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## The Role of the NYPE Inter-Club Agreement as a Modular Apportionment Mechanism for Cargo-Claims across Multiple Jurisdictions

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# THE ROLE OF THE NYPE INTER-CLUB AGREEMENT AS A MODULAR APPORTIONMENT MECHANISM FOR CARGO-CLAIMS ACROSS MULTIPLE JURISDICTIONS

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## Abstract

*The New York Produce Exchange Inter-Club Agreement (the 'ICA') is a staple maritime cargo claims provision incorporated into popular charter party forms, the NYPE46, ASBATIME, and NYPE15. It mechanically regulates cargo liability apportionment between charterers and shipowners mechanically for quick dispute resolution. This study aimed to examine the use and application of the ICA through a private international law lens to evaluate the ICA's choice of law (being English law). ICA is an independent contract applicable to national legislation or any international convention, such as the Hague Rules, Hague-Visby Rules, and Hamburg Rules. It protects the commercial interests of shipowners and charterers and accommodates mandatory rules imposed by each jurisdiction. Furthermore, the popularity of ICA throughout the maritime industry as an apportionment mechanism was also determined by evaluating previous cases handled by English, Australian, and American Federal courts. Its importance in solving inconsistencies within maritime law on cargo apportionment and the perspective of ICA under the private international conflict of laws were also examined. Library research involved studying conventions, statutes, and well-established cases of conflict of laws, private international law, cargo claims, and the ICA.*

**Keywords** : cargo claims, Inter-Club Agreement, liability apportionment, New York Produce Exchange, third party claims, Time Charters

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## I. INTRODUCTION

Humanity's long and complicated relationship with the high seas has forced practical solutions to problems arising not because of humankind's decisions. Maritime law first grew to become enforceable rules amongst commercial actors during the Age of Discovery. This was during the long sea voyages from Europe to the Far East and the New World.<sup>1</sup> The first insurance companies and clubs arose to protect people's financial security when unforeseen events occurred during the voyage.<sup>2</sup> This remains true until today because nobody

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<sup>1</sup> Albert Hyma, *The History of the Dutch in the Far East* (Michigan: George Wahr Publishing Company, 1953), 5-9.

<sup>2</sup> *Ibid.*

knows what bad weather,<sup>3</sup> war, robbery on the high seas,<sup>4</sup> or simple crew mistakes<sup>5</sup> would cause to the cargo owner's property.

Many conventions, particularly rules of law governing cargo claims and liabilities, have been raised, agreed on, and taken down in favor of business efficacy in this modern age. They protect the shipowners' and charterers' rights through trial and error, being argued by lawyers and tested by arbitral tribunals and multiple admiralty jurisdictions.<sup>6</sup> These unifications have become staple conventions, such as the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Another example is the Protocol of Signature, known as The Hague Rules or the Harter Act in the United States. They were considered revolutionary, uniting rules established by multiple admiralty jurisdictions (The English being one of the main contributors). Moreover, they codified the rights and obligations of the carrier and owner of the goods. However, The Hague Rules and its successive Hague-Visby Rules have been criticized due to the uncertainty and unfairness given in their several sub-sections.<sup>7</sup>

## II. GENERAL OVERVIEW: THE NEW YORK PRODUCE EXCHANGE INTER-CLUB AGREEMENT

Dissatisfaction with the uncertainty of the sub-sections has forced commercial men, including shipowners, charterers, and carriers, to create complicated contracts incorporated under charter parties. An example is the New York Produce Exchange Inter-Club Agreement<sup>8</sup> signed in 1970 by multiple private and insurance clubs (P&I Clubs), shipowners, and charterers associations.<sup>9</sup> The ICA's main purpose was to prevent protracted and costly litigation (whether by arbitration or through courts) through clear-cut apportionment clauses (Clause 8 of the ICA).<sup>10</sup>

<sup>3</sup> United Kingdom Supreme Court, *The Ocean Victory*, [2015] 1 Lloyd's Rep. 381.

<sup>4</sup> England and Wales High Court, *Cosco Bulk Carrier Co Ltd & Anor v M/V "Saldanha"* EWHC [2010] 1340 (Comm).

<sup>5</sup> England and Wales Court of Appeal, *Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd* [2017] EWCA Civ 2107.

<sup>6</sup> There have been several popular conventions created and subsequently abandoned or amended by the many countries of the world. The effectiveness of conventions such as The Hague Rules of 1924, The Hague-Visby Rules of 1968, The Hamburg Rules of 1978, and the Rotterdam Rules of 2008 are still debated unto today. However, most nations still rely on the Hague and Hague-Visby regimes as national legislation and despite being battle-hardened, tested rules of law, these two conventions still do not escape criticism from many academics.

<sup>7</sup> England and Wales Court of Appeals, *The Yangtze Xing Hua*.

<sup>8</sup> The ICA has been amended several times: 1984, 1996, and as of late, 2011.

<sup>9</sup> Gard P&I Member Circular No. 07-11 Dated August 2011, p. 1.

<sup>10</sup> *Ibid*. Also see the recent English Court of Appeals case of *Yangtze Xing Hua* [2018] EWCA Civ 2107 which explains thoroughly the purpose of the ICA.

The ICA is an agreement commonly incorporated into charter party forms to supplement cargo liabilities and apportionments during cargo loss.<sup>11</sup> Therefore, the parties are patterned to the master contract in a Time Charterparty,<sup>12</sup> the shipowner, and the charterer. The shipowner is responsible for the vessel's seaworthiness, encompassing the officers and crew and their training and competency. Additionally, the shipowner is responsible for the mechanical inner-workings of the vessel.<sup>13</sup> In contrast, the charterer is responsible for cargo's nature, loading, stowage, lashing, discharge, storage, or another handling.<sup>14</sup> These principles are well reflected in case law and incorporated in most charter party forms.<sup>15</sup>

Another aspect is seen in the opening clauses of the ICA, which stipulated that it applies regardless of national legislation. Therefore, it sets aside cargo apportionment rules and in person cargo liabilities as set under Article IV of the Hague and Hague-Visby Rules.<sup>16</sup> Clause 2 of the ICA stipulates:

*“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.”*

This provision allows the ICA to precede any rule of law, whether a statute or common law, allowing a one-stop, quick resolution of cargo disputes at

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<sup>11</sup> English High Court, *Idaho v. Peninsular and Oriental Steam Navigation Co.* [1983] 1 Lloyd's Rep 219.

