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# The Inter-Club Agreement

- Certain aspects

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# Summary

The focus on this master thesis is to familiarize the reader with The Inter-Club Agreement and to present some of the problems with its application that have occurred in practice and how it has been solved through case law.

The first part (chapter 2) of the thesis presents the Inter-Club Agreement to the reader and explains why it was created in the first place. The reader will get a view of the context in which the Inter-Club Agreement was created by the P/I Clubs for solving the problems with clause 8 in the NYPE charter party. Chartering in general will be explained and then especially time-chartering and the problems that can occur when the Inter-Club Agreement is incorporated into the time charterparty.

The second part (chapter 3) of the master thesis presents certain aspects on some of the problems with the conditions precedent to the application of the Inter-Club Agreement. The problems when the Inter-Club Agreement is incorporated into the NYPE time charterparty will be presented to the reader. To answer how the problems have been solved through case law the most significant cases will be analysed and conclusions are presented after every chapter.

# Preface

The author would like to thank the following persons for their assistance towards the production of this master thesis: My tutor Professor Lars Gorton at the Faculty of Law at Lund University and Mattias Hedqvist at Assuranceforeningen Skuld, both who have been nothing but helpful although having a full calendar.

A special thank to my parents and my friends who always stood by me throughout the course of completion of this master thesis.

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# **1 Introduction**

## **1.1 Purpose**

The purpose of this master-thesis is to familiarize the reader with the so-called Inter-Club Agreement, below referred to as ICA, and point out certain aspects in relation with the condition precedent to the application of this particular contractual arrangement.

The main focus will be on examining certain problems that have occurred in practice and been dealt with in various judgements from the UK and South-Africa, and to do so I will do a descriptive examination of how certain problems in connection with the condition precedent to the application of the ICA been dealt with in legal practice and which legal solutions have emerged in case law.

My humble hope is that the reader who probably is someone, with a basic knowledge of maritime law, might benefit from my study.

## **1.2 Method, materials and limitation**

The method used in the thesis is the traditional method for legal research in addition to a descriptive and analytical study of the legal sources. Traditional sources of law as well as academic commentaries have been consulted during the process of writing. Naturally, this includes legal doctrine; books as well as articles from various legal reviews have been used.

I shall make the greatest possible use of case law of which I have focused on the cases from England and South Africa. The reason for this is that those cases I have chosen are the most important cases when it comes to answering the question of this thesis. I have deliberately chosen not to examine US cases because of the problems in finding cases relevant to this thesis. When it comes to Nordiske Domme and the Scandinavian cases I haven't found any relevant to this thesis and therefore exempted them. When it comes to English cases I have considered both cases from the courts published in Lloyd's Law Reports as well as London Arbitration Awards published in Lloyd's Maritime News Letter.

When it comes to literature I have used the major works in the field of maritime law. Above this I have considered articles written by the most distinguished authorities on the subject.

I have used the materials that I have had the possibility to get hold of in Lund.

The limitations are the ICA in itself. I will not go outside the ICA, except in so far as there is a need of explaining the background of ICA and its purpose.

## **1.3 Outline**

The first part (chapter 2) of this thesis will explain what the ICA is and why it was created in the first place. The second part (chapter 3) of this thesis will show how certain problems in connection with the condition precedent to the application of the ICA have been solved through case law.

## 2 Background

### 2.1 Presentation of the Inter-club Agreement

The Inter-Club New York Produce Exchange Agreement<sup>1</sup> is an agreement entered into by the shipowners' and the charterers' P/I-Clubs<sup>2</sup> regarding the apportionment of liability for cargo claims arising under the New York Produce Exchange form of charterparty. The New York Produce Charter Party was introduced in 1946 and was subsequently replaced by the Asbatime Charter party of 1981 which subsequently has been replaced with the NYPE 93 of 1993. The first ICA was entered into 1970 and has been amended and rewritten twice in 1984 and 1996. The current one in use is the ICA 1996.<sup>3</sup>

In practice the ICA has two major fields of use. First of all the P&I clubs, the particular liability insurers of the shipowners' and charterers', agreed to use the ICA as method for settling liability claims between shipowners and time charterers. Secondly the ICA can be used as a part of a charterparty if it is incorporated directly into the charterparty with an ICA-clause. Such a clause makes the Inter-Club Agreement a component of the charterparty, and owner and charterer become contractually bound by the ICA, which will make the Inter-Club Agreement applicable to the parties even if they aren't members to any P&I-Club.<sup>4</sup>

The ICA appears to have become a kind of standard in the trade, since it is now often expressly incorporated into charterparties in the NYPE form, as well as into other time charter forms.<sup>5</sup> However, when the Agreement was drafted it was not designed for incorporation into charterparties, not even Produce<sup>6</sup>, so therefore various problems have arisen in practice. In fact, it was, in the first place, intended for the clubs only as a method to achieve settlements between the shipowners' and the charterers' P&I Clubs.

It is also possible to incorporate NYPE Inter-club agreement into other types of time charter parties with the same result as above.<sup>7</sup>

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<sup>1</sup> It is abbreviated "Inter-Club Agreement" or "ICA"

<sup>2</sup> See further regarding the P&I Clubs in 2.2.

<sup>3</sup> The ICA 84 is still in use in some charterparties by agreement.

<sup>4</sup> Wilford, Coughlin; Time Charter, p.251, both with reference to the "The Ion" [1980] 2 Lloyd's Rep. 245, 3<sup>rd</sup> ed.

<sup>5</sup> Where the Agreement is expressly incorporated into a charterparty it becomes a contractual term binding on owners and charterers, and has to be read in conjunction with the other terms of the contract.

<sup>6</sup> Produce is short for the New York Produce Exchange charter party.

<sup>7</sup> London Arbitration 27/84 (LMLN) 133.

## 2.2 Protection and Indemnity Clubs

The P&I (Protection and Indemnity) insurance covers maritime liabilities incurred by the member<sup>8</sup> in direct connection with the operation of the entered vessel. The cover protects the members against losses and liabilities towards third parties. The insurance is available to shipowners and charterers. In the event that a member is involved in a dispute with a third party, the P&I Club will actively protect him, i.e. try to find a solution, and if, ultimately, he is found liable and suffers a loss covered under his policy, the P&I Club will indemnify him for his costs.

The insurance covers maritime liabilities incurred by the member in direct connection with the operation of the entered vessel and can be provided for all types of vessels such as tankers, bulk carriers, general cargo ships, container carriers, passenger vessels and more specialised vessels.

The purpose of a P&I Club is mutual insurance against liabilities and losses incurred by members in direct connection with the operation of the entered vessels.

The cover is, in other words, liability of primary importance in relations to the carriage of goods by sea and the incurred liability must have direct connection to the operation of the insured vessel for the P&I insurance to cover its losses.<sup>9</sup> Such insurance is covered by the mutual P&I Clubs, which has both owners and charterers as members. P&I insurance is the central cargo liability insurance in shipping context.<sup>10</sup>

Because of close co-operation by the P&I Clubs, they are all organised in an association called International Group of P&I Clubs<sup>11</sup>. In this association the Clubs reinsure each other and share the costs of the biggest claims through a mutual pool. Furthermore the International Group is where the individual clubs take their mutual problems to be solved. This function is one of the reasons why the Inter-Club Agreement was entered into in the first place.

## 2.3 The reason for creating the Inter-Club Agreement and its purpose

A charterparty is a contract which is negotiated in a free market, subject only to the laws of supply and demand, where the shipowners the charterers are able to negotiate their own terms free from any statutory interference. In

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<sup>8</sup> Shipowner or Charterer who is a member of the P&I Club

<sup>9</sup> Scandinavian Maritime Law; Falkanger, Bull, Brautaset, p. 475.

<sup>10</sup> Scandinavian Maritime Law; Falkanger, Bull, Brautaset, p. 474.

<sup>11</sup> International Group of P&I Clubs, see [www.igpandi.org](http://www.igpandi.org)

practice the parties will in most times select a standard form of charterparty as a basis for their agreement and probably attach additional clauses to suit their individual requirements.<sup>12</sup> The widespread international use of such forms also makes sure that there is uniformity in the application of law and its interpretation by the courts but many of these advantages are lost if the parties use the standard form simply as a framework for their contract adding new clauses as well as amending existing clauses to the extent that the final agreement bears little resemblance to the original form.<sup>13</sup> The outcome of this is that clarity is lost and litigation is encouraged.

There are basically two central forms of carriage charter, depending upon whether the vessel is chartered for a period of time or for one or more voyages but in both instances the shipowner keeps control of equipping and managing the vessel and agrees to provide a carrying service. In the case of voyage charter the shipowner undertakes to carry a cargo between specified points, while in a time charter he agrees to place the carrying capacity of his vessel at the disposal of the charterer for a specified period of time. This means that there is a difference in risk distribution between the parties.

The main distinction between the two types of charterparties derives from there basic difference in function. While in both cases the shipowner remains responsible for the running of his own vessel and is merely providing a carrying service, in the case of time charter he is placing his vessel for an agreed time at the disposal of the charterer who is free to employ it for his own purposes within the contractual limits.<sup>14</sup> Under a time-charter the ship must, within the framework established in the charterparty, perform voyages as directed by the charterer.<sup>15</sup> This means that the time-charterer controls the commercial function of the vessel and is normally responsible for costs which are resulting directly from fulfilment of his instructions, such as fuel costs, port charges and the cost of loading and discharging the cargo.<sup>16</sup> Under a time-charter the crew is employed by the shipowner, who is also responsible for the nautical operation and maintenance of the vessel and the supervision of the cargo – at least from a seaworthiness point of view. The chartered vessel has to be in conformity with the time charter-party when it comes to cargo carrying capacity, speed, bunker consumption and other agreed conditions and terms in the time charterparty.<sup>17</sup> The shipowner has normally by contract a responsibility to keep the vessel seaworthy during the charter period.<sup>18</sup>

A charter means that the shipowner in one way or other promises to put a vessel or a certain transportation capacity at the disposal of the charterer and

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<sup>12</sup> Carriage of goods by sea; John F Wilson, p. 4.

<sup>13</sup> Carriage of goods by sea; John F Wilson, p. 4

<sup>14</sup> Carriage of goods by sea; John F Wilson, p. 5.

