

Guiding lines JUS5450/JUR1450 Marine insurance, Exam Spring 2021

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, 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. Some of the students have difficulties with the English language.

These problems have 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 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 language failure provides an unclear meaning.

The mandatory reading in hull insurance is Wilhelmsen/Bull, Handbook in hull insurance, 2017, which is based on Nordic Plan 2013 Version 2016. The current version of the Plan is however Version 2019, and the lectures was based on this version. Version 2019 should be used in the exam, but it must accepted if some students refers to Version 2016. The exam concerns provisions that has not been altered in the 2019 Version.

Special problems due to the corona-virus spring 2021

Due to the corona virus the exam is home exam and open book, and with permission to use all digital sources. The Commentary to the Nordic Plan and also other sources will therefore be available under the exam.

Due to the pandemic, all teaching at the Faculty of Law has been carried out online in the Spring semester 2021. Moreover, access to student reading rooms has been subject to significant restrictions. As the pandemic has made the study situation extremely demanding, grading must take this into account.

Guiding lines for the evaluation

Part I. Master and Bachelor level

As a starting point, the students should be able to identify most of the legal problems and provide some arguments in order to pass. The level of the grade will depend on the merit of the discussion and whether the conclusion is logical based on the discussion. As the students have all material available, an A on master level should presume identification of all problems and arguments, although faultless legal method cannot be claimed. For bachelor level, less can be required, in particular on the more complicated issues which are identified below.

Question 1

Is the insurer liable for damage to the vessel occurring in excluded waters?

The question concerns trading areas and are discussed in Wilhelmsen/Bull p. 175-180. The students should be able to point to NP Cl. 3-15 on trading areas and that the waters around Svalbard according to the Appendix to the NP map no. 1 are excluded areas regulated in Cl. 3-15 last sub-clause. The starting point is that the insurance ceases to be in effect, but the insurer may consent to sailing in advance. The question to be discussed is whether the previous permission must be considered to be renewed even if this formally is not done when the premium and special conditions are continued. This particular issue is not discussed in the book. An argument for continued permission is that the purpose of the notification to the insurer is to give him an opportunity to request special premium and conditions, cf. for instance Cl. 3.15 sub-clause 2. It can however not be expected that the students see this and any conclusion must be accepted.

Question 2

How many deductibles may the insurer apply?

The students should here refer to cl. 12-18 sub-clause 2. As such, the question is easy.

It may be that the student fails to see 12-18 sub-clause 2 and discuss the distinction between one and more than one casualty in relation to Cl. 12-18 sub-clause 1, cf. Wilhelmsen/Bull p. 317-319 with reference to ch. 4.3.2.1 on Cl. 4-18 (p. 70). This issue is discussed at p. 70-72, with reference to ND 1974 NSC Sunvictor. Arguments for considering the instances of damage as one casualty is the closeness in time and space. It can also be argued that when sailing in areas packed with ice, the risk for ice damage is prevalent. A good discussion should be given some credit, but it is a failure not to see sub-clause 2.

Question 3

Can the insurer deny cover because the ice damage is caused by ordinary use of the vessel?

This is a question of application of Cl. 10-3 and discussed in Wilhelmsen/Bull p. 113-114. The reason for the exclusion is to avoid insurance of foreseeable losses that the assured easily can finance through his own budget. The main question is whether the losses are foreseeable. It can be argued that several touches with ice is comparable to contact damage by navigation through locks or in a shallow river that are specially mentioned in the book. On the other hand, it may be argued that the insurer has given permission to sail in Polar waters, and that Cl. 12-18 sub-clause 2 appears to treat ice similar to heavy weather. A good discussion should be given credit, but cannot be expected.

Question 4

- A. Has the assured breached a safety regulation?*
- B. If so, can the insurer invoke this breach?*

This is a question of breach of safety regulations regulated in NP Cl. 3-22 ff. and discussed in Wilhelmsen/Bull p. 185 ff.

4 A – The student should be able to see that a Norwegian regulation is a “rule” issued by public authorities, and also that as the rule implements the PC, the PC 1.3.1 has this status, cf. Wilhelmsen/Bull p. 187-188. The student should also be able to point out the requirement that the rule must “concern measures for the prevention of loss”. This is not elaborated in the text, but the reference to SOLAS indicates that this condition is met. The students may point to the Preamble on the PC on this issue, but this is not covered in the mandatory reading and cannot be expected. The student should be able to see that 1.3.1 is breached even if the breach is caused by a failure to renew it.

4 B - This is a question of

1. Identification
2. Negligence
3. Causation

The student should be able to refer to Cl. 3-25 and that there is a question of negligence and causation, cf. Wilhelmsen/Bull p. 195-198, and also of identification.

A good student see that the safety regulation is addressed to the assured, whereas the breach is made by the safety and insurance manager. It is therefore a question of identification between the assured and the manager, cf. 3-36 sub-clause 2. It appears that the conditions for identification is met and this does not require much discussion.

