

Circular From GARD**Date: 24 February 2023**

The Inter-Club Agreement After 50 Years – Does Experience

Mirror Intent?

The Inter-Club Agreement (ICA) was formulated by International Group of P&I Clubs in 1970. It is intended to provide a relatively simple mechanism whereby liability for cargo claims arising under New York Produce Exchange Form (NYPE) or Asbatime charterparties and contracts of carriage authorised under such charterparties, can be swiftly and fairly apportioned between owners and Charterers. The purpose behind the development of the ICA was to avoid costly and protracted litigation. Does Gard's experience in handling cargo claims subject to the ICA match these intentions?

ICA allocation – the basics

The Inter-Club Agreement formulated in 1970 was refined by the clubs in 1984, 1996 and 2011. The full text of the ICA following amendment in 2011 can be found at the end of this article. In broad terms, cargo claims are entirely for owners' account where they arise from matters within the shipowners' sphere of responsibility, i.e. unseaworthiness or error in the navigation or management of the ship unless the unseaworthiness results from cargo handling operations. Cargo claims are entirely for charterers' account where they arise from cargo handling operations, unless either

- (a) responsibility for the entirety of the cargo handling operations has been transferred to the master in which case the cargo claim is shared equally; or
- (b) the problem with the cargo handling operation resulted from the unseaworthiness of the ship in which case the cargo claim is entirely for owners' account.

All other claims, including shortage or over carriage, are shared equally between the parties unless there is clear and irrefutable evidence that it was caused by the act or neglect of one party or the other in which case that party bears the full loss. Whereas the 1984 version of the ICA dealt with specific claim types, the 1996 revision expanded the scope of the ICA to encompass "all other claims whatsoever", promoting its application to all types of cargo claims.

Cargo interests may claim in the first instance against the shipowner or against the time charterer and the ICA applies both ways although the usual route is a claim against the shipowner under an owner's bill of lading. Often cargo claims begin with an arrest or threatened arrest of the ship and demand for security for

the claim. Usually, security is provided by a club letter of undertaking in order to avoid a threatened arrest or secure the release of the vessel. Under English law, the right to security only crystallises when a party incurs a loss. With cargo claims, there may be a delay between shipowners issuing security to the cargo claimant and paying the cargo claim which would ordinarily trigger their legal right to security from the charterer. In 2011, following the financial credit crisis and in an environment of increased sensitivity to counter-party credit risk, the ICA was refined to create a contractual right to counter-security in respect of any security provided to the cargo claimant. Thus, in the usual scenario, once owners (or owners' P&I club) have put up security to the cargo claimant, the charterer must provide security for the nascent ICA claim on a reciprocal basis.

Incorporation of the ICA into the charterparty

Although originally an agreement between the Clubs, as a matter of industry practice, the ICA is usually given contractual force as a result of express incorporation into NYPE charterparties. Some care is required in the wording of the incorporation to ensure that the correct version of the ICA and all of its terms apply. In London Arbitration 18/18, the Tribunal found that only the ICA allocation of liability was incorporated into the relevant charterparty, but not the terms creating a contractual right to security. Although there is some disagreement over whether that decision was right, the IG P&I clubs have since produced a standard clause to secure the incorporation of all the terms of the ICA as follows:



“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”.

Where properly incorporated, the ICA prevails in the event of any conflict with other charterparty provisions. In *The Kamilla* [2006] EWHC 509 (Comm), an ICA claim concerning the Algerian authorities' rejection of an entire cargo due to a small quantity of cargo damaged by water ingress, the court commented, *“The agreement prevails over the provisions of the charter-party, since it represents an agreed interpretation of the provisions of the charter-party dealing with liability for loss of or damage to cargo. Any questions as to the interpretation of the ICA must therefore depend on the construction of the ICA itself and not on the construction of the charter-party.”* This extends to any contractual time-bar for claims, *The Genius Star* [2011] EWHC 3083 (Comm).

