5401 – Guidance to markers – autumn 2021

General

Several points are more or less concealed in the presented facts; - that there is option for discharge in Denmark or Germany makes it questionable whether this involves inter-Nordic trade in the meaning of mandatory liability rules for voyage chartering, ref MC s. 322; - the fact of delay in putting on hatch covers involves questions of: a) initial unseaworthiness or allowed subsequent remedial steps which fail, ref e.g. the URD II; b) whether the delay was motivated by considerations of the cargo or safety of the ship. Moreover, the circumstances of the subsequent failure to lower the hatch covers could be seen as, a) a question whether the act was primarlily motivated by protecting the cargo or the ship, as in Pagensand, Sunny Lady and in Ulla Dorte, b) whether the overpainting amounted to initial unseaworthiness, ref the somewhat similar evalutation concerning overpainted flanges for gauging pipes in the Sunny Lady. I comment further on these points as they appear below.

Part I

Q1

This does not involve Gencon cl 2 since the mandatory rules of MC ch 13 applies to the bill of lading holder being a third party, ref MC s 325 and 253.

The information about prior loading of slate at Larvik is inserted merely for the purpose of making it realistic that the ship had such a low freeboard when approaching the Svenner area (the spcific gravity of rocks is of course much higher than that of grain). As a curiosity, the URD II went down in the Svenner area for similar reasons of swell and a low freeboard caused by a cargo of rocks (loaded at Fagerstrand in the inner Oslo-fjord) and with delayed closing of hatches.

When assessing answers, weight should be put on whether the candidate sees the factors at play: whether there was initial unseaworthiness in not having the covers closed upon departure; whether it was prudent to motivate in venting of the cargo; although negligence is admitted for the fact of not foreseeing the potential risk in open waters – crucial question: this negligence was a nautical error; wheter it primarily concerned caring for the cargo (thus would not qualify as nautical fault in any event), or it was a subsequent nautical fault, not traceable to initial unseaworthiness.

In my view there is no clear cut answer. Probably it could be viewed as a subsequent nautical fault; the master had not planned to unduly delay closing of hatches at the time of departure – but the safest answer is probably to say that Norship is not exempt from liability, since there was no clear decision/plan in place to ensure lowering of hatches before preils were encountered, thus constituting an "extended" initial unseaworthiness. The topic is however potentially complex, and candidates' reasoning for the one or the other should be rooted in some of the above considerations taken from case law.

The above concerned the "first" 50% of the damage. As to the "second" 50% this is a separate point since the "first" would have occurred in any event. This "second" however also revolves around the same circumstances: partly a question of initial unseaworthiness resulting from overpainted arrows (see further below), partly whether the failed act (successful immediate lowering of covers) was

primarily intended for caring for the cargo (avoiding further seawater damage) or to avert safety threat to the ship (holds being flooded, the ship sinking, as in the URD II).

In addition, a sophisticatd way of looking at it might be to say that had it not been for the first mistake (delayed closing of hatches allowing for the first swell) the second would not have happened, thus as a matter of causation the second formed part of the initial negligence (dependent on how that is answered) – or that it was some kind of "casus mixtus cum culpa"; if liability is established for the first, then liability as a matter of causation should also be seen as ensuing from the first, albeit liability for the second, if having appeared singularly, would not have ensued. However, candidates are clearly not expected to know about this general contract law type of liability principle.

My inclination would be to say that this second mistake was primarily for the interest of the cargo, thus did not amount to nautical fault. But the outcome is clearly up for discussion. One may equally well reach the opposite view: that this threatened the safety of ship (as in the URD II). The facts of the case are too scarce to give clear indication of the one or the other.

Moreover, the point about overpainted signs/arrows is close to the facts in the Sunny Lady. I give details of that case in ch 5 in the attached article, so the students have the case in English, having been given the article in canvas, but the article does NOT form part of the syllabus (it was published after the course began) so the candidates cannot be expected to know the answer beyond the account given in Falkanger/Bull/Brautaset p. 350, 356, 359. (In my article I criticize how the case is presented in conjunction with the U.S. case the Racer.)

Again, the question about overpainted signs/arrows and unseaworthiness must be seen as an open question, although the Sunny Lady points towards a similar overpainting being too marginal to constitute unseaworthiness, and the same could probably be said about the present case. The point is however rendered moot by the presentation of the facts, stating that the bosun would probably have acted as he did irrespective of the missing signs. One could then speculate (as the facts are presented) whether the master should have yelled less intimidatingly to avoid the mistake, hence that the yelling constituting negligence on the master's part, etc. That is open for the candidates to use, if they so wish, however my intention was not to put this as any separate basis for negligence; e.g. that excessive yelling is a mistake primarily in the interest of the ship or cargo – a discussion which may border to the absurd.

In conclusion, all outcomes: no liability, full liability, half liability, can in my view be justified. The evaluation turns on the way of reasoning.

Part II

Q2

The essence is here the wording of cl 10: "… to the extent that the terms or contents of such bills … impose or result in the imposition of more onerous liabilities …".

This in turn involves two major questions: was it the terms and contents of the bills that caused the more onerous liability? - and: was the liability under the bills more onerous than those under the charter? – with the latter question involving: was this an inter-Nordic voyage? – ref MC s 322 leading to the mandatory rules of MC ch 13 setting aside the terms of the charter, including the owner-friendly Gencon cl 2.