<sup>12</sup> “A time charter... is a contract for services to be rendered to charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charter- party the charterer is entitled to give to them”: per Lord Diplock in *The Scaptrade* [1983] 2 Lloyd's Rep. 253, at 256-257. These must be contrasted with the two other forms of charterparties, being the ‘voyage’ charter and the ‘demise/bareboat’ charter.

<sup>13</sup> This is a general rule incorporated in the majority of mainstream charterparties: see Clause 6 of NYPE15, ASBATIME (NYPE81) Form Lines 64-69, and NYPE46 Form Clause 22 Lines 140-44. See also Terence Coghlin, Andrew W. Baker, et. al., *Time Charters, Seventh Edition*. (London: Informa, 2014), 7.

<sup>14</sup> As with the previous note on the owners' obligation, this is a general rule incorporated in the majority of mainstream charterparties: see Clause 8 of NYPE15, ASBATIME (NYPE81) Form Lines 70-84, and NYPE46 Form in piecemeal. See also Coghlin, et. al., *Time Charters*, 7-8.

<sup>15</sup> Coghlin, et. al., *Time Charters*, 7-8.

<sup>16</sup> Article II and IV are the rules that primarily set cargo liabilities under the Hague and Hague-Visby regime. Article IV(1) sets out in what actions or circumstances a carrier (the person who carries the goods, i.e. the party who is responsible over the vessel where the cargo was loaded) is liable; Article IV(2) sets out when the carrier is exempted from liability.

least its apportionment aspect.<sup>17</sup>

The ICA operates, by default, under English Law, as seen under Clause 10 (‘Governing Law’):

*“This Agreement shall be subject to English Law and the exclusive Jurisdiction of the English Courts, unless it is incorporated into the charterparty (or the settlement of cargo claims under the charterparty is made subject to this Agreement). In this case, it shall be subject to the law and jurisdiction provisions governing the charterparty.”*

The ICA is governed by English law and characterizes terms and definitions under English regimes, such as ‘stowage,’ ‘lashing,’ ‘trimming.’ This occurs even when the charter party’s dispute resolution provisions do not appoint English Law. Therefore, lawyers, advocates, tribunals, and judges should not depart from definitions under English Law. This would be discussed at length in title III of this paper.

### **III. THE ICA’S POSITION UNDER PRIVATE INTERNATIONAL LAW**

Before delving into the ICA’s maritime and commercial law aspects, it is imperative to address preliminary matters. The ICA is essentially an agreement concerning maritime law involving persons and companies from many nationalities that would potentially cause conflicts. Therefore, it is necessary to discuss the ICA under a private international law lens.

#### **A. CHOICE OF LAW UNDER CONTRACTS OF A COMMERCIAL-MARITIME NATURE**

Clause 10 of the ICA states that English law shall govern the relations between the parties unless a contrary provision was given between the master charter party. In this case, the master charter party, usually of standard forms, such as NYPE15, ASBATIME, GENCON, Shelltime, and NYPE46, often

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<sup>17</sup> English High Court, *Strathnewton* [1982] 2 Lloyd’s Rep 296. *Iverans Rederi v KG MS Holstencruiser Seeschiffahrtsgesellschaft mbH & Co (The Holstencruiser)* [1992] 2 Lloyd’s Rep 378, 380. *Oceanfocus Shipping Ltd. v Hyundai Merchant Marine Co. Ltd. (The Hawk)* [1999] 1 Lloyd’s Rep. 176. *Transpacific Discovery S.A. v Cargill International S.A (The Elpa)* [2001] 2 Lloyd’s Rep. 596. *Ben Line Steamers Ltd. v Pacific Steam Navigation Co. (The Benlawers)* [1989] 2 Lloyd’s Rep 51. *MH Progress Line v Orient Shipping (The Genius Star 1)* [2012] 1 Lloyd’s Rep. 222. *Agile Holdings Corporation v Essar Shipping Ltd. (The Maria)* [2018] EWHC 1055 (Comm). *Transgrain Shipping (Singapore) Pte Ltd V Yangtze Navigation (Hong Kong) Co. Ltd.* [2017] 1 Lloyd’s Rep. 330, among others. Also in non-English jurisdictions: United States Court of Appeals *Siderius, Inc. v MV Amilla, et. al.* (1989) 880 F.2d 662. United States District Court, S.D. New York, *Sonito Shipping Company Ltd. v. Sun United Maritime Ltd.* (2007) 478 F.Supp.2d 532. Federal Court of Australia, *Incitec Ltd v Alkimos Shipping Corporation and Another* [2004] FCA 698.

elects English Law to govern the charter party. However, this does not rule out other choices of law, as provided by the recent addition drafted jointly by BIMCO-ASBA-SMF in Clause 54 of NYPE15. In this addition, United States Law was paired with a New York arbitration (Clause 54(a)), English Law paired with London arbitration (Clause 54(b)), and Singaporean Law paired with Singapore arbitration (Clause 54(c)). This addition becomes a choice where the parties must make clear.<sup>18</sup>

As reiterated by various courts and esteemed scholars, it is a general rule that contracting parties could submit themselves to a national law that would govern their relations under a binding contract.<sup>19</sup> Also, this principle of party autonomy has been echoed by the latest Rome I Regulation,<sup>20</sup> applicable law in England and Wales by their membership of the European Union. Section 3.1. of the Rome I Regulation states that:

*“1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or demonstrated by the contract terms or the circumstances of the case. By their choice, the parties select the law applicable to the whole or part of the contract.”*

Upon the choice of an EU Member State law, all European courts and arbitral tribunals cannot set aside the parties’ choice of law. However, some problems preside when actions are brought in more obscure jurisdictions.<sup>21</sup>

When a choice of law is made, it should disqualify any potential conflict of laws issues as the parties’ intention. Therefore, their successive obligations, responsibilities, and liabilities were made clear during the contract conclusion.<sup>22</sup> A lack of such choice would entail unnecessary conflicts issues addressed at the end of this sub-chapter.<sup>23</sup>

There are limitations on what provisions a chosen law may govern,

<sup>18</sup> See Clause 54 of NYPE15 ‘Law and Arbitration clause’.