It was further recognized more recently in London Arbitration 10/22 that apportionment under the ICA is *“a full and final remedy, and in light of its findings, the tribunal found that it need not consider the owners' further and alternative case that the charterparty contained an implied right of indemnity in favour of the owners.”* As such, the ICA operates as a complete code for allocating responsibility for cargo claims under the relevant charterparty.

Conditions for the application of the ICA apportionment

Cargo claims subject to apportionment:

- Must be made under a contract of carriage authorised under the charterparty and on terms no less favourable than the Hague-Visby Rules (or Hamburg Rules where compulsorily applicable).
- There must be no material amendment to the cargo responsibility clauses in the governing charterparty.
- The claim must have been properly settled or compromised and paid.

The ICA claim must be notified within 24 months of discharge or the date on which the cargo should have been delivered or 36 months where the cargo was discharge in a jurisdiction applying the Hamburg Rules. Although the ICA refers to the inclusion of specific details in the notice, the absence of those details will not render the notification ineffective, London Arbitration 3/20. Provided the ICA claim has been notified, the standard six-year contractual limitation period will then apply under the Limitation Act 1980.

Legal costs

One of the more common arguments in resisting an ICA claim is that the claim was not “properly settled” usually implying that the cargo claim was defensible. Where a claim has been settled in accordance with legal advice or on the basis of the local correspondents’ recommendation, it is more likely to be accepted as properly settled. What about cases that are successfully defended – are legal and expert costs recoverable?

Cargo claims are defined to mean not only the underlying cargo claim itself, but also the cargo claimant’s legal costs and interest as well as the costs incurred by the contractual counterparty who had to defend the incoming cargo claim, such as fees for lawyers, surveyors or experts. Where parties arrange operational or precautionary surveys in anticipation of a possible claim, these costs are unlikely to be recoverable as part of an ICA claim as they would always have been incurred whether or not a claim was presented. However, where a party successfully defends the incoming cargo claim and therefore has no third-party liability, there is authority in London Arbitration 30/16 that they will be entitled to recover the costs incurred in doing so as a Cargo Claim under the ICA. That said, this point may still be open for debate due to a conflicting decision in London Arbitration 10/15 where the Tribunal found that any ICA claim was qualified by the requirement that there was a third-party liability.

The more commercial view is that the ICA includes recovery of the costs of successfully defending a claim. It would seem illogical if defence costs are recoverable under the ICA when the cargo claim is settled for USD 1, but not where the cargo claimant withdraws or loses the claim entirely.

Custom dues or fines

It has been a debated issue whether all dues or fines related to the cargo are subject to the ICA. The minority view is that ICA applies to all cargo dues or fines levied on and paid by the shipowners. The majority view is however that it is only cargo dues or fines levied on the cargo interest, and then in turn pursued against the carrier under the contract of carriage, that are subject to the ICA. The reasoning behind the majority view is that it is only the latter type of claim that can form part of a claim under a contract of carriage.

Does incorporation of the ICA clause lead to swift and fair apportionments between owners and charterers?

The goals of both a swift and fair resolution are in some ways in tension. Swift resolution can result in what might be regarded as an unfair outcome; conversely, if the parties invest time in negotiating a fair outcome, it is likely to take time and generate costs, undermining the ICA's key objective of efficient dispute resolution. It is a question of balance and proportionality that may be different in each case. Taking these goals separately -

Swiftly apportioned

Owners generally do not pursue claims arising from unseaworthiness and Gard's experience is that some claims, for example, for straightforward cargo shortage, can be resolved with an exchange of a few e-mails between Clubs' claims handlers. Equally, security is usually exchanged on a relatively prompt basis, provided the usual requirements for security are met. This allows the parties to focus on resolving the underlying dispute. The fact that Club correspondents are known to the Clubs more widely and are often involved in the negotiation of the incoming cargo claim probably also helps to expedite the resolution of the ICA claim by improving confidence in the level of settlement achieved.

That said, where a claim is of greater financial significance, it is more likely to be scrutinised and less likely to be swiftly apportioned between the parties.