<sup>15</sup> Scandinavian Maritime Law; Falkanger, Bull, Brautaset, p. 393.

<sup>16</sup> Carriage of goods by sea; John F Wilson, p. 5.

<sup>17</sup> Shipbroking and chartering practice; Gorton, Hillenius, Ihre, Sandevärn, p. 88.

<sup>18</sup> The normal clause which is inserted into the time charterparty reads: "vessel to e maintained throughout the currency of the charter".

the charterer, in his turn, agrees to pay the agreed freight or hire.<sup>19</sup> However, if cargoes are carried for third-party cargo interests, the contracts of carriage usually will be in the form of bills of lading issued by the owner or the charterer. In the event of cargo damage, cargo interests normally will claim for their losses against the owners of the vessel or the time-charterer. Most claims are settled directly with cargo interests by either the shipowner or the charterer. However, the ultimate liability for cargo loss will be allocated between the shipowner and charterer pursuant to the terms of the charter party.

In time chartering, as in voyage chartering, the charterers and owners can allocate the liability for cargo as they wish, but as liability under the bill of lading is also involved, the situation is sometimes complex from a legal standpoint, since the carrier liability under a bill of lading is covered by mandatory rules<sup>20</sup>. This often conflicts with the non-compulsory rules of the charterparty. Cargo-owners usually claim under the bill of lading and the first question is whether the owners, time charterers, or both, are liable to the cargo-owners.<sup>21</sup> A second question is how liability should ultimately be allocated between the charterers and owners. Sometimes the charter-parties contain a paramount clause which brings in the Hague Rules or Hague-Visby rules into the charter-party and when this paramount clause is inserted into the charter-party it becomes even more complicated.<sup>22</sup> This led the P/I-Clubs to draft the ICA for apportionment of cargo-liability under a time-charter agreement based on the NYPE form in order to avoid endless discussion between owners and charterers.<sup>23</sup>

The purpose of the creation of the ICA were discussed in detail by Kerr, L.J in the *Strathnewton* [1983] 1 Lloyd's Rep. 219. In summary it is said that the ICA owes its existence to the difficulties to which clause 8 of the NYPE Time Charter gives rise. The clause reads inter alia: "...Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain..."<sup>24</sup> The words "under the supervision of the captain" has led to great doubts over how it should be interpreted. This was tested in the case, *Court Line v. Canadian Transport* [1940] Lloyd's Rep. 161, which went all the way to the House of Lords. This was in a time when the NYPE 1931<sup>25</sup> still was in use and of course before the Inter-Club Agreement. The question was whether the charterer or the owner was responsible for a cargo of wheat that had been damaged due to bad stowing. The House of Lords concluded that the starting-point should be that the captain had a right to supervise the stowing, but the words in clause 8 did not ease the charterers duty to stow

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<sup>19</sup> Shipbroking and chartering practice; Gorton, Hillenius, Ihre, Sandevärn, p. 73.

<sup>20</sup> Shipbroking and chartering practice; Gorton, Hillenius, Ihre, Sandevärn, p.288.

<sup>21</sup> Shipbroking and chartering practice; Gorton, Hillenius, Ihre, Sandevärn, p.288.

<sup>22</sup> Shipbroking and chartering practice; Gorton, Hillenius, Ihre, Sandevärn, p.289.

<sup>23</sup> Shipbroking and chartering practice; Gorton, Hillenius, Ihre, Sandevärn, p.289.

<sup>24</sup> This is the wording in NYPE 1946. In NYPE 1993 the wording is slightly different but the meaning is the same.

<sup>25</sup> The first version of NYPE was drafted in 1913 and then amended in 1921, 1931, 1946, 1981 and 1993. The 1993 version is the one which is currently in use. Clause 8 has been the same in every NYPE except for some slight changes in the wording in the 1993 version.

properly and accordingly the owner were entitled to indemnity from the charterer.<sup>26</sup> The clause places the responsibility for the loading, stowing, trimming and discharging on the charterers but it also places some responsibility on the Master acting on behalf of the owners.<sup>27</sup> As pointed out by Lord Justice Kerr, these divided obligations have given rise to considerable difficulties which he describes as follows: “Thus, in any particular case there may be issues as to the extent to which the Master in fact did or was bound to or was able to, exercise a controlling supervision. There may also be issues as to whether damage to the cargo was due for instance, to improper loading or trimming on the one hand, or to improper stowage on the other.”<sup>28</sup>

When the ICA was proposed by the Clubs<sup>29</sup>, the legal effect of this provision was unclear, particularly when (as was and still is common) the words “and responsibility” are inserted after “supervision” in clause 8 in the NYPE form and the creation of the Inter-Club Agreement was therefore an attempt by the Clubs to avoid these difficulties in interpreting clause 8 “by legislating<sup>30</sup> in advance for the division of responsibility”<sup>31</sup> as between Shipowners and Charters by means of rough and ready “more or less mechanical apportionment of financial responsibility”<sup>32</sup> to be applied (subject to certain provisos) irrespective of fault and irrespective of the parties’ obligations under the terms of the Charterparty.<sup>33</sup> The object of the Inter-Club Agreement was clearly to cut through all or at any rate most of these difficulties “with a broad brush” according to Lord Justice Kerr.

In comparison with the Hague Rules the position in these rules is more straightforward, as art. III (2) simply provides that “the carrier shall properly and carefully load, handle, stow, carry, keep, care fore, and discharge the goods carried.”<sup>34</sup> Lord Justice Kerr goes on in concluding that “however, the incorporation of the Hague Rules into the charter by a Clause Paramount does not solve the problems of clause 8 in NYPE, because it is settled law that even when the rules are obligatory applicable – as they generally are in relation to bills of lading – they do not preclude the parties from agreeing that some of the functions mentioned in art III (2) are to be transferred to the shipper or receiver of the cargo and that the carrier will in that event not be responsible for their proper performance. It follows that the incorporation of the Hague Rules does not solve the difficulties of clause 8 of NYPE.”<sup>35</sup> When the Hague or the Hague-Visby Rules are incorporated into the charterparty by a Clause Paramount they don’t become mandatory law but

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<sup>26</sup> Michelet; Last og ansvar, p.107.

<sup>27</sup> Michelet; Last og ansvar, p.107.

<sup>28</sup> The Strathnewton [1983] 1 Lloyd’s Rep. 219, p222.

<sup>29</sup> The International Groups of P&I Clubs.

<sup>30</sup> Legaslatting in the sense of making up rules in advance so that the parties would know how the responsibility would be divided as between the parties.

<sup>31</sup> The Strathnewton [1982] 2 Lloyd’s Rep 296.

<sup>32</sup> The Strathnewton [1983] 1 Lloyd’s Rep. 219, p226.

<sup>33</sup> The Strathnewton [1982] 2 Lloyd’s Rep 296 and The Strathnewton [1983] 1 Lloyd’s 219.

<sup>34</sup> Hague Rules, art III (2).

<sup>35</sup> The Strathnewton [1983] 1 Lloyd’s Rep. 219, p223.

only non-compulsorily facts of the contract between shipowner and charterer.

He describes the effect of the Inter-Club Agreement thus: “However, when the Hague Rules are incorporated into the charter, the Inter-Club Agreement also has the effect of cutting across this balance of claims and defences by a rough and ready apportionment of financial liability as between owners and charterers. The ICA does so in all cases by apportioning liability by reference to the cause of the loss or damage alleged in the cargo owner’s claims which will have been “properly settled or compromised” under clause 1(i)<sup>36</sup>. Thus, claims based on unseaworthiness are to be borne by the owners; claims for bad stowage by the charterers; and claims based on other grounds are to be shared equally unless there is clear evidence which party is responsible.

A second reason for creating the Inter-Club Agreement was to avoid disputes when settling claims and in some way to save the P&I Clubs and their members costs. Most cargo-claims ends up at the owners or charterers P/I Clubs and because the P/I Clubs main source of income is their members premiums they wanted to save costs for investigation, negotiation and settlement of responsibility for the cargo-claim by using the clear apportionment-scheme of the ICA.<sup>37</sup> In many cases, the application of the Inter-Club Agreement might be disadvantageous to one of the parties in the charter relation, but as the Clubs insured the liabilities affected by the Inter-Club Agreement, they felt entitled to enter into a costs savings agreement of this type. In *The Benlawers* [1989] 2 Lloyd’s Rep. 51, Hobhouse J. stated: “The Inter-Club Agreement is an agreement which is primarily for the benefit of the respective parties’ insurers that is of the character of a knock-for-knock agreement. It has advantages and disadvantages for shipowners, but it is intended to work in that way; it solves insurance problems and it is not concerned with such considerations as hardship or lack of moral culpability”.<sup>38</sup>

The ICA appears to have become somewhat standard when cargo-operations are carried out under time-charter. The ICA is often incorporated into many different forms of time charter parties beside the NYPE.<sup>39</sup> However, when the Agreement was drafted it was not designed for incorporation into charterparties, so that various problems have arisen in practice.

The main purpose with the ICA is of course to split up the claims that have arose between shipowner and charterer when one of the parties has settled the cargo-owners claim in the first place. The cargo-owner, who claims under a bill of lading, gets their claim settled by one of the parties,

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<sup>36</sup> Clause 4(c) in the ICA 1996.

<sup>37</sup> Michelet; last og ansvar, p.159.

<sup>38</sup> *The Benlawers* [1989] 2 Lloyd’s Rep. 51.

<sup>39</sup> Where the Agreement is expressly incorporated into a charterparty it becomes a contractual term binding on owners and charterers, and has to be read in conjunction with the other terms of the contract.

depending on whether the bill of lading is either an owner's bill of lading or a charterer's bill of lading. Then the party, who has paid the cargo-owner, claims for recovery from the other party under the ICA. To settle the responsibility as between the parties the ICA has a scheme of apportionment in clause 8.<sup>40</sup>

Some of the most frequent problems that have occurred in connection with the use of the ICA are linked to the conditions precedent to its application. In the following chapter I will try to present the problems and how these problems have been dealt with by studying the most relevant cases and the solutions presented there.

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<sup>40</sup> See Appendix 1.

# 3 The conditions precedent to the application of the Inter-Club Agreement and some areas of dispute and its legal approach

## 3.1 In general

In clause (4), the ICA contains its own conditions precedent.

