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“Young MLAANZ” Case Note – Lourenzo Fernandez

London Arbitration 10/22

In this case note, McElroys solicitor Lourenzo Fernandez reviews a recent arbitral decision, concerning the interpretation of an Interclub Agreement (ICA) clause which was incorporated in a charterparty in the context of a cargo claim. The decision confirmed a broadbrush commercial approach to the interpretation of such clauses.

Facts

The subject vessel was chartered on an amended New York Product Exchange (NYPE) 1946 form for a time charter trip. The vessel carried two cargoes of soybeans to be discharged in China. The subject cargoes were loaded in Uruguay (Uruguayan cargo) and Argentina (Argentinian cargo) respectively. The Uruguayan cargo was intended for use in the production of vegetable oils. The cargo receivers, who were the same for both cargoes, complained that the Uruguayan cargo had suffered damage during the course of carriage. Sampling of the Uruguayan cargo established that it exceeded the limit of item “percent of moldy kernel” and “percent of damaged kernel” as provided for by the relevant standards. China Customs (previously CIQ) required that the damaged kernel be returned or used for a different purpose than was intended. The cargo receivers’ subrogated cargo insurers pursued a claim against the owners in the Chinese courts. While judgment was entered in favour of the receivers’ insurers at first instance, the owners appealed to the Court of Appeal. However, the parties reached a settlement before the appeal was decided.

The owners subsequently sought to recover the settlement sum and their associated costs of defending the proceedings in the Chinese courts from the charterer via London Maritime Arbitrators Association proceedings (Arbitration Proceedings). The Arbitration Proceedings were brought pursuant to the:

- apportionment regime under the ICA, and/or
- article IV(2) of the Hague Visby Rules, and/or
- an implied right of indemnity.

Clause 59 of the ICA charterparty stated that:

> “Liabilities for cargo claims, including customs fine if imposed, shall be borne by Owners/ Charterers in accordance with the Interclub New York Exchange Agreement of February 1970 and repairs of May 1984 and any amendments thereto.”

Biography

Lourenzo Fernandez joined the McElroys team in November 2020 from a large international law firm, where he spent the first two years of his legal career in its resource management litigation and advisory team. During this time Lourenzo spent three months on secondment at the head office of a prominent national bank where he worked with the legal and commercial services teams.

Since joining McElroys, Lourenzo has developed experience in a range of areas of civil litigation, with a focus on material damage, professional indemnity, subrogated recoveries, construction, statutory liability and general liability. He is part of McElroys' marine team, providing indemnity and coverage advice to marine industry clients, and conducting subrogated cargo recoveries. Lourenzo also advisees and defends employers facing personal grievance claims.

He has appeared in the High Court, District Court and specialist tribunals, including the Canterbury Earthquake Insurance Tribunal and Real Estate Disciplinary Tribunal. Lourenzo enjoys problem solving and dispute resolution and is focused on providing commercially-pragmatic advice to clients.

Lourenzo completed degrees in Law (Honours) and Science (Biology and Environmental Science) at the University of Auckland. With a strong interest in international law, international arbitration and human rights, he published an article in the 2018 edition of the *Public Interest Law Journal of New Zealand*, exploring international criminal accountability for genocide. Lourenzo was also a delegate at the 5th Annual Australian and New Zealand Law Honours Conference in Sydney in December 2019 where he presented his paper on the potential application of the crime of aggression at the International Criminal Court to a factual case study. He is a regular contributor to McElroys' *Navigate*.

Decision

The Tribunal considered a number of issues and made the following determinations.

What was the Applicable Version of the ICA Under Clause 59 of the Charterparty?

The charterers' case was that the reference in clause 59 to the 1970 version of the ICA and the "reprints of 1984 and any amendments thereto" reflected an intention to only incorporate the 1984 version of the ICA or any subsequent version which satisfied the requirements of being an "amendment thereto", rather than being a reprint, replacement or revision. According to the owners, clause 59 of the ICA incorporated the latest version of the charterparty, being the 2011 version. The owners' position was based on the knowledge of the parties when the charterparty was concluded, and gave a broad, commercial effect to the wording.

The Tribunal preferred the owners' position and accepted the owners' argument that given Teare J used phrases such as "edition", "versions", "form", "predecessor" and "amendment" interchangeably when referencing the ICA's different version, in the commercial context of this case, it would be strange to conclude that parties had a stricter intention. Accordingly, the Tribunal found that the 2011 version applied, concluding that a technical distinction between "amendment", "replacement" and "version" was not required.

Whether There had Been a Valid "Cargo Claim" to Satisfy the Preconditions for a Claim Under any Version of the ICA?

In the charterers' view, for the purposes of a claim for cargo damage under the relevant bill of lading, the owners had to show that the cargo was discharged in a materially-worse condition than when

loaded. The charterers' case was that the Uruguayan cargo was not damaged on arrival but rather was damaged during storage after discharge, and consequently the claim was not a cargo claim.

