Guideline-5401-h-20

This was an open-book home exam (due to covid-19) where the candidates had 48 hours and a word limit of 3.000 (as a standard for most exams). They had therefore a generous time limit, however within a restricted format. This means that the reasoning of the respective answers must play an important part: have they succeeded in spotting the most central legal questions and giving a compressed and balanced reasoning for their answers?

Moreover, by decision of the Deans (studiedekanvedtak) of 20 November, I am requested to describe – as relevant information to markers – how the situation of covid-19 has influenced the efficiency of teaching of this course (jus 5402). In that respect, I would generally state:

All teaching has taken place digitally. This means that the otherwise flexibility of students putting questions during class has been significantly restricted. Although the teacher allows for questions, typically at the end of the video session, this is not equivalent to opening for q&a’s in a physical environment; the threshold for putting questions is different, there is no opportunity to stay behind and put questions to the teacher in person, etc. The negative effect of this is hard to predict, but my suspicion is that it is significant, perhaps most so for students who by nature are of reserved inclination.

The Deans also request that the following statement be made known to markers, as part of these guidelines (in translation): “The pandemics has made the general learning environment (‘den generelle studiesituasjonenen’) very demanding this semester. The marking shall have regard to this fact. Any doubt as to the proper grade shall be resolved in the candidate’s favour.”

Part I

The case concerns part voyage chartering which is to some extent addressed in the syllabus book (the English 2017 version p 453). This fact of part chartering may bring confusion as to how to direct oneself in the respective chapters of the Code, ch. 13 or 14. The essence is that it is voyage chartering and thus with tramp bills of lading being issued, giving third parties the rights as enshrined in ch. 13, see s. 325 which refers to s. 253 and more specifically to sections 274-290. Moreover, since the case concerns cargo damage, also s. 347 comes into play, with a similar reference to the provisions of ch. 13.

The Code applies as the discharge port is located in Norway, s. 252, 2, 2).

Q 1:

The aspect of fio in the case is intended as a red herring. Fio is in itself a potentially complex question, discussed in the syllabus book (p 392-94, 469-70, 488). However, in this case the fio-type situation did not involve performance under the relevant charter / bill of lading but fio under a different part cargo / part charter. In other words, it does not raise classic fio-type discussions as to whether the claimant must accept damage caused under loading/discharging operations of the relevant cargo due to agreed fio, but damage caused under a separate/different cargo operation, for a different charterer. When stating that this is a red herring, the idea is that for candidates to deal with fio indiscriminately of whether the situation involved (in the intermediate port) pertains to the charter / bill of lading at hand or not, gives a flawed starting point for the discussion.

The difficult question is therefore whether the relevant stevedores are to be considered servants of the shipowner for purposes of performing the charter (bills of lading) at hand. In this respect one should probably be fairly generous with candidates’ type of reasoning (since they are not trained in addressing such constellation) but the essence must be that one starts in the ordinary end of asking whether the damage occurred while the cargo was in the carrier’s possession (MC s. 347, ref 274), which clearly it did, and with the further question whether the relevant stevedores should be deemed the carrier’s servants under s. 275, ref 347.

That is, again, a potentially difficult question, but the starting point must be that vis-a-vis the claimant, the carrier cannot invoke such a fio defense under a separate charter. However, if candidates were to discuss this in broader terms – that fio clauses is a “warning” pertaining to loading operations in general, and that the present claimant therefore must assume some type of corresponding general risk – one should probably assess this type of argument generously. It may also be that some candidates take the view that the intermediate port call was some type of (unlawful) deviation, having an effect on the carrier’s invocation of fio-type defenses. Also this should be assessed generously, although, strictly, there is no support for it in the facts, nor is it unusual under part chartering to have such “rotation” of ports involving different part charterers.

However, since also the master was at fault, it will generally suffice for a claimant (as a matter of causation in the law of damages) to point to such fault by the master as a sufficient basis of liability. Hence, by most candidates this will probably be seen as the primary question – with the above fio discussion becoming relevant only if the master’s fault for some reason should be considered exempted from the carrier’s liability.

This, in turn, concerns: How shall this event involving the master’s fault be legally considered? Since it happened during the course of the voyage, one is prima facie within the scope of s. 276 (ref 347) and with the further question whether the fault primarily had to do with caring for the cargo or primarily with the safety of the ship (ballasting relating to stability). Also here one should take a generous approach as to the candidates’ way reasoning, since the constellation given is unusual (not directly covered in the syllabus book), hence the answering of it tricky.

Probably the better approach is to view the fault as relating to caring for the cargo and thus not exempted from liability, e.g. by stating that the master has a general duty to supervise cargo operation for ship safety purposes (with support taken e.g. from the Linvik-case) and that, had such supervision taken place, the cargo damage would have been avoided. This, again, pertains to the above discussion concerning the effect of fio under a different charter: the present claimant should not be placed at a peril (liability wise) by there being such a “third party” fio provision.

Some candidates may perhaps go into questions of initial unseaworthiness relating to this intermediate port stay. That would be a misunderstanding in the sense that this is not the commencement of the cargo voyage for the present charterer/claimant – but still the rationale of such an approach should not be entirely dismissed, due to the openness of the topic; preparation of the ship for its sea voyage is parallel to a “classic” question of the relationship between initial seaworthiness and nautical faults, as discussed e.g. in the Sunna-case.

Whether the carrier is liable or not may therefore be up for discussion, but if one should end up with no liability, one should clearly address the next question concerning measure of damages on an alternative basis of assuming liability.