(a) The apportionment only applies to cargo claims where “the claim was made under a contract of carriage, whatever its form... which was authorised under the charterparty”<sup>41</sup>

As for the first condition precedent the application of the Inter-Club Agreement stated under (4)(a) of the Agreement it is clear that the ICA only applies to cargo claims made by a third party which means that for example, if a container owned by a charter is damaged, the ICA does not apply to the container itself, even though it may apply to the cargo inside the container.

Under the 1996 version, it can be made under any “contract of carriage” (for example, voyage charters as well as bills of lading) which is a difference from the 1984 version of the ICA, in which the cargo claim had to be made under a bill of lading.<sup>42</sup> However, the contract must be “authorised” under the charterparty. The requirement that the contract must be authorised would appear to prevent the application of the ICA if a charterer issues a bill of lading which fails to confirm with the terms of the time charter, whether or not the non-conformity is relevant to the cargo claim, but this point has not yet been decided in the context of the 1996 version of the ICA. The 1984 version of the ICA<sup>43</sup> did not contain an express condition that the bill of lading had to be authorised under the time charter but, it was decided in “The Holstencruiser”<sup>44</sup> that such a condition should be implied, so that a charterer who issued a copy bill of lading which was not in strict accordance with the terms of the time charter, could not rely on the ICA. It was nevertheless held in “The Hawk”<sup>45</sup> that the test to as whether a bill of lading should be treated as authorised should be applied broadly and flexible so that a bill of lading should only be treated as unauthorised if none of the goods referred in it had been shipped or in other exceptional circumstances.

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<sup>41</sup> See appendix A: Clause 4(a) in the ICA.

<sup>42</sup> ICA 1984.

<sup>43</sup> See appendix B.

<sup>44</sup> The Holstencruiser [1992] 2 Lloyd’s Rep. 378.

<sup>45</sup> The Hawk [1999] 1 Lloyd’s Rep. 176.

It was then held in “The Elpa”<sup>46</sup> that the Holstencruiser test was incorrect and that the ICA did, in fact, applied to unauthorised bills of lading. Consequently, a charterer was entitled to rely on the ICA in respect of a cargo claim made under an improperly issued ante-dated bill of lading, even if there may have been causal connection between the non-conformity in the bill of lading and the cargo claim. The decision in both “The Hawk” and “The Elpa” dealt with the 1984 version of the ICA. However before the Courts watered down and then eliminated the requirement, which were established in “The Holstencruiser” that the bill of lading should be authorised under the time charter, the Clubs decided to incorporate the requirement in the 1996 version of the ICA. Consequently, there is now an inconsistency between the approach adopted by the courts in respect of the 1984 version of ICA and the express wording in the 1996 version of the ICA. It remains to be seen whether the courts attempt to impose the approach adopted in “The Hawk” and in “The Elpa” onto the express wording of clause 4(a) (1) of the ICA.

(b) The apportionment only applies where the cargo responsibility clauses in the time charter have not been “materially amended”.<sup>47</sup> A material is defined in clause (4) as one “which makes the liability as between Owners and Charterers clear”. The materiality of the amendment must be viewed in the context of the particular cargo claim. Consequently, it was for example held in London Arbitration 16/84 (LMLN 128) that a clause in the time charter providing for “Owners not to responsible for shortlanded cargo”, was a material amendment preventing the ICA from being applicable to shortlanding claims, but not to other claims.

(c) The apportionment only applies to cargo claims where “the claim has been properly settled or compromised and paid”.<sup>48</sup> A claim will not be properly settled or compromised if it is not reasonably settled, which means for example that where an excessive payment is made for commercial reason the requirement is not fulfilled. The cargo claim must be paid before a claim can be pursued under the ICA. It was upheld in “The Cargo Explorer”<sup>49</sup> Until the cargo claim is paid, there is no cause of action under the ICA and no right to arrest or attach the other party’s vessel or assets to obtain security.

Certain aspects of these three conditions precedent to the application of the Inter-Club Agreement plus the condition of time bar and the problems occurring with it will be studied in the following chapters.

As was mentioned above, the ICA was intended to be used with the NYPE and Asbatime forms, but as it is sometimes incorporated by agreement, into

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<sup>46</sup> Transpacific Discovery SA v Cargill International SA (2001) All ER (Comm) 937.

<sup>47</sup> See appendix A: Clause 4(b) in the ICA.

<sup>48</sup> See appendix A: Clause 4(c) in the ICA.

<sup>49</sup> Primegates Maritime Company Limited v. the bunker on board the m.v. Cargo Explorer

other types of charters, it should be given effect. For example, London Arbitration 27/84 (reported in LMLN 133), in which the Arbitrators applied the ICA to a Baltime form charter (which expressly incorporated the ICA). In this case the arbitrators concluded that as long as the Inter-Club Agreement is incorporated into any given charter it shall apply. This case was never appealed.

## **3.2 Some relevant cases regarding if the bill of lading has to be authorised under the charterparty for the ICA to apply**

### **3.2.1 General provisions**

One of the conditions precedent to the application of the Inter-Club Agreement is that the claim has to be made under a contract of carriage of any origin.<sup>50</sup> The most common contract of carriage is the bill of lading and some problems have occurred in practice when the cargo-owner has claimed under a bill of lading that wasn't authorised under the charterparty in question. This is one of the conditions precedent to the use of the Inter-Club Agreement as is seen in clause 4(a)(i) that states that the bill of lading or any other contract of carriage has to be authorised under the charterparty. The cases below show how this question has been dealt with in practice.

### **3.2.2 Relevant cases**

#### **3.2.2.1 The Holstencruiser [1992] 2 Lloyd's Rep. 378**

The background of the case was that the plaintiff ran a container service and time chartered ships from many different owners for the running of the service. The time charters were always on the NYPE form, and incorporated by clause 39 the Inter-Club Agreement. During the trips there were problems with pilferage and short delivery from containers when the ships were at port.

The issues at hand for decision concerned the scope of the Inter-Club agreement as incorporated into the time charters and what criteria had to be satisfied in order to make it applicable to any given cargo claim and the effect of the agreement once it had been decided that the agreement applied.

For the Inter-Club Agreement to be applicable the claim must be a claim under a bill of lading and the claim must be settled on the basis of the responsibility under the bill of lading and not under any other

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<sup>50</sup> ICA cl.4

responsibility.<sup>51</sup> Furthermore the bill of lading must be a bill of lading that can properly be issued under the time charter.<sup>52</sup> Judge Hobhouse had to construe the Inter-Club Agreement and regarding the scope of the ICA he pointed out that, for the ICA to apply the cargo must be carried under a bill of lading. Regarding what criteria the bill of lading must meet, he said that it must be a B/L which is properly issued under the time-charter party. Clause 8 of the NYPE form was amended to require the captain, if so requested, to sign bills of lading in conformity with Mate's<sup>53</sup> or Tally clerk's<sup>54</sup> receipts on charterer's usual form for the trade in question. Some points need to be considered: The first is the significance and effect of the inclusion in clause 8 of the words "in conformity with Mate's or Tally clerk's receipts". This restricts the authority to issue B/L on behalf of the owner's. The charterer's usual form is an owner's bill of lading and therefore this restriction on the authority to issue bills of lading is relevant and has the effect of limiting what can be a conforming bill of lading for the purpose of clause 39 and the Inter-Club Agreement.<sup>55</sup> Both types of receipts derive from traditional methods of cargo handling, but both relate to actual receipts of the relevant goods by a servant or authorised agent of the ship-owner on board the vessel. In either way the receipts will be one which acknowledges receipts on behalf of the ship of the actual goods specified in the bill of lading.<sup>56</sup> No authority was given by the time-charter-party to the charterers or their agents to sign any Mate's receipts or any other document other than an authorised bill of lading. Since the time-charter-party made express provision for the requirement that has to be satisfied before an authorised bill of lading covering specific goods may be issued under clause 8, it follows that the charterer must prove that the bill of lading was properly issued in accordance with the relevant Mate's or Tally clerk's receipts and show that the document was issued with that requirement.<sup>57</sup> Alternatively Judge Hobhouse states "that if one is to construe the time-charter-party as giving also an implied authority beyond that expressly spelt out in clause 8, the implied authority cannot extend beyond an authority to sign bills of lading which the master have the authority of the owners to sign."<sup>58</sup> Since, there was clear terms in the time charter party, which had to be fulfilled before an authorised bill of lading could be issued, it was demanded of the charterer to prove that these conditions actually were satisfied in accordance with the terms in the bill of lading. Further more the charterer had to be ready to show that tally clerk's or mate's receipt were correctly

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<sup>51</sup> The *Holstencruiser* [1992] Lloyd's Rep. 378, p.384, col. 1.

<sup>52</sup> The *Holstencruiser* [1992] Lloyd's Rep. 378, p.384, col. 1.

<sup>53</sup> Mate's receipt is a receipt given by the mate or the representative of a vessel, for goods that have been loaded on board. The mate's receipt is prima facie evidence of ownership of the goods and is exchangeable in due course for the bill of lading. It is not however a document of title and, unlike the bill of lading, its transfer does not pass possession of the goods.

<sup>54</sup> On completion of loading, the ships officer signs the mate's receipt based on the note of the tally clerks on the dock.

<sup>55</sup> The *Holstencruiser* [1992] Lloyd's Rep. 378.

<sup>56</sup> The *Holstencruiser* [1992] Lloyd's Rep. 378.

<sup>57</sup> The *Holstencruiser* [1992] Lloyd's Rep. 378.

<sup>58</sup> The *Holstencruiser* [1992] Lloyd's Rep. 378.

issued and the charterers had to prove that the cargo actually were in the possession of the owner, meaning either on board the ship or into custody of an agent on the owners side.<sup>59</sup> The master does not have any actual authority from the owners to sign a bill of lading on behalf of the owner for any goods which have not in fact been received by the owners and since the charterers' agent are on any view acting as delegates of the authority of the master, they can have no greater actual authority than the master.<sup>60</sup> On this basis the charterer must be prepared to prove that the goods were actually received by the owner and the charterer and their agents have no authority to issue a bill of lading or any form of receipt for goods which have not in fact been received by the owners.<sup>61</sup> In practical terms this means that before they can invoke the Inter-Club Agreement, the charterers must be prepared to prove that the relevant goods were actually received into the possession of the owners. They will, in practice, have to be prepared to prove that the goods were inside the container at the time it arrived alongside or on board the vessel.

