Claims Guides

The Inter-Club New York produce exchange agreement

What is the ICA?

The ICA is an agreement drawn up by the International Group Protection & Indemnity Associations ("IG P&I Clubs") to provide a mechanical apportionment of liability for cargo claims between owners and charterers. Historically, there was much dispute regarding the precise allocation of liabilities between owners and charterers for third party cargo claims. Obtaining a legal decision on the apportionment of liability was costly and the ICA was enacted to provide a "rough and ready" apportionment of liability between owners and charterers (The Strathnewton [1983] 1 Lloyd's Rep 219).

Is the ICA legally binding and does it apply to all charterparties?

There is no legal force mandating the incorporation of the ICA into charterparties. However, most IG P&I Clubs recommend that the ICA be incorporated into their Members' charterparties.

Clause 27 of the 1993 and 2015 versions of the New York Produce ("NYPE") forms expressly incorporates the ICA. The effect of the incorporation makes the terms of the ICA applicable directly to both the owners and charterers (The Ion [1980] 2 Lloyd's Rep 245).

For older NYPE forms like the 1946 version which do not expressly incorporate the ICA, the ICA can nonetheless be incorporated by using the following recommended wording:

"Cargo claims as between Owners and the Charterers shall be governed by, secured, apportioned and settled fully in accordance with the provisions of the Inter-Club New York Produce Exchange Agreement 1996 (as amended 2011), or any subsequent modification or replacement thereof. This clause shall take precedence over any other clause or clauses in this charterparty purporting to incorporate any other version of the Inter-Club New York Produce Exchange Agreement into this charterparty".

How is liability apportioned?

Before touching on the apportionment of liability, it is important to note that only actual sums paid by the party seeking an indemnity can be apportioned. In other words, owners can only seek a recovery against their charterers if their claims have crystallised, i.e. they have settled and paid the claim to the respective cargo interests (see clause 7 of the ICA).

Broadly speaking, the apportionment of liability depends on the circumstances of how the claims arose:

Section	Circumstances	Apportionment of Liability
8a	Claims arising out of unseaworthiness and/or error or fault in navigation or management of the vessel	100% owners
8b	Claims arising out of loading, stowage, lashing, discharge, storage or other handling of cargo	100% charterers
8c	Claims arising out of shortage and /or over carriage	50% owners 50% charterers
8d	All other cargo claims whatsoever including claims for delay to cargo	50% owners 50% charterers

For each of the above circumstances, there are exceptions which would change the apportionment of liability:

Section	Circumstances	Apportionment of Liability
8a	Where owners prove that the unseaworthiness was caused by the loading, stowage, lashing, discharge or other handling of the cargo.	100% charterers
8b	Where the words "and responsibility" are added to clause 8 or if there is a similar amendment to make the master responsible for cargo handling.	50% owners 50% charterers
	Where charterers prove that failure to carry out cargo operations was caused by unseaworthiness of the vessel.	100% owners
8c	Where there is clear and irrefutable evidence that claim arose out of pilferage or act or neglect by one or another (including their servants or sub-contractors)	100% by party liable
8d	Where there is clear and irrefutable evidence that claim arose out of act or neglect of one party (including their servants or sub-contractors)	100% by party liable

It is important to note that the words "act or neglect of one party" do not require any culpability or wrongdoing. Hence, in a case where soybean cargo was damaged because charterers had instructed the vessel to wait off the discharge port for a period of 4 months because charterers were not paid, owners were entitled to make a claim under section 8(d) of the ICA because there was clear evidence that the damage to the cargo was caused by charterers' act of instructing the vessel to wait, which by itself is not a breach of the charterparty (The Yangtze Xing Hua [2017] EWCA Civ 2107).

Under clause 8(b) of the ICA, charterers are normally 100% responsible for all cargo responsibilities (i.e. for loading, stowage, discharge, trimming etc.) However, the addition of the word "and responsibility" or any similar amendment to make the master responsible for cargo handling would change the apportionment to 50:50. However, a clause calling for a partial transfer of responsibility for stowage is insufficient to change the apportionment (Agile Holdings Corporation v Essar Shipping Ltd ("The Maria") [2018] EWHC 1055 (Comm)).

For illustration, a clause stating "the stevedores although appointed and paid by Charterers/Shippers/Receivers and or their Agents, to remain under the direction of the Master who will be responsible for proper stowage and seaworthiness and safety of the vessel…" is insufficient to change the apportionment of liability to 50:50.

Conditions to recovery

Apart from ensuring that the claim falls under the respective circumstances as prescribed by section 8, there are three cumulative conditions under section 4 which must be satisfied before an apportionment can take place. First, the original claim must be made under a contract of carriage. Second, the cargo responsibility clauses in the charterparty must not be materially amended. In this regard, a material amendment is one which makes the liability between owners and charterers for cargo claims clear. Third, the original claim has to be properly settled, compromised and paid. In this regard, the threshold for whether a claim is properly settled is relatively low (The Krapan J [1999] 1 Lloyd's Rep 688). A claim is not properly settled if owners or a Club settled a claim which is so weak that no reasonable owner or Club would take it sufficiently seriously to negotiate any settlement involving payment. It is important to note that in order for a recovery to take place, actual payment has to be made and not merely ascertained or agreed.

In light of the above, Members should take note of the following recommendations when dealing with ICA claims:

a. Ask their counterparty for any relevant information to help defend the cargo claim

b. Take advice from local lawyers on the merits of the cargo claim and enter into an agreement on that advice

c. Allow the counterparty to comment on the settlement prior to entering into any settlement

Are custom fines recoverable?