<sup>19</sup> Mauro-Rubino Sammartano, *International Arbitration: Law and Practice, Third Edition* (New York: Jurisnet, 2014), 632-635. J.G. Collier, *Conflict of Laws, Third Edition* (Cambridge: Cambridge University Press, 2001), 11. Symeon C. Symeonides, *Codifying Choice of Law Around the World an International Comparative Analysis* (New York: Oxford University Press, 2014), 110. See also *Scherk v Alberto Culver Co.* 417, U.S. 506, 516-17 (1974) (U.S. Supreme Court) and *Withworth and Street Estates v James Milner and Partners* [1970] A.C. 583, 603.

<sup>20</sup> European Union, Regulation (EC) No 593/2008) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

<sup>21</sup> Indonesian Supreme Court, Decision No. 1935/K/Pdt/2012, PT Asuransi Harta Aman Pratama, Tbk. vs. PT. Pelayaran Manalagi.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Supreme Court of Nova Scotia, Privy Council Case, *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7, where the complications of a vague choice of law under a bill of lading was discussed. Such events would certainly entail the application of the principles and rules of Conflicts of Laws and Private International Law, something commercial parties would like to avoid as they would introduce unnecessarily protracted and expensive litigation.

especially when it has no geographical connection to the place of contracting.<sup>24</sup> Such super-mandatory rules would limit the parties to decide certain provisions independently. However, this and matters of public policy shall not be addressed in this paper. Instead, choice of law issues is confined to the ICA and its relation to the main charter party and national legislation addressed in the following paragraphs.

In time charter cases, the contracting parties usually decide on the law to govern their agreement under a clause within the charter party.<sup>25</sup> First, there is often an express governing law stipulation in the standard form, such as in Clause 54 of NYPE15 or the clauses added by the parties ('Rider Clauses').<sup>26</sup> Second, when there is no express governing law, there is usually an arbitration provision referring to arbitration of any disputes in a particular forum, such as London. Such circumstances reflect an implied choice of law, such as English Law in the case of London.<sup>27</sup>

English Law is a highly popular choice of law in commercial contracts such that its international nature could affect laws from different countries. Aside from historical explanations, the reason for English Law's popularity is its predictability, preciseness, and transparency. As a result, it asserts reliability and certainty for the commercial interest of the parties contracting under it.<sup>28</sup> Therefore, the reader should not be surprised by the English maritime cases cited in this paper. They are a binding authority within England and Wales jurisdictions and persuasive authority to other popular jurisdictions, such as the American, Australian, and Singaporean courts.<sup>29</sup> Conclusively, an English decision that challenges previous authorities would also affect other jurisdictions. This further confirms the popularity and the international nature of English Law, especially in commercial contracts.

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<sup>24</sup> Indonesian Supreme Court, Decision No. 1935/K/Pdt/2012.

<sup>25</sup> Coghlin, et. al., *Time Charter, Seventh Edition*, 5. See also Lawrence Collins, C.G.J. Morse, et.al. eds., *Dicey, Morris and Collins on the Conflict of Laws, 14th Edition* (London: Sweet & Maxwell, 2007), para. 32–064. *Egon Oldendorff v. Libera Corporation* [1995] 2 Lloyd's Rep. 64, *Egon Oldendorff v. Libera Corporation* (No. 2) [1996] 1 Lloyd's Rep. 380, and *The Wisdom C* [2014] 2 Lloyd's Rep. 198.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> "[...] English law is often described as one of the most precise and detailed contract laws in the world. If the choice of the law governing contracts significantly impacted the external dispute resolution rate, one would expect English law to do poorly in any study based on disputed cases. However, in this study, it ranks first as the law chosen by commercial actors resorting to external dispute resolution." See Gilles Cuniberti, "The International Market for Contracts: The Most Attractive Contract Laws," *Northwestern Journal of International Law & Business* 3, (2014):462.

<sup>29</sup> Senthil Sabapathy, "The Achilles": Struggling to Stay Afloat," *Singapore Journal of Legal Studies*, (2013): 384-401. One easy example of English Law causing a deep-seeping impact in international contract law is how in this article the House of Lords decision of *Transfield Shipping v. Mercator Shipping Inc.* (The Achilles) [2009] 1 A.C. 61 (H.L.) affected legal regimes in Singapore and Australia.

## B. CHOICE OF FORUM AND JURISDICTION: MARITIME ARBITRATION

Clause 10 of the ICA appoints English Law as governing law of the contract unless the master charter party applies a different law. Also, the aforementioned clause neatly appoints the ‘[...] exclusive jurisdiction of English Courts [...]’ as the forum in case of a dispute. However, this is also set aside in favor of other forums, such as the popular dispute settlement mechanism of arbitration in these master charter parties.

Arbitration is a private method of resolving disputes when parties agree to refer to an impartial tribunal consisting of one or more (usually three) arbitrators. It is carried out through a clause within a contract, often referred to as ‘arbitration agreements’ by the doctrine of separability.<sup>30</sup> Furthermore, a referral to arbitration could be agreed upon after a dispute has arisen.<sup>31</sup> Arbitration operates differently from courts. Maritime and commercial arbitration preserves the parties’ confidentiality and privacy. Also, it provides a flexible and speedy procedure and near-universal enforceability under the 1958 New York Convention.<sup>32,33</sup>

In the maritime industry, disputes arising from transport documents and charter parties are often referred to arbitration, as seen in many maritime-related cases worldwide. The prominent law firm Holman Fenwick Willan reported that in 2017, 1,750 maritime-related proceedings took place in London,<sup>34</sup> 140 in Singapore,<sup>35</sup> and 23 in Hong Kong.<sup>36</sup> Additionally, the many maritime disputes dealt by the English Courts in recent years are all appeals against an arbitration award.<sup>37</sup> In this regard, arbitration has continuously proven its popularity amongst commercial actors, and it could be argued that English arbitration is the practice for maritime cases. Moreover, arbitration and their arbitrators have proven their merits through their experience over the years in handling maritime cases. Many associations and institutions have been established to accommodate the constantly rising need of settling maritime disputes through arbitration, such as the LMAA and SCMA.