As to the latter question: the answer is in my view open ended, and one finds no assistance in the syllabus. The preferable approach would in my view be to say that here the charterer has at the time of making the charter agreed to the voyage being extended beyond the scope of the inter-Nordic protective rules pursuant to MC s 322. The fact that the charterer had an option subsequently to decide whether or not to make the voyage inter-Nordic, should not have the effect of enabling oneself to navigate within or outside such legal protective position. But also the other alternative is clearly arguable: that it is the actual voyage (with the relevant part cargo) which should govern, possibly with some (albeit) remote assistance from the system of the MC concerning choice of law and jurisdiction in s 252, ref s 310, where the actual voyage counts as a precondition on a par with an optional voyage. (the fact that s 310 has essentially been set aside by the Lugano convention, is a separate topic).

This means that both alternatives under the question involving inter-Nordic voyages must be deemed acceptable.

The other question presupposes that the first is answered to the effect that this was an inter-Nordic voyage, leading to a discrepancy between the liability terms of the charter and those of the MC's mandatory rules. (That Gencon cl 2 would lead to non-liability seems to me obvious, and I do not discuss it further here; there is no indication of privity on the owner's or manager's part.) This question seems to me to go in the direction of cl 10 not covering the situation at hand. It was not the terms or content of the bills that led to increased liability but rather the mere fact that bills were issued. In other words, regardless of what terms the bills would have contained, the mandatory provisions of the MC would have been triggered by the mere fact that bills were issued, and being in the hands of a third party receiver. As part of such analysis, also the following may be put up for discussion: Cl 10 envisages increased liability from the terms or contents of the bills in relation to "those assumed by the owners under the charter party". Are, in respect of the above discussion of inter-Nordic voyage, possible mandatory liability of Norship "assumed by the owners"? In other words, could it be said that despite (possible) mandatory liability under the voyage charter, only the liability under the charter itself (cl 2) was "assumed", so that Norship would have an argument under cl 10 even with an inter-Nordic voyage? To me this would be a somewhat formalistic argument but it cannot be dismissed; one should reward candidates being able to spot it.

Perhaps not too many candidates will end up with the above conclusion of cl 10 not being applicable to the present situation, but will take a less stringent analysis of the wording and end up with a conclusion that the clause provides for indemnity. That must be considered alright; the important point is that they see the main aspects involved in the question.

It could also be that candidates find that the wording of cl 10 opens for doubt and that MC s 338, 3 should lead to a narrow construction of cl 10, bringing alignment between the two sets of rules. That is clearly a legitimate approach. It should be mentioned that the syllabus book (p. 496-98) gives no direct answer: for some reason Gencon cl 10 is not integrated in the discussion concerning the Vestkyst I and MC s 338, even though cl 10 was introduced already in 1994 (13 years before the issuing of the book).

Part III

Q3

The replacement of bills with sea waybills in the context of the case is partly tricky and yields no clear cut answer, hence how candidates answer it should be assessed generously.

From an overarching perspective it should make no difference – in terms of liability for cargo damage, as here – whether the one or other type of documents is chosen. Under the mandatory scope of the liability rules, waybills trigger the same liability as bills of lading (as would also a mere oral agreement of carriage of general cargo). The difficulty is however that the effect of tramp bills of lading (Mc s 325, ref 253) only covers bills of lading, in line with the HVR themselves (which generally only deal with bills of lading), although that part (the nature of cargo documents) is expanded on in the MC compared to the HVR. However, the expansion of the scope of cargo documents in the MC is not carried out systematically, as exemplified with the said restriction to only bills of lading being retained in respect of tramp cargo documents (s 325, 253). This restriction (not expanding tramp cargo documents onto waybill) is probably explained by the fact that in 1994 waybills were to a limited extent used as tramp documents, but e.g. in the more up to date Rotterdam Rules (which have so far not come into existence) waybills are in this respect placed on a footing with bills of lading.

The essence of the above is therefore that from a legal policy viewpoint there should be no reason to discriminate between the two types of documents within the context of the case. On the other hand, the wording of the MC is as such clear: it merely talks about bills of lading (s 325, 253). It therefore takes some degree of insight and "courage" on the candidates' part to disregard the wording in favour of more overarching considerations, which it cannot be expected that they adopt– and which also means that the 'de lege lata' answer must be considered unsettled, in my view.

I add that if one ends up with the answer that waybills in the system of the MC cannot be equaled with bills of lading, this leads to the outcome that Nortrade as a third party receiver is bound by the owner friendly Gencon cl 2. This is, from the policy point of view of protection of third party receivers, fairly dramatic. In turn, it has the effect of making moot any question of recourse rights by the shipowner in the present case. Thus, if waybills were to be used and given the effect as here described, important aspects of the case would be rendered legally moot.

Q4

If candidates were to equal waybills with bills for the purpose of granting mandatory rights to third party receiver (Nortrade), a separate question may arise in respect of indemnity rights. The presented Gencon cl 10 here expressly provides for "bills of lading" being issued, and candidates may object that there is a contradiction in the premise for the question of the exam, thus in the wording being presented to candidates.

One should treat also this type of objection generously. My thinking has been that to strike out "bills of lading" of the clause would be confusing (under the previous questions) while wishing to put the present question to them. Therefore, whether candidates state that they assume that the wording of the clause "bills of lading" shall be deemed amended to read "sea waybills", or they state that the wording does not allow for waybills, so that there is, in consequence, no express indemnity covering waybill, must both be considered acceptable.

In the latter case a further question does in principle arise: if there is no express indemnity provision, what does then govern? One would then be back to the solution in the MC (s 338, 3) and with the rationale of the Vestkyst I being applicable, and with the critical remarks in that respect as set out in

the syllabus book (p 496-97 – and with the shortcoming of that presentation, as set out under Part II above).

Trond Solvang - December 2021