

Circular Ref: 2016/0007

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Cargo Claims Clause

This Circular is sent to clarify a few items in the Circular¹ that was sent last week. This clarifications to our previous Circular is only meant for Charterers/Operators (and not the Owners of the vessels).

In order to further promote the application and incorporation of the 2011 Agreement into all NYPE /Asbatime charterparties, the International Group has drafted a charterparty clause and published a circular which we circulated to you last week *Draft Charterparty Clause Promoting The Use of The Inter-club New York Produce Exchange Agreement 1996 (As Amended September 2011)*. The suggested charterparty clause in the last week's Circular is as follows:

"Cargo claims

Cargo claims as between Owners and the Charterers shall be settled in accordance with 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".

In our view, this clause is very good for the Owners. However, this clause is not favorable to the Time Charterers/Operators of the vessel.

Clause (4) (c) of the previous version of InterClub Agreement ('Hereinafter 1996 Agreement') provides:

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

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

It has been understood for a while that this provision under the old 1996 version makes payment of a Cargo Claim (as defined under clause (3) of the 1996 Agreement) a condition precedent to a right to indemnity. Accordingly, in the absence of payment by the Owners to the Cargo Owners, no accrued cause of action crystallises and there is therefore no right, prior to payment, for the party sued in respect of a Cargo Claim to require that the other party to the charterparty, provide security (which could be sought, by for example, arresting or threatening to arrest a vessel or other property).

¹ Draft Charterparty Clause Promoting The Use of The Inter-club New York Produce Exchange Agreement 1996 (As Amended September 2011), published on 6 May 2016.

In order to explain in simple words, this means, if a ship owner has not paid to a cargo owner pursuant to settlement for a cargo claim, then even though they might have provided the security to the cargo owner, they will have no right to ask for a counter-security from a charterer under the ICA 1996 agreement.

However, a new Clause 9 in 2011 ICA agreement, allows the Owners' to seek countersecurity from the Charterers irrespective of whether they have put up an security that was inflated or too quickly had accepted the demands of cargo claimants to provide a security. This demand for security from Owners of the vessel passed to the Time charterer/operator of the vessel will be without waiting for the settlement to happen between the Owners and Claimants for the cargo claim.

ALCO FDD team based in Shanghai suggested the following wording for the Time Charterers or operators or owning companies (but not for their owned vessel, but only the chartered vessel):

“Cargo claims under this charterparty to be settled between Owners and Charterers solely in accordance with the Inter-Club New York Produce Exchange Agreement (1996) excluding any later or subsequent amendment.”

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