Standard Club

June 2018

Cargo

The Inter-Club Agreement

Introduction

The Inter-Club Agreement (ICA) first came into force on 20 February 1970. It was revised in 1984, in 1996 and again in 2011.

See *24 August 2011, Standard Bermuda Circular: Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011)*, which details the basis for the 2011 amendment to the 1996 Agreement, including the security amendments.

The ICA was formulated by the International Group of P&I Clubs (IG) to provide a relatively simple mechanism for dealing with cargo liabilities under the New York Produce Exchange (NYPE) and Asbatime form charterparties. The aim of the ICA was, and still is, to avoid costly and protracted litigation in finding and apportioning fault for cargo claims arising under such forms. The ICA further seeks to address ambiguities inherent in the drafting of clauses 8 and 26 of the NYPE 1946 form.

When is the ICA relevant? Incorporation of the ICA

Under the NYPE 1946 and Asbatime charterparty forms, the ICA will not be automatically incorporated. Express incorporation must be made for the ICA to apply within these charterparty forms.

Conversely, under the NYPE 1993 form, clause 27 provides that cargo claims between an owner and charterer are to be settled in accordance with the 1970 ICA, as amended in 1984 *'or any subsequent modification or replacement thereof'*. Therefore, unless the standard clause 27 is amended, the latest (2011) version of the ICA will now be automatically incorporated into the NYPE 1993 form without the need for any additional wording.

However, the ICA is not limited to just the NYPE and Asbatime forms, it can be incorporated into any other charterparty form. Indeed, parties are free to incorporate the ICA into any contract, but care should be taken when doing so as there may be a greater chance of inconsistencies between the ICA provisions and the subject charterparty wording.

The ICA can also be incorporated in part; however, this is not recommended as best practice. If attempts are made to incorporate the ICA, clear wording should be used as to the exact extent of the incorporation.

How does it work? Apportionment under the ICA

The ICA regime acts similarly to a knock-for-knock agreement, laying down a clear formula of how liabilities are to be allocated between owners and charterers. It is mechanical in its allocation of cargo liabilities between an owner and charterer.

For the apportionment provisions under the ICA to apply, the following preliminary requirements have to be fulfilled. There must be:

- a cargo claim (clause 3); and
- a claim made under a contract of carriage, i.e. a bill of lading, waybill, etc. (clause 4).

Cargo claim(s)

(3) ...Cargo Claim(s) mean claims for loss, damage, shortage (including slackage, ullage or pilferage), overcarriage of or delay to cargo including customs dues or fines in respect of such loss, damage, shortage, overcarriage or delay and include:

(a) any legal costs claimed by the original person making any such claim;

(b) any interest claimed by the original person making any such claim;

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(c) all legal, Club correspondents' and experts' costs reasonably incurred in the defence of or in the settlement of the claim made by the original person, but shall not include any costs of whatsoever nature incurred in making a claim under this Agreement or in seeking an indemnity under the charterparty.

This clause was amended from the 1984 version of the ICA and extends the category of claims. Under the 1996 version of the ICA, the scope of what is recoverable was also significantly widened.

However, customs fines will be limited to those made under a carriage contract and therefore paid by the original cargo claimant as opposed to fines paid by the owner and/or charterer direct.

Contract of carriage

(4) Apportionment under this Agreement shall only be applied to Cargo Claims where:

(a) the claim was made under a contract of carriage, whatever its form,

(i) which was authorised under the charterparty;

The term 'contract of carriage' is very wide and ICA claims may therefore arise under any type of contract of carriage, including waybills, through bills and even sub-charterparties.

Courts and tribunals often treat the ICA as a commercial agreement, recognising that the aim behind its development was to avoid detailed legal arguments and costly disputes. This has been demonstrated in the outcomes of the *Hawk*[1] and *Elpa*[2] cases, and also London *Arbitration 3/13*.

(ii) which would have been authorised under the charterparty but for the inclusion in that contract of carriage of Through Transport or Combined Transport provisions, provided that

(iii) in the case of contracts of carriage containing Through Transport or Combined Transport provisions (whether falling within (i) or (ii) above) the loss, damage, shortage, overcarriage or delay occurred after commencement of the loading of the cargo on to the chartered vessel and prior to completion of its discharge from that vessel (the burden of proof being on the Charterer to establish that the loss, damage, shortage, overcarriage or delay did or did not so occur); and

(iv) the contract of carriage (or that part of the transit that comprised carriage on the chartered vessel) incorporated terms no less favourable to the carrier than the Hague or Hague Visby Rules, or, when compulsorily applicable by operation of law to the contract of carriage, the Hamburg Rules or any national law giving effect thereto; and

When a cargo claim arises under a through bill of lading or any other combined transport contract of carriage, the claim can be subject to apportionment only when:

1. the loss has occurred at sea (i.e. from tackle to tackle); and

2. the Hague/Hague Visby Rules were applicable to that contract, or the Hamburg Rules were compulsorily applicable.

