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Inter-Club Agreement: the Right to Counter Security

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The recent London Arbitration Award 18/18 highlights the need for care to be taken over the precise wording of clauses used in charterparties to incorporate the Inter-Club New York Produce Exchange Agreement 1996, as amended September 2011 ("ICA 2011").

Facts

The vessel was chartered from the claimant, a Disponent Owner, to the Charterer on an amended NYPE 1946 form with additional riders.

The charterparties between Head Owners, Disponent Owners and Charterers were said to have been on essentially back-to-back terms. Each charter read:

"P&I Club/Cargo Claims
"… Liability for cargo claims, as between Charterers and Owners, shall be apportioned/settled as specified by the Interclub New York Produce Exchange Agreement effective from 1996 and its subsequent amendments."

Cargo interests raised a cargo claim against Head Owners alleging damage amounting to US$900,000. Following a threat of arrest, the Club for Head Owners provided security in the form of a letter of undertaking.

The Head Owners demanded that Disponent Owners provide counter-security pursuant to clause 9 of the ICA 2011 which they considered to be incorporated into the charterparty.

Clause 9 of the ICA 2011 provides:

"If a party to the charterparty provides security to a person making a Cargo Claim, that party shall be entitled upon demand to acceptable security for an equivalent amount in respect of that Cargo Claim from the other party to the charterparty, regardless of whether a right to apportionment between the parties to the charterparty has arisen under this Agreement ..."

Disponent Owners in turn made a request of Charterers to provide counter-security to them pursuant to the above terms. The P&I Club for Charterers refused to provide counter-security as they consider that the words used in clause 35 of the charterparty were not adequate to incorporate the entirety of the ICA 2011, in particular the security provisions of clause 9.

The award

Disponent Owners commenced arbitration proceedings seeking an order for specific performance requiring Charterers to provide counter-security in the form of a Club letter or undertaking, alternatively a first class bank guarantee or payment into escrow.

The Charterers argued that the wording of clause 35 did not incorporate the full text of the ICA 2011. Charterers relied on a restrictive interpretation of the words "liability" and "apportioned/settled" in clause 35 to mean that only those parts of the ICA 2011 relating to the apportionment and settlement of claims were incorporated in the charter. This would not include the security provisions.

Owners argued that the terms clearly intended to incorporate the full terms of the ICA 2011 with regard to liability for cargo claims.

The Tribunal agreed with Charterers that as a matter of strict construction the charterparty only incorporated those parts of the ICA 2011 that related to apportionment and settlement of cargo claims. The wording of clause 35 was clearly restrictive and did not make provision for security for claims. Without express wording incorporating the full terms of the ICA, its full incorporation could be not assumed.

The Tribunal noted that clause 35 would have been adequate to cover both parties' interests prior to the introduction of clause 9 in 2011.

Accordingly clause 9 of the ICA 2011 did not apply to the charterparty and Charterers were not obliged to provide security. The decision does not affect Charterers' liability regarding apportionment and settlement of the cargo claim.

It is understood that Owners sought permission to appeal to the High Court but this has been refused.

Amended International Group Recommended Charterparty Clause

As a result of this decision the International Group took the opportunity to consider their recommended charterparty clause wording for incorporation of the ICA, to ensure this encompasses the requirement for security to be provided (See Steamship Mutual Circular L317 – IG – Claims co-operation).

The International Group have amended the clause as follows to include an express reference to securing claims:

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

Comments

It is to be expected that, following this award, where the wording of charterparty clauses are not clear or open to interpretation the right to counter-security could become an issue for debate. The award highlights that parties need to be careful in their charterparty clauses and check the extent of the incorporation of the ICA. All Owners and Charterers are encouraged to review any charterparty clauses that they regularly adopt to assess whether the incorporation of the ICA therein would include the counter-security provisions.

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