Q 2:

As to the measure of damages it is clear that s. 279 applies, ref s. 347, hence standardized measure (market value at discharge port) does prima facie apply and with indirect losses (mere financial losses) being excluded. This is however not entirely black and white, see the syllabus book (p 273-74). Whether costs in destruction of damaged goods are recoverable is discussed in the syllabus book (p 374).

Moreover, the unity is cartons (p 375), thus the unit limitation is NOK 40.020.000 (100x60x667x10). The weight limitation is NOK 1,2 mill (60.000x2x10). Nothing is said as to whether also the units (cartons) are damaged but if candidates also include these, that must be deemed acceptable, MC s 281 i.f.

The direct losses claimed was: 50% of the cargo destructed, based on a market price of NOK 10 per kg=NOK 300.000 (60.000x10x50%) – plus losses through rebate sale=NOK 150.000 (30.000x10x50%) – in total NOK 450.000. This is below the limitation right and recoverable in full.

If candidates were to conclude that destruction costs of NOK 100.000 were recoverable, then still the limitation amount would not be reached. It seems fairly clear that loss of goodwill (NOK 500.000) is not recoverable under s. 279.

Part II

Q 3:

The point here is to test out identity of carrier questions where i.a. MC s. 295 comes into play.

How this is to be understood in a tramp bill of lading situation is not entirely clear. The provision (s. 295) stems from liner trade situations, as a type of “anti-Lysaker/Lulu” provision, disallowing identity of carrier clauses which typically aim at channeling all cargo claims to the head owner – thus protecting the liner company, as contracting carrier, from being sued. This type of constellation pre Lysaker/Lulu was intended to be avoided by the introduction of s. 295, deeming the contracting carrier (liner company) as the responsible party, while adding s. 286 in holding (also) the performing carrier liable as responsible party.

On that rationale it is clear that the voyage charterer (Vega Shipping) would be deemed the equivalent of a contracting carrier (liner company). Moreover, s. 347 refers to (amongst other) s. 295 while also referring to the application of s. 286 “… accordingly”. This indicates that both the head owners Genuine Shipping (performing carriers) and voyage charterers Vega Shipping (contracting carriers) could be held responsible.

However, the above illustration from the liner trade has no clear parallel in a plain chartering situation, as here. The tradition in chartering is that head owner (Genuine Shipping) is the party to the bills; that company employs (and has nautical instruction right over) the master and crew, and that company takes out cargo-p&I insurance etc. For such reasons, it is also not so that a cargo owner would typically wish to claim against a managing owner (Vega Shipping). Hence, it seems doubtful that the reference in the MC ch 14, s. 347 to s. 295 is well thought through (which is the conclusion in a solid master thesis published in MarIus some years ago).

The above is further complicated by the facts of the case, stating that it is the port agents on behalf of the Master who signs the bills – not the master himself who signs, as contemplated in MC s 295.

It is however not expected that candidates see this uncertainty relating to the applicability of the MC, including s. 295. It must be fine that they find that the one or the other party, or possibly both, could be deemed the responsible party under the bills, although the “safest” way, by applying the Code, would be to discuss and apply s. 295 along the lines indicated above; Vega Shipping is the contracting carrier, Genuine Shipping is the performing carrier, in that MC s 286 is applied “accordingly” (to a liner trade situation). Hence, it is not to be expected that they know how such application is complicated in practical life, in the chartering trade.

Part III

Q 4:

This is strictly speaking outside the ambit of the contract law course since it involves potential questions of tort. The point is that candidates should be able to see that there is no contractual relation between the claimant cargo owner and Kr.sand Stividaar as tortfeasor.

One could ask whether the stevedores would be considered servants of the carrier (see discussion under q 1). If so s. 282,2 provides that these are protected by the Himalaya-type provision of the Code, meaning that the claimant shall not be any better off by claiming against such servants than by claiming against the carrier. Hence, if the facts had been so that it was a stevedoring company assisting in the present cargo carrying performance, retained by the shipowner/carrier, who caused the damage, a claim against such stevedores would be directly covered by s. 282,2.

A complicating factor (ref q 1) is however that the stevedores did not assist (and cause damage) in such a capacity, but rather as a (regular) third party servant. This question has not been much up for decision/discussion under Norwegian/Nordic law. It is worth mentioning (although candidates are not expected to know) that it is generally a live topic under US law. Here the constellation has typically been: Occasioned by the low limitation amounts of the Hague Rules (as implemented in the US COGSA), cargo owners typically try to claim against stevedores in tort, thus avoiding any limitation amount, while the courts have generally responded by adopting a wide understanding of the concept of “carrier”, thus deeming e.g. stevedoring defendants to be “carriers”, and with the limitation rights intact, similar to what is the intention behind MC s. 282,2 (which originates from the Hague-Visby Rules, not the Hague Rules).

In assessing the candidates’ answers, it must be considered acceptable that they see that this is a claim outside of contract, and either state that it belongs to general tort law, and/or see the point about MC s. 282,2 regulating a similar type situation and that, for such reasons, whatever liability would be subject to limitation rules.

If they connect to their answer in q 1, by holding that Kr.sand Stividaars are to be deemed servants of Vega Shipping within the context of carriage of a different cargo than the one at hand, then they would have a connecting point for reasoning also under this Part III. That would be a sophisticated way of connecting the topics and should be rewarded.

Trond Solvang - December 2020