In those cases when through bills of lading or trans-shipment bills of lading were issued under the charterparty the owners could only be held responsible for the part of the journey which they performed.<sup>62</sup> The reason for this were that the time-charter is a contract between owners and charterers in which the owner takes on the responsibility of providing the ship's service to the charterer, which means that every issued bill of lading, that the charterer will support it's claim on, will have to relate to such services which is agreed between owner and charterer under the time-charterparty.<sup>63</sup>

The essential element of the decision is that if the charterers wish to rely on the Inter-Club Agreement they need to prove that the bill of lading under which the claim arose was authorised under the charterparty. It means that the bills of lading have to be issued in strict compliance with the terms of the charterparty in question.

### 3.2.2.2 The Hawk [1999] Lloyd's Rep.176

The question in this case was whether the bills of lading which the claims had been brought under must be authorised under the charter-party for recovery under the Inter-Club Agreement.

The time-charter was an amended NYPE form and clause 50 in the charter stated that "charters and/or their Agents are hereby authorised by owners to sign on Master's and/or Owners behalf B/L as presented in accordance with

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<sup>59</sup> The Holstencruiser [1992] Lloyd's Rep. 378, p. 384, col. 2, p. 385, cols. 1 and 2.

<sup>60</sup> The Holstencruiser [1992] Lloyd's Rep. 378.

<sup>61</sup> The Holstencruiser [1992] Lloyd's Rep. 378.

<sup>62</sup> The Holstencruiser [1992] Lloyd's Rep. 378, p. 385, col. 2.

<sup>63</sup> The Holstencruiser [1992] Lloyd's Rep. 378, p. 385, col. 2.

Mate's or Tally Clerk's receipts without prejudice to this C/P". In clause 39 the Inter-Club Agreement was incorporated into the charter-party.

It was the owner's case that the charterers and/or their agents had failed to issue bills of lading in accordance with the Mate's or Tally Clerk's receipts, contrary to the letter of authorisation signed by the Master. They said that the bills of lading were not signed in strict accordance with the Mate's receipts and accordingly the bills of lading were not properly issued in accordance with clause 8 and clause 50 of the NYPE. The charterers contended and said that in any event the absence of the Mate's receipt ought not to be a bar to recovery under the ICA. They accepted that certain remarks were not mentioned on certain bills of lading but they meant that these remarks were unnecessary or irrelevant to the conditions of the cargo, asserting that the claims under those bills of lading did not arise out of these remarks not being mentioned on the bills of lading in question.

The arbitrators said that it was necessary to consider the issue of unauthorised bills of lading in relation to individual claims, rather than by way of a blanket defence which would cause all the claims to fail "in limine", since they agreed with the charterers that there have to be a causal connection between the cargo claim in respect of which indemnity was sought on the one hand and the discrepancy between the Mate's receipts and the bills of lading on the other. Some of the claims were rejected on the ground that the claims were for shortage and no Mate's receipt had been produced. The arbitrators reasoned that the absence of the Mate's receipts was relevant to a shortage claim since without it the charterers were unable to prove that the relevant goods had ever been received into the owner's or their agents' possession. As to seven claims the arbitrators held that the charterers were entitled to recovery under the Inter-Club Agreement either because the charterers were justified in not clausing the bills of lading or because the failure by the charterers to clause the bills of lading, so as to include notations contained in the Mate's receipts had not been causative of the loss.

The owners appealed the issue of whether it was a condition precedent to recovery under the Inter-Club Agreement that the bill of lading, under which the claims were brought, must be authorised by the charter.

In the Appeal to Commercial Court Judge Diamond asked the parties what their view was on clauses 8 and 50 of the NYPE. The owner contended that under both clause 8 and clause 50, a bill of lading which was not in conformity with the mate's receipts would be regarded as unauthorised and not in compliance with the terms of the charter. The charterer contended that clause 50 gives a general authority on the charterers to issue a bill of lading, and that the additional reference to the bills of lading being "in accordance with Mate's or Tally clerk's receipts" gives rise to a separate undertaking by the charterers.

As to the question of the condition precedent to the application of the Inter-Club Agreement for apportionment of the cargo damage as between owners and charterers, the Judge states that the conclusions in *The Holstencruiser*, that it is to be implied in the Inter-Club Agreement, which is incorporated into the charter-party, that to qualify for settlement under that ICA, the bill of lading under which the claim is brought must have been authorised by the charter-party is still valid but it is to be rigorously construed.<sup>64</sup> According to Judge Diamond it is important that the test, if the ICA is applicable, is applied broadly and flexibly so as to give effect to the commercial purpose of the Inter-Club Agreement and not reducing its effectiveness as a means of settling and apportioning the liability for cargo claims as between owners and charterers.<sup>65</sup> He states that “looking broadly at the question of authority in this particular case I would accept that a bill of lading is clearly unauthorised if none of the goods referred in it have been received into the possession of the owners. I also accept that a bill of lading may be unauthorised in other exceptional circumstances, but I would not regard a bill of lading as unauthorised merely because there is no exact correspondence between every representation in the bill of lading and the corresponding notation on the Mate’s or Tally clerk’s receipts.”<sup>66</sup>

The conclusion of the Judge in this case can be summarised as follows: As to the effect of the Inter-Club Agreement, when incorporated into a charterparty in the present form, nothing can justify that absence of a mate’s receipt is a bar to recovery whatever the cause of the loss. Where a shortage claim is concerned and a question arises as to whether the relevant goods were ever delivered into the possessions of the owners or their agent at the port of loading, then as stated in *The Holstencruiser*<sup>67</sup>, it is for the charterer to prove that the bill of lading was authorised in the sense that it was a bill of lading which the master would have had the authority of the owners to sign. This normally involves that the charterer must prove that the relevant goods were actually received by the owners and to prove this they may need to produce and rely on the relevant Mate’s or Tally Clerk’s receipts.

Where no issue arises as to the claim being a shortage claim, then prima facie is that the bill of lading will be authorised and any lapse in the bill of lading or notations to be found in the receipt will not in itself constitute a bar to recovery under the Inter-Club Agreement.<sup>68</sup>

### 3.2.2.3 Transpacific Discovery SA v Cargill International S.A. [2001] 1 All ER Comm 937 (ELPA)

This was an appeal of an arbitration award in London on the 27<sup>th</sup> May 1999. In that award the owner’s claim for indemnity against the charterer for costs incurred by the owner’s settlement of cargo damage to cargo owners

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<sup>64</sup> *The Hawk* [1999] Lloyd’s Rep.176.

<sup>65</sup> *The Hawk* [1999] Lloyd’s Rep.176.

<sup>66</sup> *The Hawk* [1999] Lloyd’s Rep.176.

<sup>67</sup> *The Holstencruiser* [1992] Lloyd’s Rep. 378.

<sup>68</sup> *The Hawk* [1999] Lloyd’s Rep.176.

were dismissed. The cause of cargo damage was fire on board the owner's vessel Elpa.

The vessel Elpa was a bulk carrier which was chartered on the NYPE form for a time charter trip to Mexico from the Black Sea. During the voyage a fire started on the vessel and the cargo of cotton was damaged. The owner settled the claim with the cargo owner and turned to the charterer for indemnity.

Clause 59 in the charterparty stated that all cargo responsibility between owner and charterer should be apportioned according to the Inter-Club Agreement. Accordingly to the ICA damages occurring due to unseaworthiness is to be 100 % compensated by the owner. The cargo damage in this case was due to fire and it was concluded that it was unseaworthiness of the vessel in question that caused it. The owner therefore argued that the ICA did not operate so as to deprive them of a claim because the bills of lading signed by the captain were ante-dated and not claused in accordance with mate's receipts. If the bills were not regularly or properly issued under the time-charter, then the owners submitted that the charterers could not establish one of the necessary conditions precedent to the application of the Inter-Club Agreement. Instead they meant that the claim should be regulated according to other provisions in the charter party so that they would get full indemnity for their costs in settling the claim with the cargo owners.

The dispute was referred to arbitration and the arbitrators held that the ante-dating and issuance of clean and not claused bills had no bearing on the particular cargo claims which meant that the claims fell to be apportioned in accordance with the Inter-Club Agreement.

The owners appealed contending that the arbitrators had erred in law in that it was a condition precedent to the applicability of the ICA that all relevant bills of lading should have been bills authorized by the charter-party. An ante-dated bill<sup>69</sup> was by definition not authorized since it was potentially a fraudulent document and on this basis the cargo had not been carried under a bill of lading to which the ICA applied and the charterers had failed to establish the necessary authorization in this case. The arbitrators had also ignored the facts which showed that the bills had not been properly issued.

The charterers argued that the ICA was not rendered inapplicable by an irregularity in the bills of lading which had no bearing on the cargo claim.

Judge J. Morrison in Q.B. Commercial Court concluded that the ICA only applied to cargo claims which had been brought under bills of lading which contained the Hague-Visby Rules governing the carriage in question and that the only time the ICA wasn't applicable was if the cargo never been

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<sup>69</sup> An ante-dated bill is a bill of lading which has been dated after the issuing date.

shipped so that the bills of lading never applied to the cargo.<sup>70</sup> It was held by the Judge, that if the goods were shipped but the bill of lading were not issued in accordance with the charter-party, the ICA was nevertheless applicable if the cargo claim was a claim under the bill of lading and subject to the Hague-Visby Rules or their equivalent.<sup>71</sup>

The cargo was damaged through fire due to unseaworthiness of the vessel. Under the ICA, the owners claim would fail, as the ICA allocates to the owners 100% of the responsibility for claims arising from unseaworthiness.<sup>72</sup> The Owners argued that the ICA did not apply since the B/L signed by the master were defective, in that way that they were antedated and, in contradiction to the express terms of the charter-party, not claused in conformity with mate's receipts.