The book does not say much on negligence in this respect, but the question of negligence/gross negligence is addressed in general at p. 206-207:

If the casualty is caused by a breach of legislation or class regulation, the presumption is that the person responsible for the breach has acted with negligence, in particular if the regulation is aimed at preventing casualties. Such cases would however normally all be within the scope of the rules on safety regulation in NP. More relevant circumstances in regard to an evaluation of negligence according to Cl. 3-22 is therefore the risk for the ship being involved in an accident, whether or not this risk was foreseeable for the assured, to what extent the risk could be avoided and how much time the assured had at his disposal to act.

From this the students should be able to deduct that when there is a breach of a written regulation, there is a presumption for negligence. On the other hand, the breach is a result of a failure to renew the certificate, which implies that the underlying conditions to get the certificate is in order. A good candidate may also argue that the risk reducing factors are the safety requirements of the PC, not the certificate itself. Both conclusions should be accepted.

The issue of causation in relation to certification is discussed in Wilhelmsen/Bull p. 196-197. A good student points out that causation may be presumed when there is a breach of a rule to prevent loss, p. 196, and also that the assured has the burden of proving that there is no causation, cf. Cl. 3-25 sub-clause 3 and Wilhelmsen/Bull p. 199, but this cannot be required and in particular not from the bachelor students. The students should however see that there is normally no causation between a lack of a certificate and a casualty, Wilhelmsen/Bull p. 197.

Question 5

- A. Has the assured breached a safety regulation?*
- B. If so, can the insurer invoke this breach?*

This is also a question of breach of safety regulations, see above.

A – This is a question of whether the procedures in the Operational Manual has the status of safety regulation according to NP Cl. 3-22. The issue is discussed in Wilhelmsen/Bull p. 189-192. The candidate should see that the wording of Cl. 3-22 is that the safety regulation is “issued by public authority”. This implies that the safety regulation is the rules in the Code itself, and not the procedures defined by the assured to be included in the PWOM. This also follows from Wilhelmsen/Bull p. 191-192 on the ISM regulation, which can be used as a parallel here. The question is also discussed in the NP Commentary 2019 p. 121, partly referred in Wilhelmsen/Bull p. 192, but the students cannot be expected to see this. The conclusion should thus be that a breach of the procedures does not constitute a safety regulation.

B – This is a question of identification, negligence and causation

A good student sees that the procedure is breached by the captain, whereas Cl. 3-25 is addressed to the assured, and that according to Cl. 3-36 the assured cannot be identified with the captain in regard to negligence in connection with their service as seamen, see *Wilhelmsen/Bull* p. 216-217. It cannot be required that they see this, and in particular not on bachelor level.

The exam does not implicate that Cl. 3-25 sub-clause 2 on special safety regulation should be addressed, but a student mentioning that this clause cannot be applied as this is not a “special safety regulation” should be given credit for this.

As for the question of negligence, it should be pointed out that the breach creates a presumption for negligence, and that the assured has the burden of proof for another result, Cl. 3-25 last sub-clause.

The student should see both the presumption for causation in cl. 3-25 last sub-clause and the fact that look out is a precaution for safety and failure therefore also presumes causation.

Part II. Only for Master level

The insurer is concerned about the risk for damage in Polar waters, and is contemplating to insert the following clause in the policy:

Unless otherwise agreed in writing, it shall be a condition of the insurance of the Vessel that the assured shall comply or procure compliance with all statutory requirements of the state of the Vessel's flag relating to the construction, adaptation, condition, fitment, equipment, manning, safe operation, security and management of the Vessel and at all times shall maintain or procure the maintenance of the validity of such statutory certificates as are issued by or on behalf of the state of the Vessel's flag in relation to such compliance.

The assured shall not be entitled to any recovery from the Association in respect of any claim arising during a period when the Member is not fulfilling or has not fulfilled the conditions in this provision.

The insurer asks you as a lawyer to explain the differences between this clause and the provision of safety regulations in the Plan.

This is a question of comparing the Nordic safety regulation approach with the UK warranty approach, cf. Wilhelmsen/Bull p. 33-35 and p. 201. The actual clause is not mentioned in the book as it is taken from the P&I insurance. The students should be able to point out

1. The assured's duty in the clause is tied to "statutory requirements". Similar to what is stated above on safety regulations, this implies that the insurer may invoke a breach of the regulation to implement and maintain a manual, but not a breach of the procedures prescribed in the manual.
2. It does not matter what organization or person makes the breach ("comply or procure compliance"). There is therefore no need for issues of identification.
3. The insurance is suspended when there is a breach of the rules, i.e. there is no cover at all. This is stricter than the provision of causation in NP Cl. 3-25, but not as strict as a traditional warranty. A good student also refers to the apportionment principle in Cl. 2-13 on combination of causes which can lead to apportionment if a breach of a safety regulation is combined with objective perils, but this cannot be required.
4. There is no requirement of fault. This is also stricter than NP Cl- 3-25.