## C. ASPECTS COMMERCIAL ACTORS MUST HEED IN AN ARBITRATION AGREEMENT FOR MARITIME DISPUTES

Commercial actors in the maritime industry should heed the importance of arbitration clauses to enforce and ensure smooth commencement, proceedings, and awards. Maritime arbitration is often conducted under or influenced by English law. Therefore, English authorities may be preferred for constructing a good arbitration agreement. Such agreements must consist of the following



aspects.<sup>38</sup>

- a) The agreement to arbitrate (stating that this clause is an arbitration agreement);<sup>39</sup>
- b) Referring the dispute to arbitration (the parties refer any disputes arising under or in connection with the contract to arbitration);<sup>40</sup>
- c) The dispute referred to arbitration (under which national law the arbitral tribunal shall decide the dispute);<sup>41</sup>
- d) The arbitral procedure (the law of the seat, which would govern the arbitration agreement, completely separable to the substantive agreement);<sup>42</sup>
- e) The arbitration award (challenge to an award through an appeals system and enforcement of an international award via the New York Convention. Parties must heed this to have a reliable system of appeals and an enforceable award. The *lex arbitri* or law of the seat, upon which the parties have determined beforehand under an agreement, governs the arbitration process. This holds whether awards are enforceable, default rules apply when the parties do not intentionally draft their alternatives, and appeal mechanisms).<sup>43</sup>C.

#### D. MODEL ARBITRATION CLAUSES

Based on the previous parameters, several arbitration clauses have been identified. They are updated to the most recent developments in private international law or conflicts of law and the law on arbitration.<sup>44</sup>

One example is the three-choice Clause 54 (Law and Arbitration) of the NYPE15, which provides three options, with an additional open clause. These clauses are accommodated with a statement through customary rider clauses, which would choose one of these venues expressly:

##### **“54. Law and Arbitration**

**\*(a) New York.** *This Charter Party shall be governed by United States*

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<sup>38</sup> Ambrose, et. al., *London Maritime Arbitration*, 64. See also: *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep 116 (CA), 119, *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd’s Rep 45 (Comm) 56; *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd’s Rep 671.

<sup>39</sup> Ambrose, et. al., *London Maritime Arbitration*, 65-66.

<sup>40</sup> Ambrose, et. al., *London Maritime Arbitration*, 71.

<sup>41</sup> *Ibid*, 69-70.

<sup>42</sup> *Ibid*, 71.

<sup>43</sup> *Ibid*, 76-77.

<sup>44</sup> See *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd’s Rep 671, being regarded as a landmark case and certainly of authority in conflicts/private international law issues under English law.

*maritime law. Any dispute arising out of or connected with this Charter Party shall be referred to three persons in New York. One person shall be appointed by each of the parties hereto, and the third by the two chosen. The award of the arbitrators or any two of them shall be final. Also, to enforce any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in line with the rules of the Society of Maritime Arbitrators, Inc. (SMA) current at the time this Charter Party was entered into.*

*In cases where neither the claim nor any counterclaim exceeds the sum of US\$ 100,000 (or such other sum as the parties may agree), the arbitration shall be conducted before a sole arbitrator in line with the Shortened Arbitration Procedure of the SMA current at the time this Charter Party was entered into.<sup>45</sup>*

*\*(b) London. This Charter Party shall be governed by and construed in line with English law. Any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London according to the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in line with the London Maritime Arbitrators Association (LMAA) Terms current when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and notify in writing the other party to appoint its arbitrator within fourteen days of that notice. It must state that it would appoint its sole arbitrator unless the other party appoints its arbitrator and gives notice within fourteen days. When the other party does not appoint its arbitrator and give notice within the fourteen days, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its sole arbitrator and advise the other party accordingly. The award of a sole arbitrator shall be 1045 binding on both parties as though appointed by agreement.*

*Nothing herein shall prevent the parties from agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator. In cases where neither the claim nor any counterclaim exceeds the sum of US\$ 100,000 (or such other sum as the parties may agree), the arbitration shall be conducted according to the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced. ([www.lmaa.org.uk](http://www.lmaa.org.uk))*

*\*(c) Singapore. This Charter Party shall be governed by and construed in line with Singapore\*\*/English\*\* law.*

*Any dispute arising out of or in connection with this Charter Party, includ-*

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<sup>45</sup> ([www.smany.org](http://www.smany.org)).

*ing any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration in Singapore in line with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*

*The arbitration shall be conducted in line with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.*

*The reference to arbitration of disputes under this clause shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and notify in writing the other party to appoint its arbitrator and give notice within fourteen days. It must state that it would appoint its sole arbitrator unless the other party appoints its arbitrator and gives notice within the fourteen days specified. When the other party does not give notice within the fourteen days, the party referring a dispute to arbitration may appoint its sole arbitrator and advise the other party accordingly without the requirement of any further prior notice to the other party. The award of a sole arbitrator shall be binding on both parties as though appointed by agreement.*

*Nothing herein shall prevent the parties from agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.*

*In cases where neither the claim nor any counterclaim exceeds the sum of US\$ 150,000 (or such other sum as the parties may agree), the arbitration shall be conducted before a single arbitrator according to the SCMA Small Claims Procedure current at the time when the arbitration proceedings are commenced. (www.scma.org.sg)”*

Clause 54 is therein updated to the most recent developments in case law, such as the often-cited commercial case of *The Sulamerica*.<sup>46</sup> Also, it fulfills certain parameters that would deduce an arbitration clause enforceable under law.

First, each sub-clause includes a choice of law (United States Law, English Law, or English/Singaporean Law),<sup>47</sup> making clear the law governing the contracting parties. Second, each sub-clause refers the dispute to arbitration in a certain place (New York, London, and Singapore) while also appointing legislation governing arbitration. Therefore, it appoints the seat of arbitration and makes a clear choice on the *lex arbitri* to govern the arbitration’s proceedings, awards, appeals, and enforcement. Third, each sub-clause appoints procedural

<sup>46</sup> *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd’s Rep 671.

<sup>47</sup> As provided in Clause 54(c) of the NYPE15.

arbitration rules, including the Rules of the Society of Maritime Arbitrators, Inc. (SMA), the London Maritime Arbitrators' Association (LMAA) Terms, and the rules of the Singapore Chamber of Maritime Arbitrators (SCMA) tailored to the needs of maritime arbitration. Fourth, each sub-clause decides the proper constitution of the tribunal involving three persons, two of which are appointed by the parties. The two appointed persons subsequently elect a third arbitrator or a chairperson. Such stipulations reduce the risk of lawyers arguing that the tribunal is improperly constituted, the award unenforceable, or the dispute decided on jurisdiction. Fifth, the sub-clauses decide on certain time limitations for commencing the proceedings.