Fairly apportioned

Can a mechanistic approach to cargo claims ever result in a fair apportionment between owners and charterers? To the extent that the ICA recognizes the general framework of responsibility in a free in/free out charterparty, it is difficult to see how any result would be regarded as unfair. However, there are the inevitable shades of grey where cargo claims arise from causes beyond either party's control, such as attritional shortage or excess landing claims due to differences in the calibration of shore scales at different ports covered by Clause 8(c). For these claims, responsibility is simply split equally between the parties and the ICA certainly delivers a pragmatic outcome. However, it is less certain that the rough and ready approach would be regarded as fair, particularly in the context of paper shortages which were deemed by the Tribunal in Arbitration 28/17 to form a valid ICA claim even though there is no physical loss of cargo.

Similarly, Clause 8(d) inevitably picks up a wide array of claims due to its catch-all nature and simply splits them equally in circumstances where a less mechanistic approach might result in a perception that the cause of the loss more naturally fell within one party's sphere of responsibility. For example, it was held by the Tribunal in London Arbitration 10/22 that inherent vice claims are to be split equally between the parties even though charterers would ordinarily be perceived as responsible for the cargo and therefore the risk of quality issues with the cargo which is shipped. It seems unlikely that the owners in that case would regard having to shoulder half of the losses arising from the inherent characteristics of cargo as being a fair outcome. In reality, the true unfairness of shouldering losses arising from inherent vice is most pronounced where the courts hearing the claim do not recognise the defence of inherent vice and neither the owners nor the time charterers have any relationship to the cargo. Whilst it appears that there may be scope to recover contributions under the NYPE form from time charters, there is usually no recourse against the voyage charterer who supplied the cargo. In such circumstances, the fact that owners and charterers share the pain may not be seen as unfair as both owners and time charterers usually know which trades present a risk of

unfair court decisions.

That said, the potentially harsh effects of Clause 8(c) and (d) are mitigated by the exception allocating one of the parties only where there is clear and irrefutable evidence that the claim arises from their act or neglect.

An example of the mitigating effect of this provision is to be found in the case of *Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Ltd* [2017] EWCA Civ 2107 where the charterers ordered a ship loaded with soyabean meal to wait off the discharge port for four months during which time the condition of the cargo deteriorated so that it was ultimately damaged on outturn. The Tribunal found that the cause of the damage was the inherent nature of the cargo combined with the protracted period of storage onboard the ship. Consequently, the ICA claim fell within Clause 8(d) with the starting point being equal allocation between the parties subject to the exception transferring responsibility to one party. The Tribunal ultimately found that the decision to keep the ship and cargo waiting off the discharge port was an “act” for the purposes of the exception shifting responsibility entirely to the charterers. One of the key points in dispute was whether or not the “act” had to be culpable and the Tribunal’s decision that the relevant act did not have to be culpable was upheld on appeal through to the Court of Appeal.

However, it is clear from London Arbitration 19/17 that performance of an existing obligation under the charterparty will not constitute an “act” for these purposes. This decision concerned sweating damage to a steel cargo which the shipowners argued was due to the charterers’ decision to load different cargo at different temperatures at different ports. The Tribunal declined to find an “act” for the purpose of transferring responsibility for the cargo claim to the charterers because the parties had specifically agreed to load different cargo at different ports. In the tribunal’s view, the word “act” was directed at some specific and definable event or occurrence, not at the charterers’ general compliance with their contractual obligations under a charterparty.

Taking the two cases together, it appears that an act need not be culpable, but must be non-contractual.

Overall, it seems likely that for smaller cases, the ICA is often successful in delivering a swift resolution. However, for higher value claims, the parties will be tempted to explore ways to circumvent the simplistic mechanical approach to claims in the hope that the legal spend will be set off by a reduction in the contribution. Regrettably, this approach undermines the objective of the ICA. Whilst a fair outcome may be desirable, what different parties perceive as fair in any particular case is inevitably subjective. However, whilst difficult to support empirically, it does seem likely that the losses of one case will be offset by gains of another case and that the ICA may be considered fair to the extent that it delivers a more economical outcome for P&I insurers across a portfolio of claims.