Judge Morrison stated that "the charter-party determined the rights and obligations of the parties inter se. The ICA is dealing with what should happen to third party claims successfully made against one or other of them. The ICA applies only to cargo claims which have been brought under bills of lading which contains the Hague/Hague-Visby Rules governing the carriage. If the goods never have been shipped so that the bills of lading never applied to the cargo then the claim would be outwith the ICA. If the goods were shipped but the bills of lading were not issued in accordance with the charter, provided the cargo claim was not affected, that is provided the claim was still a claim under the bill of lading and subject to the rules, then the ICA applies. The ICA only ceases to apply if the cargo claim is not made under the bill of lading or the protection and limits of the Hague/Hague-Visby Rules are lost"<sup>73</sup>

The Judge ruled that the arbitrators' award would be upheld because once it was established that the cargo claims were based on bills of lading which incorporated the necessary limitations then that would be sufficient to cross the threshold into the application of the ICA.<sup>74</sup>

Accordingly the appeal would be dismissed.

The conclusion of the case in short is that where the ICA is incorporated into the charter, it will apply provided the bill of lading, under which the cargo claim is brought, complies with the ICA – namely are subject to the Hague/Hauge-Visby Rules or some rules equivalent. This is the case; even if the bill of lading may in some respect be defective under some terms of the charter-party, for example, ante dated bills or bills that are not claused in conformity with mate's receipts.

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<sup>70</sup> Transpacific Discovery S.A. v Cargill International S.A. [2001] 1 All ER Comm 937, p. 600, col. 1.

<sup>71</sup> Transpacific Discovery S.A. v Cargill International S.A. [2001] 1 All ER Comm 937, p. 600, col. 2.

<sup>72</sup> ICA, Clause 8.

<sup>73</sup> Transpacific Discovery S.A. v Cargill International S.A. [2001] 1 All ER Comm 937.

<sup>74</sup> Transpacific Discovery S.A. v Cargill International S.A. [2001] 1 All ER Comm 937, p. 601, col. 2.

### 3.2.3 Conclusions

For owners and charterers alike, the ICA is intended to represent a simple method of apportioning liability for cargo claims where cargo interests have made a claim under a bill of lading. In the case of *Elpa*, the terms of the time charterparty under which the *Elpa* was employed provided for the Master to sign bills of lading as presented by charterers and expressly incorporated the term of the ICA. In seeking to demonstrate that the ICA was inapplicable, owners relied on the fact that the Master of the *Elpa* has signed ante-dated bills of lading. Owners used that fact as the basis for their submission that it should be implied into the ICA as a condition precedent to the effect that it should only apply to claims mounted under a bill of lading if it was an authorised bill. Of course, owners argued that as ante-dated bill of lading was not authorised. It is at this point that earlier case law on this subject becomes interesting and a brief look at the cases that came before the *Elpa* and how they dealt with the issue of “authorised bills”.

In the *Hawk* owners asserted that charterers had failed to issue bills of lading in conformity with the mate’s and tally clerk’s receipts as the governing time charterparty required. As in the *Elpa*, Owners maintained that a condition precedent should be implied into the ICA requiring any bills of lading to be authorised bills in order for the ICA to apply. In the *Hawk*, the Judges considered the effect of the courts findings in the earlier test-case on this subject, namely the *Holstencruiser* case, and concluded that if the charterers wished to rely on the ICA they needed to prove that the bill of lading under which the claim arose was authorised by the charterparty. That point was an essential element of the decision in the *Holstencruiser*.

However, in the *Hawk* the court was concerned to avoid the risk of “introducing unnecessary technicalities”<sup>75</sup> into the operation of the ICA and concluded that the authorisation test should be applied “broadly and flexibly”<sup>76</sup> so as to give effect to the intended purpose of the ICA. The court pointed out that if there were any causal connection between the cargo claim and the discrepancies in the bill of lading, a claim for damages would exist under the charterparty. It is on this latter point the latest case, the *Elpa*, departs from the previous cases.

In the *Elpa*, the Judge made the point that the charterparty determines the rights and obligations of owners and charterers as against each other and the ICA deals with the adjustment of successfully asserted third party claims. The Court also found that if goods were shipped but the bills of lading were not issued in accordance with the charterparty, the bills were still authorised

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<sup>75</sup> The *Hawk* [1999] Lloyd’s Rep.176.

<sup>76</sup> The *Hawk* [1999] Lloyd’s Rep.176.

in that the party issuing them at least had apparent authority to do so. Accordingly, the Court concluded that the ICA will apply provided the claim is brought under a bill of lading that is subject to the Hague or Hague-Visby Rules and confirmed that there “is no need to search for any implied term”<sup>77</sup> in the ICA.

In the *Elpa*, the Court went on to conclude that the effectiveness of the ICA would be undermined if it were to be made subject to issues arising out of charterparties, specifically as to the character of bills of lading. It is at this point that the *Elpa* may be distinguished from the *Hawk*. In the latter case, the Judge found that it was appropriate to investigate whether the defect in the bill of lading was causative of the claim under it, whereas the Judge in the *Elpa* rejected that position, commenting that it was likely to lead to an increase in litigation which was the very problem that the ICA was designed to avoid.

A party may therefore invoke the ICA even if the relevant bills of lading were ante-dated or otherwise discrepant under the charterparty, provided the bills of lading were issued by an authorised party in respect of goods actually loaded on board the ship and pursuant to the provisions of the Hague or Hague-Visby Rules. There is no need for the parties to consider whether the discrepancies in the bills were causative of the cargo claim. In the *Elpa* the court struck a blow for commercial common sense and preserved the straightforward regime for resolving cargo claims that the ICA was intended to create.

### **3.3 Some relevant cases regarding if the cargo responsibility clause in the charterparty has been materially amended so that the ICA is no in use**

#### **3.3.1 General provisions**

It is quite common that, when negotiating a charterparty on the NYPE form, or any other form, the parties make amendments to the standard form. Some of these amendments may introduce changes to the manner in which liability for cargo claims is apportioned between owners and charterers. The parties to the charterparty have the freedom of contract and can limit the

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<sup>77</sup> “The *Elpa*” *Transpacific Discovery S.A. v Cargill International S.A.* [2001] 1 All ER Comm 937.

ambit of the ICA if they wish. The way of doing this is by materially amending the charterparty. For the ICA 1984 and 1996 to apply, the cargo responsibility clause in the NYPE form must not be materially amended. A material amendment is one which makes liability for cargo claims clear.

The ICA 1984 gives one example of such a material amendment and it's the addition of the words "and responsibility" in Clause 8 of the NYPE together with the addition of the words "cargo claims" in clause 26, or the words "cargo claims" in clause 26 only. Where these amendments are in place the ICA's apportionment will not apply and owners will be responsible for cargo claims. The ICA 1984 then provides, in a quite contradictory manner, that the addition of the words "and responsibility" in Clause 8 of the NYPE is in itself a material amendment, but that this does not render the ICA inoperative. Instead, an alternative apportionment formula is to be applied.<sup>78</sup>

The ICA 1996 endeavours to remove the contradiction contained in the 1984 formula. In addition, it was thought that the provision of two apportionment formulae was quite confusing, so there were attempts to merge them into one, without affecting the division of liability as established in the 1984 form. As a result, the new form says clearly that the addition of the words "and responsibility" in Clause 8 of the NYPE is not a material amendment, but that the addition of the words "cargo claims" to clause 26 of the NYPE charter renders the Agreement inoperative even if it's expressly incorporated into the charterparty. In practice the result should be the same as under the 1984 form.

### **3.3.2 Relevant cases**

The question all cases deal with is whether the amended clause makes the cargo liability as between owners and charterers clear.

#### **3.3.2.1 London Arbitration 16/84 (LMLN 128)**

The arbitration concerned a ship which was chartered on a NYPE form for a time charter trip and had cargo shortlanded at one of its ports on the journey. The parties to the charterparty had written in clause 62 of the NYPE charter that the ICA should apply between owner and charterer, in respect of apportionment of responsibility to cargo damage. The so called "cargo responsibility" clause in NYPE were not materially amended but an addition to the last sentence of clause 46 of the NYPE charter read: "owner not to be responsible to shortlanded cargo".

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<sup>78</sup> The question of this is outside the ambit of this master thesis.

The cargo was damaged due to shortlanding, and the cargo-owners claim under the bills of lading was settled by the charterer. The charterer then claimed for an indemnity from the owner under the ICA. The charterer meant that clause 46 was in conflict with clause 62, which implemented the ICA, and that clause 62 should prevail over clause 46 because it came later in the agreement.

The question in hand for the arbitrators was if the addition to the last sentence in clause 46 could be regarded as a material amendment, and as such put the ICA out of function regarding the apportionment of the liability.

The arbitrators did not believe that it was intended by the P&I Clubs, who created the ICA in the first place, that if a material amendment to the effect of the printed clause were made in a typewritten clause or clauses, the provisions of the ICA should not come into effect.<sup>79</sup> For example, if the printed form was left unamended, but a charter contained an additional typewritten clause which made it very clear that the owners were to have no liability whatsoever in respect of any kind of cargo claim, it could not be imagined that the clubs would insist – as between themselves – that the ICA should have any effect.

On that basis, the additional words of clause 46 of the charter had to be considered to be a “material amendment” for the purposes of the agreement so far as shortlanding were concerned.<sup>80</sup> But it would be a strange consequence if because a charter dealt with one category of claim by way of a material amendment, the agreement should cease to have effect in relation to claims not dealt with by that amendment.<sup>81</sup>

The consensus of the arbitration was that a material amendment dealing with one type of claim, in this case shortlanding claims, does not prevent the ICA from applying to other types of claims.

### 3.3.2.2 London Arbitration 17/84 (LMLN 128)

Cargo which was transported on a ship under a NYPE time charter had been damaged due to bad stowage. The owners settled the claims under the bills of lading with the cargo-owners, and then demanded indemnity from the charterers. The charterers thought that the indemnity was plausible indeed, but only indemnified the owners with 50% because they meant that this was what they were liable for and not more. The owners demanded to be indemnified with 100% of the cargo damage claims that they had paid the cargo-owner and took the case to arbitration to get a ruling on the matter.

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<sup>79</sup> London Arbitration 16/84, the arbitrators.

<sup>80</sup> London Arbitration 16/84, the arbitrators.

<sup>81</sup> London Arbitration 16/84, the arbitrators.

The charter was on a NYPE form for a time charter trip and clause 8 of NYPE was amended and read inter alia: “Charter are to load, stow and discharge the cargo at their risk and expense but always understood these operations remain under the supervision and direction and responsibility of the Captain.”