(b) the cargo responsibility clauses in the charterparty have not been materially amended. A material amendment is one which makes the liability, as between Owners and Charterers, for Cargo Claims clear. In particular, it is agreed solely for the purposes of this Agreement:

(i) that the addition of the words "and responsibility" in clause 8 of the New York Produce Exchange Form 1946 or 1993 or clause 8 of the Asbatime Form 1981, or any similar amendment of the charterparty making the Master responsible for cargo handling, is not a material amendment; and

(ii) that if the words "cargo claims" are added to the second sentence of clause 26 of the New York Produce Exchange Form 1946 or 1993 or clause 25 of the Asbatime Form 1981, apportionment under this Agreement shall not be applied under any circumstances even if the charterparty is made subject to the terms of this Agreement; and

The ICA only applies when the charterparty has not been materially amended. For an amendment to be 'material', it has to make cargo liability between the owner and the charterer clear.

See *London Arbitration 27/84*, where the following additional wording *'The master is to supervise safe stowage and seaworthy trim'* was considered roughly equivalent to the rights expressed by the words *'under the supervision of the master'* in clause 8 of the NYPE form and therefore did not constitute a material amendment.

(c) the claim has been properly settled or compromised and paid.

For apportionment to apply, the original claim must not only have been properly settled but also paid. This requirement was described in *The Strathnewton*[3] as a condition precedent and the principle was upheld in the US case of *The Lazos*.[4]

The basis of the settlement is to be considered rather than the cargo claim itself. See *The Holstencruiser*[5] and *The Benlawers*.[6] This more flexible approach was adopted in *London Arbitration (29/04)* and also *London Arbitration 3/94*.

1. [1999] 1 Lloyd's Rep. 176
2. [2001] 2 Lloyd's Rep. 596
3. [1999] 1 Lloyd's Rep. 176
4. [2001] 2 Lloyd's Rep. 596
5. [1983] 1 Lloyd's Rep. 219
6. [2007] No.06 civ.15308CSH New York

The ICA provides for either 100% or a 50/50 liability split. In the case of a 50/50 apportionment, there is often a 'trickle down' effect down the contractual chain (if the contracts are back to back), e.g. head charterer 50%, sub-charterer 25%, sub-sub-charterer 12.5%, etc.

Clause	Cause of cargo claim	Apportionment
8(a)	Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel... save where the Owner proves that the unseaworthiness was caused by the loading, stowage, lashing, discharge or other handling of the cargo, in which case the claim shall be apportioned under sub-clause (b).	100% owner
8(b)	Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo	100% charterer
	unless the words "and responsibility" are added in clause 8 or there is a similar amendment making the Master responsible for cargo handling	50/50
	save where the Charterer proves that the failure properly to load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel	100% owner
8(c)	Subject to (a) and (b) above, claims for shortage or overcarriage	50/50
	unless there is clear and irrefutable evidence that the claim arose out of pilferage or act or neglect by one or the other (including their servants or sub-contractors)	100% to the party whose act or neglect gave rise to the claim
8(d)	All other cargo claims whatsoever (including claims for delay to cargo):	50/50
	unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors)	100% to the party whose act or neglect gave rise to the claim

Time bar under the ICA

The ICA includes its own time bar mechanism, under which a cargo indemnity claim may no longer be brought if not brought within the stipulated time. These issues were explored in the club's article 'Protecting time under the ICA' in the Standard Bulletin, December 2015.

Clause 6 of the ICA sets out the relevant time bar provision:

'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...'

The need to provide as much information as possible in relation to the underlying cargo claim was emphasised in the *Ipsos*[7] case. This judgment is a reminder of the importance of ensuring that contractual notices, such as those under the ICA, are given in writing, and are clear and unambiguous as a matter of best practice.

The underlying time bar under English law, for parties to commence formal proceedings for breach of contract, is that provided by the *Limitation Act 1980*[8], which is six years from the date on which the cause of action accrued. The indemnity arising from the ICA is such that the time bar for commencing proceedings is calculated from the date when the underlying liability for the cargo claim has been established (i.e. when the claim is settled and paid) not from the (earlier) date of discharge or delivery (see *London Arbitration 32/04*).

Inconsistencies between the ICA provisions and the other charterparty clauses

Clause 2 of the ICA sets out that *'the terms of this Agreement shall apply notwithstanding anything to the contrary in any other provision of the Charterparty...'*.

In *The Strathnewton*, it was confirmed that a claim based on clause 8 of the NYPE form could not be asserted independently of the agreed ICA protocol. The overriding capacity of the ICA was confirmed in the more recent case of *The Genius Star 1*.[9] In this case, it was held that the general time bar (of 12 months) within the charterparty did not apply to claims falling under the ICA, which had its own self-contained time limit in clause 6 (of 24 months for written notification and six years overall).

