

## **JUS5450/JUR1450 Marine insurance, Exam Spring 2019**

### **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.

On the other hand, this group of students is generally hard working and extremely motivated. This should also be taken into consideration. Even if the attitude here is that we shall not follow a "normalfordelingskurve" in the strict sense, it would seem appropriate that at least 10 % of the students and may be even 15 % should be given an A. In the previous examination of marine insurance we therefore operated with less strict requirements than we do with an ordinary group of Norwegian legal students. We have also practised that we do not lower the result due to weak language qualifications unless bad language render the meaning unclear.

The course was based on Nordic Plan 2013 Version 2016 and this contract was given to the students. The main mandatory reading is Wilhelmsen/Bull, Handbook in hull insurance, which is also based on Version 2016. The exam is thus based on this version of the Plan. However, the amendments of the 2019 Versions are discussed during the lectures, and students that refer to the 2019 Version should be credited.

## Part I. Master and Bachelor level

### *Question 1*

- A. *Is the war risk insurer liable for the arrest of the vessel?*
- B. *If so, is the war risk insurer liable for total loss?*

The topic is a central part of the mandatory reading, cf. *Wilhelmsen/Bull* p. 93 ff and p. 389.

A. The clauses are not listed and the candidates must be expected to find the relevant rules in NP Cl. 2-9 (b) and point out that the vessel is neither captured nor confiscated. The question thus is whether “other similar interventions” can be applied cf. *Wilhelmsen/Bull* p. 96 ff. A good candidate points out that the wording contains no requirement as regards the motive of the interventions, but that it follows clearly from the Commentary that measures to implement customs or police legislations are outside the war risk cover (p. 96). Further, it follows from the *Sira* case based on previous arbitration practice that the intervention must be made for the furtherance of overreaching political goals (p. 98). This is further developed to mean interventions that are typical for war or times of international crisis, and often can be explained by foreign policy considerations.

In this case, the immediate cause of the detention is breach of customs legislation, but the reason for the legislation is to prevent using the Urea fertilizer in the making of bombs and national security issues. This combination is not discussed in *Wilhelmsen/Bull* and the conclusion is open. Relevant arguments would be that the detention is not directed primarily at the vessel, but at the cargo, and that the vessel as such is no security risk. This appears different from the *Germa Lionel* case (p. 97). Another relevant argument is that there is no indication in the text that the fertilizer was to be delivered to Boko Haram or used to make bombs. Rather, it was to be used for peaceful means. A third argument is that even if there are terrorist attacks in part of Nigeria, the text do not indicate an actual war or international crisis. However, the vessel was boarded by the Nigerian marine, and this may indicate a war risk.

The candidates can not be expected to use the Commentary to the 2019 Version of the Plan, but if these are referred to it should be credited. The Commentary states that

It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption.

The last sentence may be used as an argument to support that if there is an overriding security goal behind the detainment, it does not matter that the intervention formally is justified by a breach of customs regulation. However, the meaning in the Commentary is that there if there is a difference between the real reason and the formal reason, i.e. the formal reason do not reflect the real reason, the real reason is decisive. In this case there is an actual breach of customs regulation, and the detention is based on Nigerian legislation. Even so, a candidate referring to this sentence should be given credit.

The candidate may discuss the issue as a matter of combination of causes. Even if this issue is not raised, it should be given credit if discussed. The candidate should be able to point out Cl. 2-14. A good candidate points out that the two causes are interacting before the insured event (the arrest/detainment), and that there is a chain of causes rather than two independent causes. The guiding line in such case is that the most direct cause constitute the dominant cause unless the previous cause creates a substantial increase in the risk for a casualty, cf. p. 124-127 and in particular p. 126 and ND 1989.263 Scan Partner. It can be argued that the security issues behind the legislation do not raise the risk for detention due to breach of customs regulation; such breach would lead to detention also for other goods.

B: If the arrest is an intervention covered by NP Cl. 2-9 b, the question is whether the insurer is liable for total loss. The test here is only to find Cl. 5-11, which clearly states that the insurer is liable if the vessel is detained for more than 12 months (6 months in the 2019 Version).

### **Question 2**

- A. Is the marine risk insurer liable for the arrest of the vessel?*
- B. If so, is the marine insurer liable for total loss?*

See Wilhelmsen/Bull p. 106 ff and p. 260 ff.