Any of these choices could be overridden by rider clauses resulting from negotiation between the parties. Also, the rider clauses may contain additional terms or amendments to the standard form master charter party. Therefore, the choices provided within Clause 54 are not strict, as demonstrated by the existence of sub-clause (d). However, commercial parties should heed the risks of choosing laws not suggested by the clause. This is because one might encounter characterization or qualification issues, especially how terms are construed and their legal implications.<sup>48</sup>

## E. ARBITRAL AWARDS AND THEIR ENFORCEMENT

An award is a decision disposing of a relevant matter in dispute.<sup>49</sup> An arbitral tribunal could give awards similar to those of courts of law.<sup>50</sup> Therefore, besides the final award, which addresses special performance and damages, arbitral tribunals may also bestow interim or provisional awards, such as injunctions.<sup>51</sup> Citing London Maritime Arbitration, 4th Edition, about Arbitration under an English regime:

*“An injunction is an order requiring a party to do or refrain from doing something. It is a remedy with a broad range of use. For instance, freezing orders may be granted to stop a party dissipating its assets pending the determination of a dispute [...] Injunctions may also prevent disclosure of confidential information [...] They are a general remedy awarded by arbitrators under section 48(5) of the 1996 Act [...].”*

<sup>48</sup> On characterisation and adjustments, as well as the multitude of its implications, see: Lawrence Collins (ed.), *Dacey Morris & Collins on the Conflict of Laws, Fourteenth Edition* (London: Sweet & Maxwell, 2006), 37-49. See also Sudargo Gautama, *Pengantar Hukum Perdata Internasional [Introduction to Private International Law]*, Sixth Edition (Jakarta: Badan Pembinaan Hukum Nasional, 2012), 119-131.

<sup>49</sup> Ambrose, et. al., *London Maritime Arbitration*, 303. See the relevant decisions in *Cargill Srl Milan v Kadinopoulos SA* [1992] 1 Lloyd's Rep 1 (HL); *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd*, *The Smaro* [1999] 1 Lloyd's Rep 225 (Comm).

<sup>50</sup> Sammartano, *International Arbitration: Law and Practice*, 945-946.

<sup>51</sup> Ambrose, et. al., *London Maritime Arbitration*, 115-116.

When such disputes are international, enforcement issues are governed by the New York Convention.<sup>52</sup> However, the Convention bestows methods and procedures of enforcement to competent authorities of a contracting state. The enforceability of interim awards shall be discussed later.

## F. MITIGATING RISK BY THE PROPER WRITING OF AN ARBITRATION CLAUSE: THE INDONESIAN SUPREME COURT CASE OF ASURANSI HARTA AMAN PRATAMA V PELAYARAN MANALAGI (2012)

This sub-chapter discusses the Indonesian case of Asuransi Harta Aman Pratama v Pelayaran Manalagi.<sup>53</sup> It was heard by the Indonesian Supreme Court in cassation (final appeal). Three levels of Indonesian courts dealt over an insurance policy with English Law as the choice of law without an arbitration clause. The question of law was whether Indonesian courts could decide over the choice of English law.

### 1. Facts of the Case

A vessel operated by PT Pelayaran Manalagi (Owners) caught fire off the eastern coast of Sumatra, Indonesia. It was subsequently abandoned by the crew after the Master had declared the vessel beyond saving. Although the vessel was insured, PT Asuransi Harta Aman Pratama (Insurers) refused the insurance claim, stating that it was not covered under the policy. Under a relevant clause, the policy stated, “This insurance is subject to English law and practice.”

Under the contract, Owners filed a claim against the Insurers in the District Court of Central Jakarta under Article 118 of the HIR with no arbitration clause.<sup>54</sup> The Insurers were domiciled within the competence of the aforementioned court. Initially, the court decided on the merits, awarding the Owners with the vessel’s total loss costs. However, there was an appeal at the Jakarta High Court,<sup>55</sup> whose opinion was reiterated by the Supreme Court<sup>56</sup> at the cassation level. It was decided that no Indonesian court had jurisdiction over such disputes because the parties had appointed English law and practice. The court defined ‘since they had appointed English law and practice,’ any action could only be filed at English courts of admiralty

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<sup>52</sup> Article V of the New York Convention, where it is discussed on what grounds the recognition and enforcement of an arbitral award by a Contracting State may be refused.

<sup>53</sup> Indonesian Supreme Court, Decision No. 1935/K/Pdt/2012.

<sup>54</sup> *Herzeine Inlandsch Reglement*, S. 1941-44, is the foremost authority in Indonesia that governs civil procedure.

<sup>55</sup> In Indonesian ‘*Pengadilan Tinggi Jakarta*’

<sup>56</sup> In Indonesian ‘*Mahkamah Agung Republik Indonesia*’

jurisdiction. Therefore, the case was decided on the preliminary matters of jurisdiction, and the merits were left untouched.

## 2. Discussion

With all due respect to the bench judges that dealt with this case, this study disagrees with the decision, though the discussion of such matters would make this article unnecessarily lengthy. However, upon drafting the insurance policy, the parties should have heeded the bad reputation of Indonesian courts in international matters. Instead, they should have submitted themselves to arbitration in London, Singapore, or any other regular forum for maritime disputes for a better conclusion.

Appointing an express choice of law and jurisdiction under an arbitration clause nullifies the connecting factors that cause a conflict or private international law issue, putting such disputes almost straight to the merits.<sup>57</sup> Therefore, this study recommends commercial actors, such as charterers, owners, and insurers, for using arbitration clauses<sup>58</sup> to avoid lengthy and costly litigation. Arbitration guarantees a confidential and quick resolution to disputes and provides skilled and experienced personnel to handle specialized cases such as maritime cases. As seen in the aforementioned case, there are no guarantees that national courts have the required expertise to resolve maritime disputes at a similar quality and pace.

## G. THE USE OF THE ICA IN MULTIPLE JURISDICTIONS

This subsection discusses the ICA and its choice of law and jurisdiction in the courts of England and Wales, the Federal Courts of the United States of America, and the Federal Courts of Australia. The ICA and many charter parties have English law as the default choice of law and its arbitration agreement, English Law, and arbitration in London. Cases that do not cohere to these default choices result from the amendment of the arbitration agreement, such as the Federal Court of Australia case of *Incitec v Alkimos*.<sup>59</sup> Additionally, English Law was used to decide the merits of an American case in *Sonito Shipping v Sun United Ltd*.<sup>60</sup>

### 1. England and Wales

In the *Yangtze Xing Hua* case,<sup>61</sup> the dispute gravitated around a sizeable shipment of soya beans caused by the cargo being stored for too long awaiting

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<sup>57</sup> Indonesian Supreme Court, Decision No. 1935/K/Pdt/2012, 6-8.