Is the purpose of the ICA to avoid costly and protracted litigation met in practice?

The concept of the ICA is certainly simple and to some extent has withstood the test of time, being revised only twice in 1984 and 1996 with the 2011 amendment in relation to counter-security. However, despite the stated purpose of the ICA, the reality is that its effectiveness is heavily reliant on both Club claims handlers and the assureds following the spirit of the agreement.

The number of ICA claims which form the subject of Tribunal awards or judgments seems relatively limited taking into account the vast number of cargo claims which clubs routinely handle and the popularity of the NYPE form as a charterparty. As such, whilst difficult to measure empirically because of the absence of any visibility of unreported ICA claims, the general perception is that the ICA does provide a swift and effective resolution for many cargo claims. However, where commercial considerations interfere with the expeditious resolution of cargo claims under the ICA, the creativity and inventiveness of the English legal industry has generated a substantial body of law. Fortunately, arbitration Tribunals and Courts generally seem to recognize and give effect to the commercial objective and character of the agreement.

In the 2018 case of the *Maria*, in which charterers argued unsuccessfully that a partial transfer of responsibility for stowage to the Master constituted a material amendment to the cargo handling responsibilities resulting in a 50/50 split, the Court commented:

The regime created by the ICA was designed to achieve, and has achieved, a clear and certain system for allocating responsibilities as between owner and charterer in the cases to which it applies. Since the only options within clause (8)(b) are 100 per cent charterer, 100 per cent owner or 50/50, it is obviously a very mechanistic and no doubt sometimes arbitrary regime. Which is why it is sometimes criticised. But it has the merit of simplicity, as with motor insurers' "knock-for-knock" agreements to which it has been compared.

In London Arbitration 10/22, mentioned above, the Tribunal similarly recognised in relation to technical and semantic arguments about which version of the ICA was incorporated into the relevant charterparty that where the Courts had previously used expressions such as “edition”, “versions”, “form”, “predecessor” and “amendment” interchangeably when referring to different versions of the ICA, “*it would be a strange approach...to conclude that commercial parties in the present case intended something stricter.*”

Further, in *Kamilla Hans-Peter Eckhoff KG v. A.C Oerssleff's Eftf. A/B ("The Kamilla")* [2006] EWHC 509 (Comm), owners were appealing against an arbitration award finding them responsible for the losses arising from the authorities' decision to reject the entire cargo on the basis that the underlying cause was the unseaworthiness of the vessel. However, the Court agreed with the Tribunal's findings and observed: “*As the courts seem repeatedly to have acknowledged in the various cases in which they have considered the working of the ICA, it is an attempt to cut through the legal and factual problem which arose when interpreting the provisions of the New York Produce Exchange form in the context of liabilities for loss of or damage to cargo and to provide what was described by Counsel for the Charterers as "a form of rough and ready justice".*”

The very existence of court judgments on ICA claims suggests that the ICA is perhaps not entirely successful in avoiding protracted and costly litigation. However, reported cases are relatively few and far between and, if nothing else, the ICA probably does reduce the scope for complex legal debate.

Concluding remarks

The ICA is, at times, an imperfect solution aimed at cutting through legal complexities to deliver a

pragmatic result. It is perhaps ironic that ICA claims by definition will be dealt with in their initial stages within P&I clubs and yet Tribunals and Courts are having to hold the counterparties to the spirit of the agreement. Instead of questioning whether ICA is fit for purpose, parties should maybe more often ask themselves whether their arguments “fit the purpose” of the ICA. The above comments by arbitrators and judges suggest parties sometimes get it wrong.

Gard recommends all its members to apply and follow the ICA in all cases where it is properly applicable even if the counterparty is not insured by an IG club. Gard’s perception is that the ICA has brought significant costs savings to the membership overall and a cooperative approach avoids parties becoming side-tracked by pointless disputes.