Section 3 of the ICA states that custom dues and fines in respect of loss, damage, shortage, overcarriage or delay form part of the cargo claim. However, the cargo claim has to be made under a contract of carriage. Hence it is arguable that the fines are only recoverable under the ICA if the fines were levied against and borne by the cargo interests (who would then claim against owners under the contract of carriage). If the fines were levied against owners by customs authorities, such fines arguably do not form part of the cargo claim and may not be recoverable under the ICA.

The issue of security for customs fines has been considered by the International Group ("IG") Clubs, who have agreed that since the strict construction of the ICA is that customs fines imposed directly on an owner or charterer or its agent (as opposed to an indemnity claim brought by cargo interests) probably do not fall under the ICA, there is no entitlement to ICA security as between an owner and charterer unless either has provided security to cargo interests. One party may of course still have a claim under the charterparty for an indemnity outside the ICA if the other party is in breach of the charterparty.

When must security be furnished under the ICA?

Apart from the mechanical apportionment of liability, the ICA also seeks to provide certainty in relation to the lodging of security and counter security between owners and charterers. The ICA provides that there be reciprocal exchange of securities once security has been issued by owners to the cargo interests.

To illustrate, a party is only obliged to put up security after such security has been lodged by the counter party to the claimant. If the counterparty does not put up security, he is not entitled to demand for security. For example, in the event owners make a security demand against charterers, charterers are only obliged to put up security if such security has already been lodged by owners in favour of the cargo interests.

As to the quantum of security, so long as security has been lodged by the counterparty, he is entitled to make a demand for security for the same quantum notwithstanding any right of apportionment under the ICA or under the contract of carriage. Hence, if an owner puts up security in favour of cargo interests, he is entitled to demand similar security against charterers even though the claim arose out of unseaworthiness of the vessel. (i.e. 100% liability on owners).

Members should note that security need not be provided if there is ambiguity as to whether the entire ICA or specifically, clause 9 of the ICA is incorporated into the charterparty. In London Arbitration 18/18, the charterparty provided for claims to be "apportioned/settled as specified by the Inter-Club New York Produce Exchange Agreement effective from 1996 and its subsequent amendments."

The tribunal held that as a matter of strict construction, only the parts of the ICA in relation to the apportionment and settlement of claims were incorporated into the charterparty but clause 9 which dealt with the provision of security was not incorporated into the charterparty. Hence, charterers were not contractually obliged to put up counter security as per the ICA. In light of this decision, Members should exercise caution in drafting their charterparty clauses which incorporate the ICA. If Members' intention is for security to be exchanged swiftly, they should ensure that the entire ICA is incorporated into the charterparty. In this regard, the IG has recommended that the clause set out in Section 2 above should be used to ensure that all aspects of the ICA are incorporated into a charterparty (please also see the Club's Notice to Members No. 9 2018/2019).

Are costs recoverable under the ICA?

Under section 3 of the ICA, all legal, Club correspondents' and experts' costs reasonably incurred in the settlement of the claim made by the original person (i.e. the cargo interest) are recoverable.

The law is still uncertain as to whether the costs incurred in successfully defending a claim against the cargo interests can be recovered against a counterparty in the charter chain. On one hand, it is clear from section 8 of the ICA that a recovery can only be made if there was liability to a third party. If the cargo interests' claim is successfully defended against, there is technically no liability incurred and the costs cannot be passed down (London Arbitration 10/15). On the other hand, it has been held that the reference to "Cargo Claims" in clause 4 of the ICA includes costs incurred in the defence of the original claim, hence such costs are recoverable (London Arbitration 30/16). The Club's views lean towards the latter position because section 4 makes a specific reference to costs incurred in the defence of a claim, and it is in the spirit of the ICA for such costs to be passed down the charter chain.

Is there a change in time bar if the ICA is incorporated?

Clause 6 of the ICA states that all claims are time barred unless written notification of the claim is provided to the other party within 24 months from the date of delivery of the cargo or from the date the cargo should have been delivered. To protect time, only a message setting out the notice is required and there is no need to commence legal proceedings or issue a notice of arbitration. There are no specific requirements for the contents of the message though clause 6 states that the notice shall if possible, include details of the contract of carriage, the nature of the claim and the amount claimed.

It is important to note that the time bar under clause 6 is an additional requirement to any statutory or contractual limitation period. Hence, under English law, a party making a claim would have six years from the accrual of the cause of action to commence arbitration or litigation.

If there is a contractual provision providing for a time bar of only one year, would this supersede the time bar under the ICA? The answer is normally no because clause 2 of the ICA states that the ICA shall apply notwithstanding any contrary provision in the charterparty. Hence, most contractual one-year time bars would be defeated if the ICA is incorporated into a charterparty (The Genius Star 1 [2012] 1 Lloyd's Rep 222). In a similar vein, the 24-month time bar under the ICA trumps the one-year time bar under the Hague Visby Rules (The Strathnewton [1983] 1 Lloyd's Rep 219). However, it all depends on the wording used and if a clause is drafted to provide that all claims including claims under the ICA require the commencement of proceedings in 12 months regardless of any other provision in the charterparty, such clause would likely trump the 24-month notification time bar contained in the ICA.

In light of the decision in London Arbitration 18/18, there are doubts as to whether the two-year time bar under the ICA is incorporated into the charterparty if the incorporation clause merely states that claims are to be "apportioned" according to the ICA. Again, the Club recommends Members to utilise the latest IG wording for the incorporation of the ICA (See section 6 above and the Club's Notice to Members No. 9 2018/2019) to ensure that all benefits of the ICA are properly incorporated into the charterparty.

Conclusion

It is useful for Members to take note of the above aspects of the ICA so that they are better primed to understand their respective legal positions when they are faced with an ICA claim, thereby ensuring that the ICA claims are resolved expeditiously.

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