<sup>58</sup> *Ibid*, 9-11.

<sup>59</sup> FCA, *Incitec Ltd v Alkimos Shipping Corporation and Another*.

<sup>60</sup> *Sonito Shipping Ltd v Sun United Ltd* [2007] 478 F.Supp.2d 532.

<sup>61</sup> EWCA, *The Yangtze Xing Hua*.

discharge. There were orders by the charterer to use the vessel as floating storage instead of transport for carriage. The vessel was chartered under an NYPE Form which incorporated the ICA, with English as a choice of law and arbitration in London as a forum of dispute. Subsequently, the arbitral tribunals and the courts respected the choice without determining their jurisdiction by seat choice. There were no conflict issues in this case.

## 2. Australia

In the case of *Incitec v Alkimos*,<sup>62</sup> the ICA was used to conduct cargo apportionment. The ICA was incorporated by an NYPE Form, where the choice of law was English with an original arbitration forum in London. The parties' solicitors later chose for the forum of arbitration to be Australia. However, the Australian Federal Courts did not dispute the choice of English Law and decided the merits on such. The question of law was whether Australian courts could administer the case, of which it could, according to a valid submission agreement.

## 3. United States of America

In *Sonito Shipping v Sun United Ltd*,<sup>63</sup> English Law was chosen to govern a charter party, arbitration held in London. The defendant was granted leave to assert maritime attachment (security) according to a cargo claim. However, they were denied enforcement of the interim award after plaintiffs challenged the attachment order in New York. Under English Law, the damaged party had no right to indemnification for loss cargo. This is because Cl. 4(c) of the ICA stipulates that all claims must first be settled to the third party before any remedies are given, including attachment or arrest. The damaged party could not seek maritime attachment (security claims of sorts) at the time of filing because they are barred by Clause 4(c) of the ICA 1996 ver.

Seeing the three previous cases that are undoubted authority under each jurisdiction, each jurisdiction respects the parties' choice of law and arbitration forum. This means that it is unreasonable to disregard the parties' commercial interests, something paramount for any jurisdiction. Moreover, the contractual provisions governing the parties' relations still apply when a different law governed the contract than when a vessel would be arrested as a guarantee for payment (such as in *Sonito v Sun United*).

## IV. THE ICA AS A COMMERCIAL CONTRACT

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<sup>62</sup> FCA, *Incitec Ltd v Alkimos Shipping Corporation and Another*.

<sup>63</sup> *Sonito Shipping v Sun United Ltd* [2007] 478 F.Supp.2d.

The ICA and maritime contracts have been previously discussed under a private international law lens. This section discusses the ICA on its merits or under a maritime law lens and as a commercial contract. English Law is the most popular choice used in maritime and commercial contracts.<sup>64</sup> Therefore, the ICA is examined under its minute and precise rulings by exploring English courts' clauses and their interpretation. This chapter is much briefer than the previous sections addressing conflicts or private international law issues. It provides a general view of how the ICA is to be applied in cases of cargo disputes.

The ICA strictly regulates liability apportionment in cargo damages throughout a charter party,<sup>65</sup> though it has a wider scope. Under its ten clauses, the ICA discusses the apportionment (Clauses 7 and 8) and the avoidance of national rules and international conventions on the carriage of goods (Clause 3 and 5). Furthermore, it discusses the conditions precedent to claim under the ICA (Clause 4), Security (Clause 9), and choice of law and jurisdiction (Clause 10). However, more complex issues, such as security and choice of law, shall not be addressed individually under this paper. Instead, this part shall focus on setting aside national rules and conventions (Clauses 2 and 5) and a brief explanation of the conditions precedent for claiming under the ICA (Clause 4). Also, it shall focus on the unique claims' notification and the time-bar regime under English Law (Clause 6) and apportionment (Clauses 7 and 8).

## A. INCORPORATION ISSUES

One could assume that the parties would incorporate the whole of the ICA (as in Clause 1 to 10 in full). However, in some cases, certain constructions of the incorporation clause under the charter party (commonly under a specifically negotiated incorporation clause) only incorporate the apportionment mechanisms (as in 'only Clause 8') and not the entire ICA.

This issue was addressed in London Arbitration 18/18,<sup>66</sup> where the incorporation clause was as follows:

*"[...] Liability for cargo claims, as between Charterers and Owners, shall be apportioned or settled as specified by the Interclub New York Produce Exchange Agreement effective from 1996 and its subsequent amendments."*

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<sup>64</sup> Gilles Cuniberti, "The International Market for Contracts: The Most Attractive Contract Laws," *Northwestern Journal of International Law & Business* 3, (2014): 462.

<sup>65</sup> *Ibid*, 467.

<sup>66</sup> London Arbitration 18/18 (Lloyd's Maritime Law Newsletter, 16 August 2018)



When a party requested security under Clause 9 of the ICA, the arbitral tribunal was convinced that Clause 9 had not been incorporated due to the narrowness of the incorporation clause, and the request was denied. Therefore, it is duly suggested by P&I clubs, including Steamship Mutual and the International Group that, to enforce the ICA holistically, commercial actors should put into contract the following clause:<sup>67</sup>

*“Cargo claims as between Owners and the Charterers shall be governed by, secured, apportioned and settled fully according to 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 precede 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.”*

## B. THE SETTING ASIDE OF NATIONAL RULES AND INTERNATIONAL CONVENTIONS (CLAUSE 2)

The ICA was made to be an agreement independent of national legislation and international conventions. It was meant to secure the unambiguous clarity required of cargo apportionment and modify statutes of limitation (later discussed under Clause 6). This is evident under Clause 2 of the ICA, stating:

*“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.”*

Something reiterated under Clause 5:

*“(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.”*

The implications of Clauses 2 and 5 signify the setting aside of first, the time-bar requirements set out under the Hague and Hague-Visby Rules, the more mainstream of international conventions employed by many states. Any action must be brought forth one year after the cargo was damaged, or such causes of action shall be extinguished.<sup>68</sup> Second, liability must be apportioned