Conversely, the owners argued that for the purposes of a cargo claim under 2011 ICA, they simply needed to establish that the claim in the Chinese courts concerned alleged damage to the Uruguayan cargo during the relevant voyage. The owners considered that whether damage occurred in fact was irrelevant. The Tribunal agreed and found that the claim in the Chinese courts concerned alleged damage to the Uruguayan cargo during carriage, and as such, met the requirement of a "cargo claim" for the purposes of the 2011 ICA.

If so, Whether the Cargo Claim was "Properly Settled or Compromised"?

According to the charterers the requirement for claims to be "properly settled" was pre-condition to the ICA applying and that failing to "properly" settle the claim precluded the owners from recovering from the charterers under the ICA. The charterers argued that the claim was not "properly settled" for the following reasons:

- the owners effectively conceded that either the charterers or the owners themselves were liable for the alleged damage to the Uruguayan cargo by not challenging the position advanced by the cargo receivers that it was damaged at the time of discharge
- failure to advance all available factual and legal arguments
- failure to maintain and/or produce "proper" records which would have strengthened their defence to the cargo claim
- failure to pursue an effective settlement strategy.

The owners' case was that the appropriate approach to the ICA was a "broadbrush" one, and as such, if the claim between the owners and the cargo receivers was settled in good faith on the basis of a genuine view as to the merits of the claim, the claim should be considered to have been "properly settled" for the purposes" of the ICA. The Tribunal agreed with the owners' position and noted that the necessity for the claim to be have been "properly settled or compromised" does not require that the subject claim be relitigated, or second guessed, nor does it necessitate the nuanced, detailed assessment required to assess reasonableness for an indemnity claim.

Apportionment: Under Clauses 8(b) and 8(d) of the ICA 2011

Clauses 8(b) and 8(d) of the ICA 2011 provide:

> (8) Cargo Claims shall be apportioned as follows:
>
> (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

(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

Clause 8(b)

The Tribunal found clause 8(b) required that there be a cargo handling aspect to the damage, rather than merely being attributable to the loading the cargo. The Tribunal found that this interpretation was supported by the fact clause 8(b) specifies "or other cargo handling matters". Given that no improper cargo handling was alleged to have caused the damage, the Tribunal found that the damage did not fall within clause 8(b) of the ICA.

Clause 8(d)

Instead, the Tribunal found that the damage fell within the "catch all" provision of clause 8(d).

The owners argued that the ICA provided for the nature of evidence required rather than a specific standard of proof. The owners argued that the charterers relevant "act", which justified an 100% apportionment under clause 8(d) of the ICA was the loading onboard of cargo which was bound to spoil and as such exposed the owners to a liability in circumstances where they had no fault. The owners relied on Teare J's comments in *The Yangtze Xing Hua* [2017] 1 Lloyd's Rep 212 and *London Arbitration 30/16* with respect to loading cargo with an inherent vice.

The charterers' sought to distinguish *The Yangtze Xing Hua* on the basis that the damage did not "arise out of" the charterers' decision to load the subject soybeans, but rather arose from the cargo receivers' actions in storing the cargo for four months. In addition, the charters considered that the chain of causation between its decision to ship the soybeans and the eventual loss was also broken by the owners' failures discussed above, including failing to maintain proper information about the cargo and conceding that the damage had been caused.

The Tribunal was reluctant to apportion any of the loss to the owners in circumstances where the cargo, being soybeans, were naturally bound to spoil over time and the charterers were arguing that the cargo was not damaged during the carriage. The Tribunal noted that the soybeans had to be of a particularly high quality which contributed to China Customs paying particular notice to the cargo. In addition, the Tribunal held that the owners' defence was disadvantaged by the lack of contemporaneous documents concerning the quality of the cargo on loading, and the fact that independent testing on discharge was prevented by China Customs. Overall, in these circumstances, the Tribunal agreed with the charterers' distinguishing of *The Yangtze Xing Hua* case and was not inclined to make an 100% apportionment in the absence evidence concerning the cause of the loss, other than inherent vice, there was no "clear and irrefutable evidence" of an "act or neglect" by either the owners or the charterers. The Tribunal held that a 50% apportionment should apply.

Comment

While the Tribunal's decision is not binding, it provides useful guidance on what version of the ICA applies and the interpretation of particular clauses. The decision confirmed the broad, commercial approach to the interpretation of the ICA, dismissing technical defences.

The Tribunal's comments on apportionment in circumstances where the cargo suffered from an inherent vice are particularly interesting. It is unclear how the Tribunal considered the parties' arguments concerning the interpretation of "clear and irrefutable evidence" being required to displace the fallback position of a 50/50 apportionment under clauses 8(c) and (d). However, the

Tribunal's decision that inherent vice was insufficient for an 100% apportionment in the absence of "some contributory act or neglect of one or other party which compounded the situation" creates uncertainty for charterers in respect of risk exposure where cargo suffers from inherent vice. In such circumstances, depending on the facts and the available evidence, risk could range from at least 50% to 100%.

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