When it came to the division of responsibility concerning cargo liability, as between owners and charterers, the ICA was to be used for apportionment and was incorporated in clause 46 of NYPE.

The question that the arbitrators had to decide on was if the amendment in clause 8 of NYPE was “clear” in the way of the provision of the ICA, so that it made the ICA inoperative in apportioning cargo liability as between owners and charterers

The owners said that the reference to “risk” in clause 8 meant that liability for loss or damage arising out of cargo operations would rest with the charterers, and the reference to the supervision, direction and responsibility of the master was simply to confirm the master’s right to supervise, direct and be responsible for cargo operations. Those words did not displace the meaning of “risk” which attached to charterers. There was no material amendment to risk.

The charterers contended that the amendments to clause 8 should be considered as cancelling each other out and meant that clause 8 of NYPE was materially amended.

In the present case, the damage had arisen due to a failure on the part of the ship properly to supervise and direct the fixing of cargo separations and since it had been a breach by the owners in that respect, the charterers argued that, that under clause 8 the owners should be fully responsible for the cargo claim.

The arbitrators concluded that faced with those competing arguments on the interpretation of clause 8 in NYPE, it was difficult to say that the amendments made to the printed form of clause 8 in NYPE made the liability position “clear” which was an imperative demand in the ICA if it should be set aside as apportionment of liability of cargo damage as between owner and charterer.<sup>82</sup> A technical approach to the construction of the ICA was to be adopted and the result of this was that there was no “material” amendment to the cargo liability provisions in the present charter.<sup>83</sup>

Since there was no evidence to suggest that improper stowage had been caused by the master’s intervention in the loading operations, the owner’s claim succeeded and the liability in the present case was thus the charterers.

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<sup>82</sup> London Arbitration 17/84, the arbitrator.

<sup>83</sup> London Arbitration 17/84, the arbitrator.

The conclusions of the case were that an amendment to clause 8 in NYPE providing for cargo to be handled at charterers' risk under the responsibility of the captain was not a material amendment for purposes of the ICA because it was not sufficiently clear. The reason of this was because the words "risk" and "responsibility" cancelled each other out and therefore the charterers was responsible for bad stowage as if clause 8 was unamended.

### 3.3.2.3 London Arbitration 5/00 (LMLN 539)

In this arbitration award the shipowners claimed against that charterer to be indemnified against cargo claims in respect of the cargo of rice in bags. According to the shipowners the cause of the damage was bad stowage by the stevedores employed by the charterers but according to the charterers the damage was caused by failure of the vessel's crew to close the hatches sufficiently quickly during a storm during loading, alternatively properly to ventilate the cargo during the laden voyage.

The time-charterparty was in the NYPE form and clause 44 of the charterparty provided that the Inter-Club Agreement should be used when settling all claims between owners and charterers.

In the charterparty there were special provisions in clause 50 which provided regulations concerning the stevedores operation and stated inter alia: "The stevedores although appointed and paid for by the charterers, shippers or receivers of their agents to be regarded for all purposes as servants of the owners and to remain under the direction and control of the Master, who will be responsible for proper stowage and the seaworthiness of the vessel."

The question the tribunal had to answer was if the "stevedore clause" constituted a material amendment to the charter party which made the responsibility for cargo damage clear so that it made the Inter-Club Agreement inapplicable.<sup>84</sup>

The shipowners had pointed to the clear words of clause 44 which on its face clearly evidenced an intention by the parties to incorporate the Agreement when considering all "claims". The ICA, they said, took precedence over other clauses in the charterparty. Its very purpose was to cut across any allocation of functions and responsibilities spelled out by other charterparty clauses so as to avoid expensive investigation into the facts and apportionment of blame in any particular case. Clause 50, headed "Stevedore Damage Clause" was not directed at cargo claims and could not oust the incorporation of the Agreement.

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<sup>84</sup> London Arbitration 5/00, the arbitrators.

The charterers were of the opinion that clause 50 clearly allocated responsibility for cargo claims resulting from bad stowage, which were thus outside the ambit of the ICA. “All purposes” plainly embraced cargo claims. There was thus a material amendment within the meaning of the ICA.

In the tribunals view it was no doubt that clause 50 which was headed “Stevedore Damage Clause” had “started off in life”<sup>85</sup> to deal with what everyone understood by the expression “stevedore damage”, namely responsibility for damage to the vessel caused by the stevedores. It was the opening sentence in which the stevedores were made the owners servants for “all purposes” and “under the Master’s control and direction” and made it the “Master’s responsibility for proper stowage and seaworthiness” that was the addition to the normal stevedore responsibility but did “all purposes” make the liability “clear” for “cargo claims”?<sup>86</sup> The charterers had pointed out that the sentence specifically referred to “stowage” which obviously included all aspects of arranging and securing cargo in the ship or on deck “not only in the interests of the seaworthiness of the vessel but in order to avoid damage to the goods”.<sup>87</sup>

The majority of the tribunal concluded that the opening sentence of clause 50 did not constitute a material amendment to a cargo responsibility clause which made liability for cargo claims as between owners and charterers “clear”. The majority did not feel comfortable with holding that a clause headed “Stevedore Damage Clause” and plainly intended, originally at least, to deal with damage to the vessel made by stevedores could be regarded as overriding another typed clause inserted specifically to deal with responsibility for cargo claims.<sup>88</sup> The majority considered that the parties must have known what they had done when they included clause 44 into the charterparty.<sup>89</sup> They introduced a pragmatic cost effective scheme to deal with cargo claims against which they were apparently both insured. Clause 44 referred specifically to “all claims” whereas clause 50 referred to the employment of stevedores in wide ranging terms albeit for “all purposes”.

Accordingly, the majority concluded that the ICA did apply and that the cargo claim fell to be determined by the ICA.

### 3.3.3 Conclusions

The second main condition in clause 4 is that the provision of apportionment only applies where the cargo responsibility clauses in the time charter have not been “materially amended”. The definition of a

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<sup>85</sup> London Arbitration 5/00, the arbitrators.

<sup>86</sup> London Arbitration 5/00, the arbitrators.

<sup>87</sup> London Arbitration 5/00, the charterers.

<sup>88</sup> London Arbitration 5/00, the arbitrators.

<sup>89</sup> London Arbitration 5/00, the arbitrators.

material amendment in the sense of the ICA is defined in (b) as “one which makes the liability as between Owners and Charterers, for Cargo Claims clear”.<sup>90</sup> If an amendment is really material must be viewed in the context of the particular cargo claim. The condition that the materially amendment must make the liability as between owners and charterers clear was upheld in the two arbitrations awards, London Arbitration 16/84 and London Arbitration 17/84. In London Arbitration 16/84 the clause in question provided that “Owners not to be responsible for shortlanded cargo”. This was a material amendment because it made the liability clear and therefore preventing the ICA from being applicable to shortlanding claims but the conclusion of the arbitration was that a material amendment dealing with one type of claim, in this case shortlanding claims, does not prevent the ICA from applying to other types of claims.<sup>91</sup> In London Arbitration 17/84 the question came up again if the amended clause was sufficiently clear so that it made liability as between owners and charterers clear and the conclusions of the case were that an amendment to clause 8 in NYPE providing for cargo to be handled at charterers’ risk under the responsibility of the captain was not a material amendment for purposes of the ICA because it was not sufficiently clear. The reason of this was because the words “risk” and “responsibility” cancelled each other out and therefore the charterers was responsible for bad stowage as if clause 8 was unamended.

An amended stevedore damage clause (providing that the stevedores were owners’ servants for all purposes and that the master was responsible for proper stowage and seaworthiness) is not sufficiently clear to constitute a “material” amendment for ousting the apportionment under the ICA. The majority of the tribunal concluded that the opening sentence of clause 50 did not constitute a material amendment to a cargo responsibility clause which made liability for cargo claims as between owners and charterers “clear”. The majority did not feel comfortable with holding that a clause headed “Stevedore Damage Clause” and plainly intended, originally at least, to deal with damage to the vessel made by stevedores could be regarded as overriding another typed clause inserted specifically to deal with responsibility for cargo claims.<sup>92</sup> The majority considered that the parties must have known what they had done when they included clause 44 into the charterparty.<sup>93</sup> They introduced a pragmatic cost effective scheme to deal with cargo claims against which they were apparently both insured. Clause 44 referred specifically to “all claims” whereas clause 50 referred to the employment of stevedores in wide ranging terms albeit for “all purposes”.

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<sup>90</sup> ICA cl. 4 (b).

<sup>91</sup> London Arbitration 16/84 (LMLN 128).

<sup>92</sup> London Arbitration 5/00, the arbitrators.

<sup>93</sup> London Arbitration 5/00, the arbitrators.

## **3.4 Some relevant cases regarding if the underlying claim has been properly settled or compromised and paid**

### **3.4.1 General provisions**

The liability allocation in ICA is a simplified formula but there are certain preconditions to be met before the indemnity claim can be pursued and the third of these is that the original claim has to be properly settled or compromised and paid before the ICA can be used to apportion the claim. Claims have to be reasonably settled or else they will not be considered as properly settled or compromised. An example of unreasonable settlements is ex gratia settlements which are made for commercial reasons. Some certain problems have occurred with the question of whether the underlying cargo claim can be recognised as properly settled or compromised and paid. This is specially the case when a party is asking for security, in some of the assets that belongs to the other party, for the claim that hasn't been paid. The most common situation in this case is that one party want to arrest or attach assets that belong to the other party for securing payments of the underlying claim. The question is whether there is a possibility to obtain security before the original claim has been properly settled or compromised and paid?

The cases below show some of the difficulties and how it has been dealt with in practice.

### **3.4.2 Relevant cases**

#### **3.4.2.1 The Cargo Explorer<sup>94</sup> (The High Court of South Africa, case no: A252/94)**

The plaintiff, Primegates Maritime Company, was the owner of the M.V. Sea Muse, which was chartered to Allied Maritime under a time charter party. The Sea Muse loaded rice in Hochimin City and unloaded the cargo at various ports in Africa. On three occasions in different ports, claims for short delivery occurred and the plaintiffs P&I Club put up security for the claims but they were not yet settled or paid.

