Protecting time under the ICA

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The Inter-Club New York Produce Exchange Agreement (ICA) regime, if expressly incorporated into a time charterparty on NYPE or Asbatime forms, is a means of apportioning liability for cargo claims. It allows parties to resolve liability for cargo claims between owners and charterers quickly and at minimal cost. However, this is only the case if the party initially liable for the cargo claim notifies the other party 'in time'.

ICA provisions

The ICA, which was first formulated and entered into by clubs in 1970, has undergone three revisions[1]. Following the 1996 amendment, the ICA was renamed the Inter-Club New York Produce Exchange Agreement 1996 (ICA 1996). Clause 2 of the ICA 1996 provides that:

– *'The terms of this Agreement shall apply notwithstanding anything to the contrary in any other provision of the charterparty; in particular the provisions of clause 6 (time bar) shall apply notwithstanding any provision of the charterparty or rule of law to the contrary.'*

Clause 6 ICA provides that:

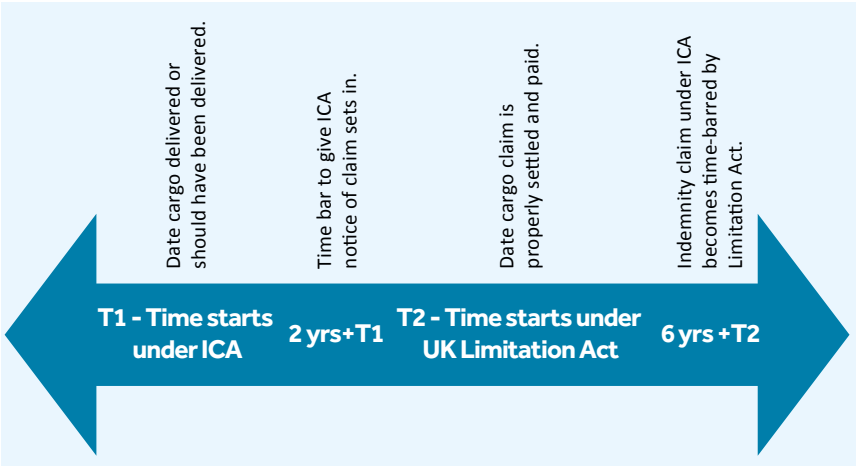
– *'Recovery under this Agreement by an Owner or Charterer shall be deemed to be waived and absolutely barred unless written notification of the Cargo Claim has been given to the other party to the charterparty within 24 months of the date of delivery of the cargo or the date the cargo should have been delivered, save that, where the Hamburg Rules or any national legislation giving effect thereto are compulsorily applicable by operation of law to the contract of carriage or to that part of the transit that comprised carriage on the chartered vessel, the period shall be 36 months. Such notification shall if possible include details of the contract of carriage, the nature of the claim and the amount claimed.'*

Both clauses 2 and 6 have been preserved in the Inter-Club New York Produce Exchange Agreement 1996 as amended September 2011 (ICA 2011). Therefore, any authorities on these points with regard to the ICA 1996 should equally apply to the ICA 2011.

Whilst the ICA sets out the relevant notice obligations and the time bar for providing such notice, it must be mentioned that the time bar under English law for the parties to commence proceedings in relation to their indemnity claim is the same as that for breach of contract under the Limitation Act 1980, which is six years from the date when the cause of action accrued. This is calculated as when the underlying cargo claim is properly settled and paid[2].

1 *24 August 2011, Standard Club Circular, Inter-club New York Produce Exchange Agreement 1996 (as amended September 2011)*. The ICA was amended in 1984, 1996 and 2011

2 See London Arbitration 32/04



Visually, the time bars could be represented as above.

By the application of clause 2, the time bar provision in clause 6 will prevail over any other time bar mentioned in the charterparty that might appear to be in conflict. This was confirmed in the 2011 English High Court decision in the *Genius Star 1*[3].

We look at this case in detail below.

Background

In this case, the ICA 1996 had been expressly incorporated into the charterparty, which was itself subject to English law and jurisdiction. Clause 39(2) of the charterparty provided that:

'Any claim must be made in writing and the claimant's arbitrator appointed within 12 months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred.'

The sub-charterers settled a cargo claim with cargo interests and sought to recover the settlement from the charterers. The charterers, in turn, passed the claim up the charterparty chain to the owners. Both the sub-charterers and charterers notified their claim within 24 months of delivery in accordance with the provisions of the ICA 1996, but failed to commence arbitration proceedings within 12 months in accordance with clause 39(2) of the charterparty. The owners argued that the claim was, therefore, time-barred.

Comment

Whereas clause 6 of the ICA dealt with the time bar for notification of a claim, clause 39(2) of the applicable charterparty provided for the commencement of proceedings in relation to that claim. While these provisions obviously relate to different requirements, the applicability of the latter in relation to an indemnity for a cargo claim would preclude the applicability of the former in this case.

Judgment

The arbitrators in the first instance, and then the Commercial Court on appeal, had to decide whether the one-year time limit in clause 39(2) applied to cargo claims that were to be settled and apportioned in accordance with the ICA 1996. Applying the test of what a 'reasonable man having the background knowledge available to both owners and charterers' would understand, both held that, applying clause 2 of the ICA, the one-year time limit under clause 39(2) did not apply to claims under the ICA. These had their own time limit under clause 6 and the charterers and sub-charterers, having notified the counterparty appropriately under the ICA, then had the benefit

3 M.H. Progress Lines SA v Orient Shipping Rotterdam BV and other, The Genius Star 1 [2011] EWHC 3083 (Comm)

of the usual six-year limitation period for bringing their recovery claims.

Therefore, while in disputes *not covered* by the ICA, other time bar provisions stated in the charterparty would take effect, where a cargo claim is *to be apportioned under the ICA*, the 24-month time bar in clause 6 will prevail.

Application

The ICA regime makes sense on a commercial level. Notice of the cargo claim must be given within two years of the date of delivery of the cargo, or the date when the cargo should have been delivered, except where the Hamburg Rules apply (where the period is 36 months to take into account the two-year time bar for cargo claims under those rules). As such, the ICA time bar seeks to be one year after the underlying cargo claim should expire. Furthermore, the time starts running from delivery rather than discharge.

A carrier who is potentially liable for a cargo claim under a bill of lading should, therefore, have plenty of time after being notified of a cargo claim to notify the relevant party from which to seek apportionment or recovery under the ICA.

Conclusion

It is of utmost importance for members to provide adequate and timely notice of a potential ICA claim under their charterparties in order to avoid a time bar of any recovery claim they may have.

Such notice should contain as much information as possible, but should, as best practice, at least include details of the contract of carriage, nature of the claim and the amount claimed. A full example can be found below, although it is understood that not all of the information will always be available initially.

Draft notice

To: Name of owner/charterer *(with logical amendments)*
Vessel:
Voyage:
Bill of lading:
Port of loading:
Port of discharge:
Nature of cargo claim:
Amount claimed:

Dear Sirs,
We, owner of the [ ] hereby place you, the charterer, on notice pursuant to the ICA incorporated into the charterparty dated [ ] of a potential claim under the above-mentioned bill of lading.

Furthermore, pursuant to the applicable charterparty and the ICA, we place you, the charterer, on notice for full liability in this matter and reserve the right to hold the charterer liable to indemnify the owner against any and all costs, losses and liabilities arising out of and in connection with this matter.

The owner's rights are fully and expressly reserved.