We thank Fredrik Doksrød Olsen, Senior Claims Adviser – Dry Cargo and Louis Shepard, Senior Claims Adviser - Defence Lawyer for their contributions to this article.

APPENDIX A

INTER-CLUB NEW YORK PRODUCE EXCHANGE AGREEMENT 1996 (AS AMENDED SEPTEMBER 2011)

This Agreement, the Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011) (the Agreement), made on 1st September 2011 between the P&I Clubs being members of The International Group of P&I Associations listed below (hereafter referred to as "the Clubs") amends the Inter-Club New York Produce Exchange Agreement 1996 in respect of all charterparties specified in clause (1) hereof and shall continue in force until varied or terminated. Any variation to be effective must be approved in writing by all the Clubs but it is open to any Club to withdraw from the Agreement on giving to all the other Clubs not less than three months' written notice thereof, such withdrawal to take effect at the expiration of that period. After the expiry of such notice the Agreement shall nevertheless continue as between all the Clubs, other than the Club giving such notice who shall remain bound by and be entitled to the benefit of this Agreement in respect of all Cargo Claims arising out of charterparties commenced prior to the expiration of such notice.

The Clubs will recommend to their Members without qualification that their Members adopt this Agreement for the purpose of apportioning liability for claims in respect of cargo which arise under, out of or in connection with all charterparties on the New York Produce Exchange Form 1946 or 1993 or Asbatime Form 1981 (or any subsequent amendment of such Forms), whether or not this Agreement has been incorporated into such charterparties.

Scope of application

- 1 This Agreement applies to any charterparty which is entered into after the date hereof on the New York Produce Exchange Form 1946 or 1993 or Asbatime Form 1981 (or any subsequent amendment of such Forms).
- 2 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.

- 3 For the purposes of this Agreement, 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;
 - 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.
- 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;
 - 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
 - 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
 - c) the claim has been properly settled or compromised and paid.
- 5 This Agreement applies regardless of legal forum or place of arbitration specified in the charterparty and regardless of any incorporation of the Hague, Hague Visby Rules or Hamburg Rules therein.

Time Bar

- 6 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.

The apportionment

- 7 The amount of any Cargo Claim to be apportioned under this Agreement shall be the amount in fact borne by the party to the charterparty seeking apportionment, regardless of whether that claim may be or has been apportioned by application of this Agreement to another charterparty.
- 8 Cargo Claims shall be apportioned as follows:
- a) Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel:
100% Owners
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).
 - b) Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo:
100% Charterers
unless the words "and responsibility" are added in clause 8 or there is a similar amendment making the Master responsible for cargo handling in which case:

50% Charterers
50% Owners

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 in which case:
100% Owners
 - c) Subject to (a) and (b) above, claims for shortage or overcarriage:
50% Charterers
50% Owners

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) in which case that party shall then bear 100% of the claim.

- d) All other cargo claims whatsoever (including claims for delay to cargo):
50% Charterers
50% Owners

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) in which case that party shall then bear 100% of the claim.

Security

- 9 If a party to the charterparty provides security to a person making a Cargo Claim, that party shall be entitled upon demand to acceptable security for an equivalent amount in respect of that Cargo Claim from the other party to the charterparty, regardless of whether a right to apportionment between the parties to the charterparty has arisen under this Agreement provided that:
- a) written notification of the Cargo Claim has been given by the party demanding security to the other party to the charterparty within the relevant period specified in clause (6); and
 - b) the party demanding such security reciprocates by providing acceptable security for an equivalent amount to the other party to the charterparty in respect of the Cargo Claim if requested to do so.

Governing Law

- 10 This Agreement shall be subject to English Law and the exclusive Jurisdiction of the English Courts, unless it is incorporated into the charterparty (or the settlement of claims in respect of cargo under the charterparty is made subject to this Agreement), in which case it shall be subject to the law and jurisdiction provisions governing the charterparty.

Source of Information: The Gard P&I Club