Security issues

There is no direct English law authority on the issue of security. However, there is South African authority, based on *The Strathnewton* and *The Holstencruiser*, that security cannot be obtained for a claim under the ICA prior to the underlying cargo claim having been paid or settled. In *The Cargo Explorer*,[10] where the 1984 version of the ICA was applicable, the charterer successfully set aside the ship arrest until such time that the claims under the relevant bill of lading had been fairly disposed of, i.e. settled or compromised and paid, and that there was no claim under the ICA that could be enforced in the meantime.

7. *Ipsos S.A. v Dentsu Aegis Network Limited (previously Aegis Group plc)* [2015] EWCH 1171 (Comm)
8. Section 5
9. [2011] EWHC 3083
10. The High Court of South Africa A252/94

The IG recently considered this position (where settlement of a cargo claim under the 1996 Agreement is a condition precedent to a right to indemnity including a right to security) and determined that it was unsatisfactory and was leading to further costs between parties. The IG therefore introduced a new provision into the 1996 Agreement in September 2011, which creates an entitlement to security for an equivalent amount on the basis of reciprocity, once one of the parties to a charterparty has put up security in respect of a cargo claim, provided that the time limits set out in clause 6 of the 1996 Agreement have been complied with.

Whilst there is no clarity yet provided from the English courts, the prevailing view is that a right to security under the ICA only arises where the governing charterparty is dated after 1 September 2011 and the underlying cargo claim arises after 1 September 2011, unless otherwise agreed.

Summary

The ICA is a pragmatic approach to apportioning cargo liabilities. It has been reviewed and revised and it will continue to be scrutinised so that it remains appropriate. The IG clubs (and their members) are discouraged from taking technical points against one another, and instead should follow the spirit of the ICA.

CASE STUDY

A ship, *Bulker 1*, is on a long-term time charter to a charterer on the NYPE 1993 form with additional riders. The date of the charterparty is 1 May 2014 and it applies English law and London arbitration. Under the terms of the charterparty, the charterer is responsible for loading and discharge, i.e. clause 8 has not been amended. The charterparty provides for worldwide trading excluding well-known sanctioned countries, but includes trade to West Africa.

In an earlier voyage, the charterer gave orders to load a cargo of rice in bags in Ho Chi Minh City, Vietnam for discharge in Port Harcourt, Nigeria under owner's bills of lading. The cargo was loaded in apparent good order and condition, and the bills of lading were issued on 20 May 2015. The cargo was carried without any incident and arrived at the nominated discharge port on 12 June 2015, when discharge operations were commenced. During ongoing discharge operations on 14 June 2015, the master alleged that there was cargo damage/shortage principally due to local stevedores' rough handling of the bags. Shortly before discharge operations were completed, cargo interests presented a claim for cargo damage/shortage worth $60,000 and threatened to arrest the ship. They were not willing to accept a club LOU.

The owner appointed local correspondents to assist in negotiating settlement of the cargo claim for $42,500. The owner paid the settlement funds on 18 June 2015 and thereafter the ship sailed.

In preparing an owner's ICA recovery from its charterer, the following considerations are reviewed:

1. What notice should the owner give to its charterer and what is the time limit for doing so?
As a matter of best practice, the owner should place its charterer on notice as soon as it is reasonably practicable to do so. There is no prescribed form that the notice under the ICA should take, although there will be certain minimum information requirements.

Clause 6 of the ICA refers to the relevant time bar provision. This sets out the requirement to give written notice *'of the Cargo Claim... within 24 months of the date of delivery of the cargo or the date the cargo should have been delivered...'*. In this case where discharge operations began on 12 June 2015, notice should be given to the charterer before 11 June 2017.

2. What is the time bar for any recovery action against the charterer?
Bearing in mind that English law applies under the charterparty, the usual six-year limitation will apply under the provisions of the Limitation Act 1980. The date to be adopted as the start date for the relevant time bar calculation is the date that the underlying liability for the cargo claim has been established (i.e. when the claim is settled and paid), not from the date of discharge or delivery (*London Arbitration 32/04*). In this example, as the owner paid and settled the claim on 18 June 2015, the time bar date will be 17 June 2021.

3. How will the claim be apportioned under the terms of the ICA?
See clause 8(b), where the charterer is to be held 100% liable where the claim arises from cargo discharge operations. However, there may also be an argument that clause 8(d) of the ICA should instead apply, such that the party seeking to rely on this clause should provide *'clear and irrefutable evidence'* that the cargo claim arose from neglect by the charterer's servants for 100% of the liability to rest with the charterer. However, this evidence may sometimes prove difficult to adduce. On these facts it is immaterial, but it could make a difference on different facts.

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