 2,5.

MS “Unlucky” was repaired and FastShips claimed the repair costs reimbursed from the H&M insurers. The repair costs amounted to MUSD 4.

In addition to the repair costs, FastShips also made a claim against H&M insurers for the liability incurred towards both “Wind Installer” and the wind farm owner and operator. The same claims were also made against Gard as FastShips’ P&I insurer.

Issues to be discussed by both bachelor (JUR1450) and master (JUS5450) students:

When the claim for repair costs was made against the H&M insurers, the insurers had several objections.

Firstly, even though the insurers had heard about the potential software issues from the broker of another assured, the insurance would have been more expensive had they received the information from the yard. Secondly, the repair costs was a consequence of a cyber attack and that was a risk covered by the war insurance and not marine insurance. If it was not covered by the war insurance, the risk fell nonetheless outside the scope of cover under the marine insurance. Thirdly, this was clearly an error in the vessel’s system, and losses for such errors always fell outside the scope of the H&M insurance, “just read the Plan, and you’ll see that this is straight forward”. Fourthly, if the H&M insurers were liable at all for the repair costs, the liability could not amount to more than MUSD 3,5, as two casualties caused the damage, and not one.

FastShips was not happy with the response from the H&M insurers. Johan Rockfjell replied the following on behalf of FastShips.

Firstly, the information from the yard was not relevant for the insurers. The only difference would have been a higher premium, and in any case, this was information the insurers already knew. In any event, this was not FastShips fault but the fault of the useless broker Sander Vaule. It had to be the insurers problem that they trusted the broker, not FastShips’. Secondly, the hacker attack was covered by the marine insurance, this was not a war peril and thus it had

to be covered under the Plan. Thirdly, the exclusion the H&M insurers was referring to was not relevant as the software could not be considered to be a “part” and in any event the exclusion did not apply for the whole damage. Fourthly, the damage to MS “Unlucky” was caused by the same peril, the cyber attack, and accordingly FastShips was only liable for one deductible under the insurance contract.

Discuss the issues the parties’ arguments raise.*

**Please note that on some of the issues there is not necessarily one correct answer. What we then expect you to do is to identify the relevant issues and questions, and to argue reasonably.*

Issues to be discussed only by master (JUS5450) students:

FastShips had covered the claims for damages from both the insurers of “Wind Installer” and the owners and operators of the wind farm. Now FastShips claimed these costs reimbursed from both the H&M insurers and Gard. Both the H&M insurers and Gard had several objections.

The H&M insurers refused to cover the liability and argued as follows. Firstly, the H&M insurance is a property damage insurance and not a liability insurance. What FastShips claimed covered was third party liability claims, and accordingly these losses were excluded from cover. Secondly, if the H&M insurers were liable, it could only be in relation to the damage caused to “Wind Installer” and not the liability in relation to the damage on the array cable. Thirdly, any liability towards third parties had to be limited to the sum insured. Fourthly, if the H&M were liable for either just the liability towards the insurers of “Wind Installer”, or both towards “Wind Installer” and the wind farm owner and operator, a separate deductible had to apply in relation to these claims in addition to the deductible(s) applicable for the damage claim by FastShips.

Gard on their side did not agree with the H&M insurers’ approach. Firstly, H&M insurance on Nordic Plan conditions does cover third party liability in certain instances. This was straight forward and therefore the H&M insurers had to be liable for the whole loss in relation to “Wind Installer”. Secondly, in relation to the liability towards the wind farm owner and operator, there was arguably an exclusion for this liability in the Nordic Plan, but this liability had to be covered by the H&M insurers because this liability arose as a consequence of the master trying to save MS “Unlucky” from further damage and not to avoid incurring third party liability. Because of this the H&M insurers had to bear this liability and not Gard.

FastShips did not really care whether the whole liability had to be borne by one or the other of the insurers, but did not agree with the H&M insurers that several deductibles applied in this instance.

Discuss the issues the parties’ arguments raise.*

**Please note that on some of the issues there is not necessarily one correct answer. What we then expect you to do is to identify the relevant issues and questions, and to argue reasonably.*