London Arbitration 18/18

Charterparty – Interclub NYPE Agreement 2011 – Charterparty providing that liability for cargo claims should be apportioned as specified by Interclub NYPE Agreement – Cargo receivers bringing claim against owners – Owners providing security to prevent arrest of vessel – Whether charterers required to provide counter-security

The subject vessel was chartered by the claimant disponent owners (the owners) to the respondent charterers on an NYPE 1946 form with additional clauses. Following one of the voyages the cargo receivers and their subrogated underwriters (the cargo insurers) raised a cargo claim against the head owners for alleged damage amounting to US$900,000.

Following the threat of the vessel being arrested, the head owners' P&I Club provided the cargo insurers with security of US$900,000 in the form of a letter of undertaking (LOU).

Following the placement of the LOU the head owners' P&I Club demanded security for the same amount from the owners, which was duly provided. The owners took the view that the head owners were entitled to counter-security pursuant to their rights under the Interclub NYPE Agreement 2011 (ICA 2011) which they believed was incorporated into their charterparty. The charterparties between the head owners and the owners and the charterers were essentially on back-to-back terms.

Clause 35 of the charterparty read as follows:

"P&I Club/Cargo Claims

Owners guarantee that the vessel is entered and shall remain entered in a P&I Association for the duration of this charter. Entry shall include, but not be limited to, ordinary cover for cargo claims. In the case of damage to and/or loss of cargo carried on the vessel in which Owners and/or Charterers' liability could be involved under the terms of this Charter Party, as the case may be, the Owners and/or the Charterers shall on request grant reasonably time extension for commencement of suit in each and every occurrence. Such extensions shall not prejudice the ultimate responsibility of both parties. 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."

Clause (9) of ICA 2011 provided:

"Security

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

(a) written notification of the Cargo Claim has been given by the party demanding security to the other party to the charterparty within the relevant period specified in clause (6); and

(b) the party demanding such security reciprocates by providing acceptable security for an equivalent amount to the other party to the charterparty in respect of the Cargo Claim if requested to do so."

Clause (9) was a new clause introduced into ICA 2011.

The owners said that the charterers were notified in writing of the cargo claim; that the owners' P&I insurers contacted the charterers' P&I insurer (the charterers' P&I Club) asking for confirmation that the charterers would provide counter-security to the owners pursuant to their contractual obligation under clause (9) of ICA 2011 which they claimed was incorporated into the charterparty by clause 35; but that the charterers' P&I Club refused to provide counter-security to the owners.

The owners brought arbitration proceedings against the charterers and applied, under section 48(5)(b) of the Arbitration Act 1996, for an immediate order for specific performance from the charterers for the provision of counter-security in the form of a Club letter of undertaking, alternatively, a suitably worded guarantee from a first class London bank, alternatively, the placement of the demanded security amount into escrow with the owners' P&I insurer.

The charterers opposed the application and denied that they were obliged to provide counter-security under the terms of the charterparty or ICA 2011. They said that the words used in clause 35 of the charterparty were inapt to incorporate into the charterparty the terms of ICA 2011 (and in any event the provisions regarding security).

Held, that the charterers' case relied on the correct understanding of the words "Liability" and "apportioned/settled" in the following sentence of clause 35 of the charterparty:

"*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." (Tribunal's emphasis.)

The charterers had argued that it was only those parts of ICA 2011 relating to *apportionment and settlement* of claims to which reference could be made, and that the wording of clause 35 did not provide any basis for applying clause (9) of the ICA 2011 which dealt with security for claims. They also argued that the wording of clause 35 of the charterparty did not incorporate the full text of ICA 2011, and they had referred to *The Ion* [1980] 2 Lloyd's Rep 245.

The owners argued that clause 35 made it clear that the terms of ICA 2011 applied (and were therefore incorporated into the charterparty) in full as regards liability for cargo claims.

The tribunal agreed with the charterers that as a matter of strict construction, clause 35 of the charterparty only related to *apportionment and settlement* of cargo claims and did not include the provision of security. It did not provide any basis for applying clause (9) of ICA 2011 which dealt with security for claims, and did not incorporate the full text of ICA 2011.

That conclusion did not undermine the purpose of the ICA which was to provide a relatively simple mechanism for swiftly apportioning *liability* for cargo claims arising under the New York Produce Exchange Form and Asbatime charterparties. Of course, clause (9) of ICA 2011 also made provision for the security of claims. However, although clause 35 of the charterparty would have been adequate to cover both parties' interests as recommended by their Clubs prior to 2011 when clause (9) was added to the ICA, the wording of clause 35 was clearly restrictive and was limited to the *settlement* and *apportionment* of cargo claims and did not make provision for security for claims.

Furthermore, the tribunal accepted the proposition cited in *Time Charters* that the ICA "was neither designed nor drafted to be incorporated into charters". Therefore, it could not be assumed that the full terms of the ICA were incorporated into a charterparty without express provision to that effect, which was not the case with clause 35 since it was silent on the matter of security for the claim. It also should be born in mind that ICA 2011 was, in effect, an agreement formulated between the Clubs which they recommended their members to accept (see the preamble to ICA 2011 which stated that "The Clubs will recommend … that their Members adopt this agreement for the purpose of apportioning liability for cargo claims …"). It was noteworthy that the preamble did not refer to *security*, which suggested that it was not updated when clause (9) was introduced into ICA 2011.

Accordingly, clause (9) of ICA 2011 did not apply to the charterparty, and no criticism could be attached to the charterers or their Club for their failure to provide security as demanded by the owners. However, that decision did not affect the charterers' *liability* as regards *apportionment* and *settlement*.

The owners' application would be dismissed.

[Editor's note: permission to appeal was refused by the High Court.]