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Inter-Club Agreement (ICA) 1996 – Clause (8)(d) apportionment considered. "Acts" need not be fault based acts to apply a different apportionment regime.

The MV YANGTZE XING HUA [2016] EWHC 3132 Comm.

In considering the ICA 1996 sweep up provisions at Sub Clause (8)(d) Mr Justice Teare has concluded that an *"act"* apportioning liability away from a 50/50 split between owner and charterer, need not be fault based under Clause (8)(d).

Clause (8) of the ICA 1996 provides that cargo claims are to be apportioned 100% to Owners if arising out of unseaworthiness and/or error or fault in navigation or management of the vessel (sub-clause(8)(a)) save where that unseaworthiness is caused by loading, stowage, lashing, discharge or other handling of the cargo, in which case the apportionment reverses to charterer pursuant to sub-Clause (8)(b). (8)(b) provides that where claims arise out of the loading, stowage, lashing, discharge, storage or other handling of cargo they are 100% for Charterers unless the words *"and responsibility"* are included in Clause 8 of the NYPE form, or other similar amendment is made, where apportionment is split 50/50. However that is unless the loading or stowing issue is itself caused by unseaworthiness where it reverts to 100% to Owners.

Sub-clauses (a) and (b) therefore can involve an assessment of fault, in particular 8(a) where fault or error is specifically referenced some circumstances in order to consider whether that should be 100% for an owner.

In the absence of a claim which falls under either sub-clause (a) or (b) the ICA 1996 provides as follows under the balance of Clause (8):-

> *"(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 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."*

Sub-clause (8)(d) first appeared in the ICA 1996 version and supplements the (8)(c) shortage and over-carriage provision (on almost identical wording as will be seen above) in order that all claims not covered elsewhere are swept up. In the initial decision the parties agreed that (8)(d) was the correct section of the ICA that applied to the relevant cargo damage claim(heating damage). In their conclusions on the facts the arbitration panel held there was no fault based act or neglect of owner or charterer. The owner was not at fault (in monitoring cargo temperature and caring for the cargo) and nor were charterers at fault for loading a cargo of the inherent nature that they had. The finding of fact was that the cargo heating and damage had occurred as a result charterers loading a contractual cargo of a particular moisture content coupled with their orders which encompassed a lawful delay at the discharge port. Therefore without culpability on the part of charterer their decisions or acts gave rise to the cargo damage claim.

The question before the Judge was whether it was necessary for an owner to prove the decisions or acts were fault based in order for the cargo claim to be allocated at 100% to the charterer? The Court discussed the ICA from inception in 1970 and amendment in 1984 and 1996. What clearly influenced the Court was that the apportionment regime in the ICA (latest 1996 - amended 2011) has been held to provide a more or less mechanical apportionment of liability and cuts across Hague or Hague-Visby Rules (and other fault based provisions) apportionment otherwise included in charterparties (see ***The Strathnewton*** **[1983] 1 Lloyd's Reports 219**).

Mr Justice Teare concluded that fault was not required but simply a proven act (or neglect, that is a failure to act). The conclusion was that "act or neglect" under (8)(d) need not be culpable in order to move apportionment to one or other party at 100%. It is suggested that as the wording at Clause (8)(c) is similar that act or neglect need to be culpable/fault based under this section either.

For further information about the case or the ICA 1996 generally, please contact Simon Wolsey.

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