A: The presumption here is that the arrest is not covered under Cl. 2-9 sub-clause 1 (b). The candidates should manage to explain the all risks principle in Cl. 2-8 before they move on to discuss the exclusions. The good candidate goes directly to letter (b). Some candidates may start with letter (a), but the result of this will be that if the arrest is not covered by 2-9 (b) it will be covered by Cl. 2-8. Further, it follows directly from (b) that "intervention by a State power" is excluded, and arrest by the Nigerian navy is clearly an intervention by State power. Letter (b) does not make a distinction between foreign and own State power, and it is wrong to discuss this. From the wording the arrest is excluded, and this conclusion must be accepted. Wilhelmsen/Bull does not give basis for a more thorough discussion.

However, it follows from the Commentary to Cl. 2-8 (b) that “Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place.” The sentence is not referred to in *Wilhelmsen/Bull* and the students cannot be expected to know this. However, it has been referred to during the lectures as part of the explanation of the new regulation in Version 2019, where the difference between the wording in Cl. 2-8 (b) and the Commentary was an important issue. A reference should be credited, and even more so if the candidate manages a good discussion of the contradiction between the wording and the Commentary. Honor should also be given if the candidate refers to the new regulation, where it is clear that Cl. 2-8 (b) covers interventions by foreign State that is not covered by Cl. 2-9 sub-clause 1 (b).

B: the candidate should be able to find Cl. 11-1; “The assured may claim compensation for a total loss if the ship is lost without there being any prospect of it being recovered or if the ship is so badly damaged that it cannot be repaired” and point out that the first sentence is the relevant basis for the claim. *Wilhelmsen/Bull* give little guidance on this question. Relevant arguments are that the Nigerian State has legal basis to confiscate the vessel and due to the time that has passed it can be argued that the arrest is in fact confiscation. A candidate who refers to Cl. 15-11 in the argumentation should be credited. If 12 months is sufficient to establish total loss under war risk insurance, it may be argued that more than 2 years should be sufficient under the marine risk insurance in a case that has similarities to a war risk situation. The conclusion is open.

### **Question 3:**

Can the insurer against marine risk or war risk avoid liability due to illegal undertakings?

The candidate must be expected to find Cl. 3-16. The solution can be derived directly from the text. The insurer is liable if the assured is in good faith, and there is no indication in the text that he was aware of the lack of permits.

### **Part II. Only for Master level**

The Norwegian producer of the fertilizer had effected cargo insurance according to the Norwegian Cargo Clauses: Conditions relating to Insurance for the Carriage of Goods of 1995, Version 2004, Cefor Form No. 261, including the interest of Nigerian buyer/receiver. The insurance was effected on A clauses. As the cargo is still onboard the vessel, there is no claim against the insurer, but the Nigerian buyer wants advice as to what extent a potential future claim is covered. You are therefore asked to address the following questions:

- A. *Is the cargo insurer liable for total loss if the fertilizer is confiscated by the Nigerian State?*

It follows from § 18 no. 7 that “measures taken against the goods by State authorities” is excluded. The concept of measures is not defined, but is wide enough to include confiscation. Credit should be given if the candidate refers to no. 8, which makes it clear that confiscation is a measure. The answer to the question is therefore no.

§ 18 no. 6, 7 and 8 is treated in Wilhelmsen/Bull, Norwegian Cargo insurance, ch. 5.3.5. § 18 no. 7 was discussed during the lectures.

*B. Does it matter for the insurer's liability that the receiver/buyer did not have import permit?*

Lack of import permit is not directly excluded in any of the provisions. The closest is §. 18 no. 4, but there is no indication that the cargo is intended for unlawful purposes. On the contrary, the insurer claims that the receiver should use it for peaceful means. The answer therefore is no.

§ 18 no. 4 is treated in Wilhelmsen/Bull, Norwegian Cargo insurance, ch. 5.3.3. § 18 no. 4 was also discussed during the lectures.

*C. For how long do the insurance period last for the shipment of this cargo?*

Termination is regulated in § 15, but as the cargo is not discharged, none of the provisions fit. However, according to § 16, 2, the insurance is suspended if the goods are delayed in transit for more than three months unless circumstances mentioned in no. 1-4 applies. None of these is applicable. The insurance is thus suspended 6 months after the vessel being boarded by the Nigerian navy.

§ 15 is treated in Wilhelmsen/Bull, Norwegian Cargo insurance, ch. 7.3 and § 16 in ch. 7.4. We did not have time to discuss the period of insurance during the lectures, but an overview is given in the presentation.