Claims for damages and short delivery of a cargo of rice were made by receivers against Primegates (the plaintiff), but had not yet been settled or compromised with the receivers. Primegates contended that it was entitled

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<sup>94</sup> Primegates Maritime Company Limited v. the bunker on board the m.v. Cargo Explorer.

to be indemnified by Allied Maritime in respect of those claims under the ICA. The plaintiff meant that the charterer were responsible for the damage due to the provisions in the charter party, and because of the problems of getting payment from the charterer due to their location in Monrovia, Liberia, they arrested the bunkers on M.V. Cargo Explorer which was owned by the charterer.

The charter party stated that all claims between the charterer and the owner should be settled in accordance with the ICA in the latest addition. According to the ICA the charterer were to pay 100 % alternatively 50% of the cargo claim and this was what the owner supported its arrest on but the respondent (charterer) meant that the ICA isn't applicable due to lack of fulfilment of one of the provisos in the ICA, namely that the claim has to be "properly settled or compromised"<sup>95</sup> before it can be apportioned in accordance of the ICA. Therefore the respondent Allied Maritime asked for the arrest to be set aside on the ground that the plaintiff Primegates had no claim against them until they had either settled or compromised the cargo claims against them.

The clause in question in the ICA read inter alia: "It shall be a condition precedent to settlement under the Agreement that the cargo claim, including any legal costs incurred thereon, shall have been properly settled or compromised"<sup>96</sup>.

The words in the clause are ambiguous according to the Judge of the case and regard must be taken to the general purpose of the ICA according to him.<sup>97</sup>

The purpose of the ICA is discussed in detail by Lord Justice Kerr in the Strathnewton case.<sup>98</sup> One of the main purposes is that "there will be a rough and ready apportionment of financial liability as between owners and charterers"<sup>99</sup> and that "the Inter-Club Agreement does so in all cases by apportioning liability by reference to the cause of the loss or damage alleged in the cargo owner's claim which will have been properly settled or compromised under clause 1(i)."<sup>100</sup> Further on, the Judge in the Strathnewton case states that the effect of the preceding condition in clause 1(i)<sup>101</sup> of the Inter-Club Agreement is "as expressly stated in clause 1(i) of the Inter-Club Agreement a condition precedent to settlement under the Agreement that the owners or charterers, as the case may be, shall have properly settled or compromised the claims of the bill of lading holders

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<sup>95</sup> The Inter-Club Agreement, one precondition of the agreement.

<sup>96</sup> This is the wording of the 1984 version of the Inter-Club Agreement but the wording is almost the same in the 1996 version with the addition of the words "and paid" after "compromised".

<sup>97</sup> Judge P.C. Combrick in the "Cargo Explorer" case.

<sup>98</sup> The Strathnewton [1983] 1 Lloyd's Rep. 219.

<sup>99</sup> Lord Justice Kerr in the Strathnewton case.

<sup>100</sup> Lord Justice Kerr in the Strathnewton case.

<sup>101</sup> In the 1996 version of the Agreement this condition is now found in clause 4(c).

before the Inter-Club Agreement falls to be applied.”<sup>102</sup> This point of view was later upheld in the *Holstencruiser* case.<sup>103</sup>

The court in the *Cargo Explorer* case concluded that the question in this case wasn't the same as in the *Strathnewton* or the *Holstencruiser* case but nevertheless that the learned Judges in both the *Strathnewton* case and in the *Holstencruiser* case agreed on that the ICA were suspended until such time as the claim had been paid or settled and that this is to be applied in the *Cargo Explorer* case as well. The Judge concludes that it is only after there has been payment or settlement of a cargo claim that the ICA comes into operation and that “settlement” as it is written in the clause refers to actual payment or compromise of the claim.<sup>104</sup> This is supported by the fact that *ex gratia* settlements are excluded from the provisions of the ICA.<sup>105</sup> The point of view, that liability is postponed until the claim has been properly disposed of, accords with the general principals of indemnity namely that the obligation to indemnify only arises once the underlying claims have been met.<sup>106</sup> The parties that made the ICA in the first place intended that there had to be payment or compromise of the cargo claim before any liability under the ICA arises and this conclusion is strongly supported by the use of the word “properly” in the clause in question which is an indication that the claim has to be finally disposed of before the ICA becomes operational. Accordingly the arrest of the bunkers on board the *Cargo Explorer* was lifted.

#### 3.4.2.2 *The Gallant II*<sup>107</sup> (The high court of South Africa, case no. A39/2002)

Transpacific Eternity SA (the respondents) was the owner of the vessel “*Antares III*”. *Wajilam Exports (Singapore) Pte Limited* (the applicants) chartered the m.v. “*Antares III*” on the NYPE form to ship among other things a cargo of steel coils from Mumbai to Ravenna, Italy. The bill of lading in respect of this cargo identified the respondent charterers as the carrier. Clause 36 of the charterparty provided that:

“Liability for cargo claims, as between owners and charterers shall be apportioned as specified by the Inter Club New York Produce Exchange Agreement 1996 and its subsequent amendments”

Clause 4(c) of the Inter Club Agreement provided that:

“Apportionment under this agreement shall only be applied to Cargo Claims where ...

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

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<sup>102</sup> Lord Justice Kerr in the *Strathnewton* case.

<sup>103</sup> *The Holstencruiser* [1992] 2 Lloyd's Rep. 378.

<sup>104</sup> Judge P.C. Combrick in the “*Cargo Explorer*” case.

<sup>105</sup> Judge P.C. Combrick in the “*Cargo Explorer*” case.

<sup>106</sup> Judge P.C. Combrick in the “*Cargo Explorer*” case.

<sup>107</sup> *Wajilam Exports (Singapore) Pte Ltd v Transpacific Eternity SA (The Gallant II)* – High Court of South Africa in Durban – 31 January 2003.

Upon discharge at Ravenna, the receivers alleged that many of the coils were damaged. The receivers arrested the m.v. “Anteres III” and damages in the sum of US\$ 300 000 were laid at the door of the applicant owners. Since this claim gave rise to a maritime lien under Italian law, the applicants put up security, notwithstanding the fact that the applicants were the carriers under the bill. Consequently, the respondents requested the applicants to substitute the security, and furthermore alleged an outstanding balance on the hire statement. The respondents proceeded to arrest the applicants’ bunkers on board another vessel chartered by them, the m.v. “Galant II”, in order to obtain security for the outstanding hire, and for the cargo claim. In order to lift the arrest, the applicants provided a bank guarantee as security in the amount of US\$109 912.

The applicants contended that the respondents had no claim against them, and therefore did not make out a prima facie case against the applicants in respect of the cargo claim. It was their case that in accordance with clause 4(c) of the ICA, which applied to the charter and governed the settlement of cargo claims between owners and charterers, apportionment shall only take place once the claim has been properly settled or compromised and paid.

The respondents, in turn, contended that under clause 18 of the charter they were still entitled to an indemnity, regardless of the ICA. In terms of this clause, the applicants undertook not to permit any lien to continue which might have priority over the title and interest of the owner of the vessel.

Judge Pillay found in favour of the applicants. She held that the claim under consideration is in fact a cargo claim, and purported to follow the principle laid down in *Primegates Maritime v Bunkers on Board m.v “Cargo Explorer”* case no: A252/94. In that case it was held that the ICA only comes into operation after the cargo claim has been settled, and that the obligation to indemnify only arises once the underlying claims have been met. Subsequently, Judge Pillay held that the respondent could not claim for indemnity, neither for security, in that respect until the cargo claim is settled.<sup>108</sup> Judge Pillay stated that “even if the claim was not a cargo claim, any claim for security was premature without any prior establishment of the liabilities for the cargo damage.”<sup>109</sup> Accordingly, the shipowners were not entitled to security in the bunkers on board *The Cargo Explorer*.

### 3.4.3 Conclusion

The last condition that has to be fulfilled for the apportionment to apply is that the cargo claims which have occurred under the charterparty has to be

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<sup>108</sup> *Wajilam Exports (Singapore) Pte Ltd v Transpacific Eternity SA (The Gallant II)* – High Court of South Africa in Durban – 31 January 2003.

<sup>109</sup> *Wajilam Exports (Singapore) Pte Ltd v Transpacific Eternity SA (The Gallant II)* – High Court of South Africa in Durban – 31 January 2003.

“properly settled or compromised and paid”<sup>110</sup> by one or the other of the parties.

Both the “Cargo Explorer” and the “Gallant II” support the conclusion that the original underlying cargo claim must be paid and there is no cause of action under the ICA and no right to arrest or attach the other party’s vessel or assets to obtain security before the original claim has been settled or compromised and paid. The conclusion that can be drawn from “Cargo Explorer” is that it is only after there has been payment or settlement of a cargo claim that the ICA comes into operation and that “settlement” as it is written in the clause refers to actual payment or compromise of the claim.<sup>111</sup> This is supported by the fact that ex gratia settlements are excluded from the provisions of the ICA.<sup>112</sup> The point of view that liability is postponed until the claim has been properly disposed of, accords with the general principals of indemnity, namely that the obligation to indemnify only arises once the underlying claims have been met.<sup>113</sup> The parties that made the ICA in the first place intended that there had to be payment or compromise of the cargo claim before any liability under the ICA arises and this conclusion is strongly supported by the use of the word “properly” in the clause in question which is an indication that the claim has to be finally disposed of before the ICA becomes operational. The effect of this is that no cause of action or right to attach/arrest assets lies under the ICA until the cargo claim has been paid.

The conclusions from “Cargo Explorer” were upheld in the “Gallant II” and it was stated that the obligation to indemnify only arises once the underlying claims have been met. Subsequently this means that a party could not claim for indemnity neither for security in that respect until the cargo claim has been settled. This means that the possibility to obtain security in some other property that belongs to the party in order to obtain security for a claim is conditioned by the fact of whether the underlying cargo claim has been paid or compromised in any way by the security-seeking party.

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<sup>110</sup> ICA cl. 4 (c).

<sup>111</sup> Judge P.C. Combrick in the “Cargo Explorer” case.

<sup>112</sup> Judge P.C. Combrick in the “Cargo Explorer” case.

<sup>113</sup> Judge P.C. Combrick in the “Cargo Explorer” case.

## **3.5 Some relevant cases regarding if the cargo claim has been time barred under the Inter-Club Agreement**

### **3.5.1 General provisions**

The question in the cases is whether the one-year time bar in the Hague/Hague-Visby Rules or the two-year time bar in the ICA shall apply when the Hague/Hague-Visby is incorporated in the charter-party with a Clause Paramount at the same time as the ICA is incorporated in the charter-party. Further more the second case deals with the question of how the notification should be made and by whom.