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<sup>67</sup> *Steamship Mutual*, Steamship Mutual Circular L317 – IG – Claims co-operation (October 2018)

<sup>68</sup> The relevant part of Article III (6) of the Hague Rules reads: *“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.”* Hague-Visby Rules reads: *“Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered.”*

strictly under clauses 7 and 8 by fulfilling the conditions precedent under clause 4. It should not correspond to the decidedly vague provisions of Article IV of the Hague and Hague-Visby Rules.<sup>69</sup> These two acts of setting aside national legislation or international conventions are useful because cargo claims often come as third-party actions. The claims involve the actual cargo owners and shipowners, which would, in turn, seek indemnity from the charterers.<sup>70</sup> This sets indemnity claims under the nominal six-year time-bar as dictated by the Limitations Act 1980. The indemnity is not under the one-year time-bar dictated by the Hague and Hague-Visby Rules, which govern time-bars for cargo disputes.

### C. CONDITIONS PRECEDENT FOR CLAIMING UNDER THE ICA (CLAUSE 4)

There are three conditions precedent to the applicability of an indemnity claim under the ICA. First, the claim must be executed under a valid contract of carriage.<sup>71</sup> This means that one of the parties is a party to a contract of carriage in connection to the charter party under which the ICA is incorporated.<sup>72</sup> Second, there must not be any material amendments to the cargo responsibility clauses under the charter party governed by the ICA.<sup>73</sup> Third, the claim had already been properly settled and paid between the parties of the contract of carriage,<sup>74</sup> including the charterers (as carriers and shipowners' agents) and the shipper.<sup>75</sup> These three conditions must be fulfilled to claim under the ICA.

### D. NOTIFICATION AND TIME-BAR PROVISIONS

*“(6) Recovery under this Agreement by an Owner or Charterer shall be deemed to be waived and barred. This holds unless written notification of the Cargo Claim has been given to the other party to the charter party within 24 months of the date of the cargo’s delivery or when it should have been delivered [...] Where possible, such notification shall include details of the carriage contract, the nature of the claim, and the amount claimed.”*

Clause 6 provides an adequate alternative that inserts commercial sense for indemnity claims because the evidence, data, sufficient documents, and

<sup>69</sup> See footnotes 17.

<sup>70</sup> See *Pace Shipping Co. Ltd. v Churchgate Nigeria Ltd. (“The Pace”)* (No. 2) [2011] 1 Lloyd’s Rep 537.

<sup>71</sup> Clause 4(a) of the ICA

<sup>72</sup> A contract of carriage, often in the form of a Bill of Lading (B/L) or Letter of Indemnity (LoI), is a contract between the carrier and a shipper (or *prima facie* owner of the goods). Under this general scheme, an ICA claim would be done by the carrier (usually the charterer under a time charter) against the actual owner of the vessel (a shipowner in a time charter).

<sup>73</sup> Clause 4(b) of the ICA.

<sup>74</sup> Clause 4(c) of the ICA.

<sup>75</sup> See *The Strathnewton* [1983] 1 Lloyd’s Rep. 219 (C.A.)

settlements<sup>76</sup> could be difficult to obtain even in two years. The crux of Clause 6 is that, unless a notification with the details of the contract of carriage, the nature of the claim, and the amount claimed, had not been given within 24 months of delivery or supposed delivery date, the claim under the ICA is time-barred and extinguished.

This clause patterns common claims' notification clauses, governed by its special regime under English Law. The case of the *Ipsos S.A. v Dentsu Aegis Network*,<sup>77</sup> where Simon J. reiterated the law on a "[...] common provision that debars claims not notified within a finite period [...]." It is decided under the common law<sup>78</sup> that, in such clauses, a notification shall be rendered sufficient when the commercial purpose of a claims notification is achieved. The notification receiver could respond to it financially that the message is understood, and the notice must specify that a claim would be made in the future.

Under Clause 6 of the ICA, this standard should be applied, provided the three aforementioned elements are fulfilled within 24 months of delivery or supposed delivery. Any claim under the ICA shall not be time-barred regardless of completing the details of the contract of carriage, the nature of the claim, and the amount claimed.<sup>79</sup>

## E. APPORTIONMENT CLAUSE (CLAUSE 8)

1. Clause 8(a) and 8(b) – cargo damages caused by lack of care of the vessel or the cargo

*“(8) The amount of any Cargo Claim to be apportioned under this Agreement shall be borne by the party to the charter party seeking apportionment. This holds regardless of whether that claim may be or has been apportioned by application of this Agreement to another charter party.”*

Cargo Claims shall be apportioned as follows:

*“(a) Claims, in fact, arising out of unseaworthiness and error or fault in navigation or management of the vessel is 100% Owners’, unless they prove that the unseaworthiness was caused by cargo loading, stowage, lashing, discharge, or another handling. In this case, the claim shall be*

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<sup>76</sup> See Clause 4 of the ICA.

<sup>77</sup> *Ipsos S.A. v. Dentsu Aegis Network Limited (previously Aegis Group plc)* [2015] EWHC 1171 (Comm), see also: *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd's Rep. 423; *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm)

<sup>78</sup> *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478; see also Coghlin, et. al., *Time Charters*, 167-169.

<sup>79</sup> However, one could also argue that the completion of the three requirements under Clause 6 would also fulfil the *Ipsos*' claims notification regime.

*apportioned under subclause (b). (b) Claims, in fact, arising out of the cargo loading, stowage, lashing, discharge, storage, or other handling is 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 this case, it is 50% Charterers' and 50% Owners', except 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 it is 100% Owners."*

Clauses 8(a) and (b) deal with Cargo Claims "in fact arising out of" various causes. In *The Benlawers*,<sup>80</sup> the court approved of the arbitrators' decisions under the 1984 ICA; First, to investigate the facts of the underlying cargo damage to discover whether it was due to unseaworthiness; Second, to test unseaworthiness as under the bill of lading under which the cargo claim was brought without asking whether such unseaworthiness was actionable under the charter.<sup>81</sup> Therefore, the two-tier test would answer what caused the cargo damage and whether the vessel was seaworthy. Cargo and vessel unseaworthiness caused cargo damage makes the owner fully liable because they are obligated to provide a seaworthy vessel for the charter party.<sup>82</sup> However, an interesting question arises when the vessel was seaworthy, but the cargo was damaged.

Rules governing the event of cargo damage not due to the vessel default but due to its management or care have been decided by American and English courts since the early 1900s. Two causes of cargo loss could be attributed to the parties themselves. This distinction was set as a staple rule under American maritime law in the *Germanic*<sup>83</sup> and English Law in *Rowson v Atlantic Transport*.<sup>84</sup> All cases discussing liability apportionment stem from these two landmark rulings.<sup>85</sup>

First is cargo damage caused by want of vessel care. In this case, the cargo damage is caused by equipment or operations to keep the vessel steadily afloat. The second is cargo damage caused by want of cargo care. In this case, cargo damage is caused by equipment or operations to move the cargo from the vessel onto land.<sup>86</sup> Courts have previously ruled that when the first type

<sup>80</sup> *The Benlawers* [1989] 2 Lloyd's Rep 51

<sup>81</sup> *The Benlawers* [1989] 2 Lloyd's Rep 51; see also *The Labrador* [1998] 2 Lloyd's Rep. 387, Colman, J., said at page 406, "On its proper construction the Inter-Club Agreement is brought into play not by reference to the way in which cargo interests formulate their claim, but by reference to what on the evidence is the true cause of the cargo damage."

<sup>82</sup> *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478; see also Coghlin, et. al., *Time Charters*, 167-169.

<sup>83</sup> *The Germanic*, 196 U.S. 589 (1905).

<sup>84</sup> *Rowson v Atlantic Transport Company* [1903] 2 K.B. 666.

<sup>85</sup> See: *The Yangtze Xing Hua* [2018] EWCA Civ 2107, *The Maria* [2018] EWHC 1055 (Comm)

<sup>86</sup> Coghlin, et. al., *Time Charters, Seventh Edition* (London: Informa, 2014): 375-376, see also *Benlawers* [1989] 2 Lloyd's Rep 51, *The Labrador* [1998] 2 Lloyd's Rep. 387.

causes the cargo damage, the Shipowners are liable. However, when caused by the second type, the charterers are liable.

These cargo damage regimes are reflected by Clauses 8(a) and (b). Clause 8(a) stipulates that Owners are fully liable when the cargo damage is caused out of unseaworthiness, error, or fault in navigation or vessel management. This refers to the first cause of cargo damage (want of vessel care). Such a decision could be observed in the staple case of *Rowson v Atlantic Transport Co*,<sup>87</sup> where management error or want of vessel care occurs when equipment intended for ship operations but could damage the cargo indirectly is improperly handled by the crew.

Clause 8(b) relieves the owners because they are indemnified of any cargo damage arising out of “[...] loading, stowage, lashing, discharge, storage or another handling [...]” As a result, liability is apportioned 100% to the charterers. Liabilities in Clause 8(b) arose when the damage was caused by the stevedores’ incompetence.<sup>88</sup> Additionally, the words ‘and responsibility’ under Clause 8 of NYPE (which governs cargo liability during discharge), implying the damage was caused by want of cargo care, the liability shall be shared equally between charterers and owners.<sup>89</sup>

2. Clause 8(d) – liabilities under the act or neglect of either parties or their subcontractors and servants.

The penultimate sub-clause under the apportionment clause is Clause 8(d), which stipulates:

*“All other cargo claims whatsoever (including claims for the delay to cargo):*

*o 50% Charterers*

*o 50% Owners*

*Unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the other (including their servants or sub-contractors), in this case, that party shall bear 100% of the claim.”*

A specific question of law regarding the triggering of Clause 8(d) was addressed by the English Court of Appeals in the *Yangtze Xing Hua*.<sup>90</sup> As a result of charterers’ orders, a shipment of soya beans was kept aboard the vessel while waiting for discharge. This caused damage to the soya beans.

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<sup>87</sup> *Rowson v Atlantic Transport Company* [1903] 2 K.B. 666; see also *The Canadian Highlander* [1927] 28 Ll. L Rep 88; *The Washington* [1976] 2 Lloyd’s Rep 453; *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import & Export Corp* [2010] 1 Lloyd’s Rep. 1.

<sup>88</sup> *The Clipper Sao Luis* [2000] 1 Lloyd’s Rep. 645.

<sup>89</sup> Clause 8(d) of the ICA; see also EWCA, *The Maria*.

<sup>90</sup> EWCA, *The Yangtze Xing Hua*.

Therefore, the charterers' orders were held to act or neglect under Clause 8(d). As a result, the charterer was held liable under Clause 8(d).

## V. CONCLUSION

The discussion under Chapters I-IV resulted in several recommendations. First, for commercial actors to continually use English law under maritime contracts, specifically cargo provisions or rules about the carriage of goods by sea. This has been strung out and comprehensive regarding risk management, liabilities, and responsibilities to the parties. Additionally, English Law does not require a geographical connection between the contract and the parties. This results in an enforceable contract.

Secondly, for commercial actors to exercise prudence in drafting arbitration or dispute resolution clause. This would mitigate the risk of a shaky arbitral tribunal and an enforceable arbitration agreement. Thirdly, the seat of arbitration (to appoint *lex arbitri*) should be London or Singapore because these two venues provide excellent arbitrators under the institutions of the London Maritime Arbitrators' Association (LMAA) and the Singapore Council for Maritime Arbitration (SCMA). This was demonstrated by the landmark decision of the *Sulamerica* and other cases. Also, Hong Kong and Rotterdam provide excellent options.

The fourth point, commercial actors should incorporate the ICA under English Law into their contracts, regardless of the choice of law for the original contract. The ICA (especially under 'English' definitions) provides clear-cut, sure-fire solutions to cargo claims and liability apportionment, especially claims from a third party.

For the Indonesian Supreme Court (Mahkamah Agung Republik Indonesia) to regulate (through Peraturan Mahkamah Agung (Mahkamah Agung Regulations, 'PERMA')) or encourage (through Surat Edaran Mahkamah Agung (Supreme Court Circulars, 'SEMA')) the commercial courts under its jurisdiction to use an effective method in identifying and solving conflicts of law issues, such as choice of law. This would allow disputing actors to resolve their disputes without incorporating an arbitration clause or compromising Indonesian courts' reputation and reliability in international commercial disputes. Recognition and deciding on cases of foreign law is neither absurdity nor rarity, as demonstrated by the cases discussed.

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