When the Hague/Hague-Visby rules are incorporated into the charter-party through a Clause Paramount they cease to be mandatory and become normal contractual conditions.

When it comes to the relationship between cargo-owner and carrier when the contract of carriage is a bill of lading then of course the Hague/Hague-Visby Rules are mandatory but that is not the case between charterer and ship-owner when they are parties to a time charter party.

A cargo owner who intends to claim against the carrier for loss or damage to the goods should do this in writing and enclose the necessary documents and supporting evidence, such as a copy of the bill of lading, survey reports from discharging, invoices stating the value of the cargo, etc.

It is important for the claimant to be aware of the one-year time limit which in the Hague Rules, has the following wording: “In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered”.

It is not sufficient to make that the claim has been sent to the carrier before the year has ended. Unless the claimant gets payment he must either get time extension from the carrier or file a suit before the year has ended as otherwise his claim will be time-barred.

When it comes to the ICA the 1984 Agreement provided that “claims should be notified to the other party in writing as soon as possible, but in any event within two years from the date of discharge, or the date when the goods should have been discharged”. Under the ICA 1996, written notification of a claim must be given to the other party within 24 of the date of delivery of the cargo or the date the cargo should have been delivered, except for where the Hamburg Rules are compulsorily applicable, in which case the time bar is 36 month from the date o delivery. The apparent more generous time limit for the Hamburg Rules cases is necessary due to the fact that under the Hamburg Rules there is a two year limitation period<sup>114</sup> compared to the one year time limitation period under the Hague and Hague-Visby Rules.<sup>115</sup>

## **3.5.2 Relevant cases**

### **3.5.2.1 The Strathnewton [1983] 1 Lloyd’s Rep.296**

The issue in this case was whether the one-year time limit under Article III, rule 6, of the Hague Rules Applied where the charterparty also incorporated the ICA.

The charter was on the NYPE form and incorporated the Hague Rules by virtue of the USA clause Paramount. Clause 55 of the charter provided that the cargo claims under the charterparty were to be settled between owners and charterers under the ICA.

Cargo was loaded on board the vessel at a number of ports in the United States, in April, 1975, for carriage to ports in the Persian Gulf. After the vessel had discharged her cargo, numerous claims were made by cargo receivers under the bills of lading. The charterers settled 72 claims in

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<sup>114</sup> The Hamburg Rules, Article 20.

<sup>115</sup> Hague/Hague-Visby Rules, Article III, Rule 6.

respect of loss and damage, and then claimed recovery against the owner for either 100 % of 50 % of their expenses under the ICA.

The charterers failed to bring any suit against the owners for settlement of any cargo claims pursuant to clause 55 within one year of the delivery and the owners alleged that the charterers' claims were time barred by Art III, rule 6 of the Hague Rules. The charterers contended that the Inter-Club Agreement governed the situation, and that the ICA was not affected by the one year time bar and its own two year time bar should be operational.

Lord Justice Kerr stated that “the Inter-Club Agreement had the effect of cutting across the balance of claims and defences under the Hague Rules by means of a rough and ready apportionment of financial liability as between owners and charterers”<sup>116</sup> and if the question was asked what connection the parties could have intended between a settlement under the Inter-Club Agreement pursuant to clause 55 and the Hague Rules in relation to such settlement the answer must be none.<sup>117</sup> The functions of the ICA cuts right across any allocation of functions and responsibilities based on the Hague Rules<sup>118</sup> and there was no justification for the application of the time bar in Art. III, rule 6, of the Hague Rules.<sup>119</sup>

The conclusion from this case is that the ICA is a self-contained code which operates independently from other charter terms, including the Paramount Clause and that (1) the Inter-Club Agreement has the effect of cutting across the balance of claims and defences in the Hague Rules by a rough and ready apportionment of financial liability as between Owners and Charterers (2) the agreed apportionment has nothing to do with the Hague Rules, and in those circumstances Owners could not invoke Art. III(6) of the Hague Rules to claim that the Charterers claim was time-barred.

Consequently, the one year time bar which would otherwise be incorporated by a Clause Paramount does not apply to a claim under the ICA.

### 3.5.2.2 London Arbitration 16/02

The background of this case was that damage had occurred to the cargo due to water intrusion in one of the cargo holds on the ship. Because of the incorporation of the ICA in the charterparty the apportionment of damage between the owners and the charterers was to be done according to it. The ICA stated that in case of cargo damage due to unseaworthiness the liability was to be borne 100% by the owner.<sup>120</sup>

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<sup>116</sup> The Strathnewton [1983] 1 Lloyd's Rep 296

<sup>117</sup> The Strathnewton [1983] 1 Lloyd's Rep 296, p.225.

<sup>118</sup> The Strathnewton [1983] 1 Lloyd's Rep 296, p.225.

<sup>119</sup> The Strathnewton [1983] 1 Lloyd's Rep 296, p.228.

<sup>120</sup> Inter-Club Agreement.

The P&I Club of the charterers co-operator X, who had paid the claims made under the bill of lading to the cargo owners, claimed on behalf of the charterer for an indemnity in the amount of 80000 US\$. The owners contented their right to an indemnity on the grounds that the notification of the indemnity claim, under the ICA, was made in the wrong way. Therefore the claim should be time-barred.

The notification was made in time of the two-year time bar so the question was if the notification was made in the correct way according to the provision of the ICA. The notification was a clear notice of likely claim, and it specifically identified the bills of lading in question and the amounts being claimed as well as the nature of the claims.<sup>121</sup> Thus the only question was whether it was insufficient because it was not given by or manifestly on behalf of the charterers and might have been written by way of notice of a claim that might be pursued by X (not the charterers) against the owners in tort. In the case the charterer and X had a joint-venture operation, and it was X's P&I Club that notified the owner's P&I Club of the indemnity claim.

The arbitrators held that it would go against the intentions of the time bar provision in the ICA if a notification to the owners P&I Club from X's P&I Club on behalf of the charterer was to be declared invalid.<sup>122</sup> It simply would be out of proportions if the owner in this way could avoid the 100% responsibility that was his in the case of cargo damage due to unseaworthiness. The idea of the notification was to give the receiving part the possibility to investigate the claim in hand and prepare his strategy of defence.<sup>123</sup>

There is nothing in the provisions of the ICA that demands the notification to be given by the part that probably will claim for indemnity. In the same way there isn't any imperative demand that the notification should be given to the owner or charterer instead of one of their P&I Clubs.<sup>124</sup> The letter of notification had the substantive effect designed to be achieved by the time-bar clause in the ICA. It would have made no difference at all if the charterers' Club, rather than X's Club, had written in identical terms to the owners' P&I Club or even to the owners themselves.<sup>125</sup> In those circumstances it would be wrong and unjust to hold the charterers disentitled from recovering.<sup>126</sup>

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<sup>121</sup> As the time-bar provision states in the Inter-Club Agreement.

<sup>122</sup> London Arbitration 16/02, the arbitrator.

<sup>123</sup> London Arbitration 16/02, the arbitrator.

<sup>124</sup> Inter-Club Agreement, the time-bar.

<sup>125</sup> London Arbitration 16/02, the arbitrators.

<sup>126</sup> London Arbitration 16/02, the arbitrators.

### **3.5.3 Conclusions**

The conclusions of the cases regarding time bar are:

The conclusion is that the Inter-Club Agreement is self-contained code which operates independently from the other charter terms, including the Paramount Clause, and consequently the one-year time bar which would otherwise be incorporated by a Clause Paramount does not apply to a claim under the Inter-Club Agreement.

Notification can be made by any party that has connection to the original cargo claim and it isn't mandatory that the notification has to be given by the part that probably will claim for indemnity. In the same way there isn't any imperative demand that the notification should be given to the owner or charterer instead of one of their P&I Clubs.

# Supplement A: THE ICA 96

## Inter-Club New York Produce Exchange Agreement (1996)

This Agreement is made on 1 September 1996 between the P&I Clubs being members of The International Group of P&I Associations (hereafter referred to as "the Clubs").

This Agreement replaces the Inter-Club Agreement 1984 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;  
or

(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 onto 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.

### **Governing Law**

(9) This Agreement shall be subject to English Law and Jurisdiction, 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.

# Supplement B: The relevant clauses in ICA 84

## (1) *Application and interpretation of the Agreement*

(i) It shall be a condition precedent to settlement under the Agreement that the cargo claim, including any legal costs incurred thereon, shall have been properly settled or compromised and the cargo carried under a bill or bills of lading incorporating the Hague or Hague-Visby Rules or containing terms no less favourable. Ex gratia settlements made for business or other reasons where there is no legal liability to pay the claim shall be borne in full by the party by whom the payment is made and for the purpose of this Agreement no regard shall be had to such payments.

(ii) (a) For the Agreement to apply, the cargo responsibility clauses in the New York Produce Exchange Charter must not be materially amended. A material amendment is one which makes the liability for cargo claims, as between Owners and Charterers, clear. In particular the addition of the words “and discharge” in Clause 8 shall not be deemed to be a material amendment.

(b) However the addition of the words “and responsibility” with the reference to the words “under the supervision” in Clause 8 together with the addition of the words “cargo claims in the second sentence of clause 26 shall render the Agreement inoperative.

(iv) Any claims pursued under this Agreement by or on behalf of either Charterers or Owners should be notified to other party in writing as soon as possible but in any event within two years from the date of discharge or the date when the goods should have been discharge, failing which any recovery shall be deemed to be waived and time barred.

# Supplement C: The relevant clause in NYPE

## Clause 8: *Performance of Voyages*

The Master shall perform the voyages with due despatch, and shall render all customary assistance with the Vessel's crew. The Master shall be conversant with the English language and although appointed by the Owners shall be under the orders and directions of the Charterers as regards employment and agency; and the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashng, discharging, and tallying, at their risk and expense, under the supervision of the Master.

## Clause 26: *Navigation*

Nothing herein stated is to be construed as a demise of the Vessel to the Time Charterers. The Owners shall remain responsible for the navigation of the Vessel, acts of pilots and tug boats, insurance, crew, and all other matters, same as when trading for their own account.

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