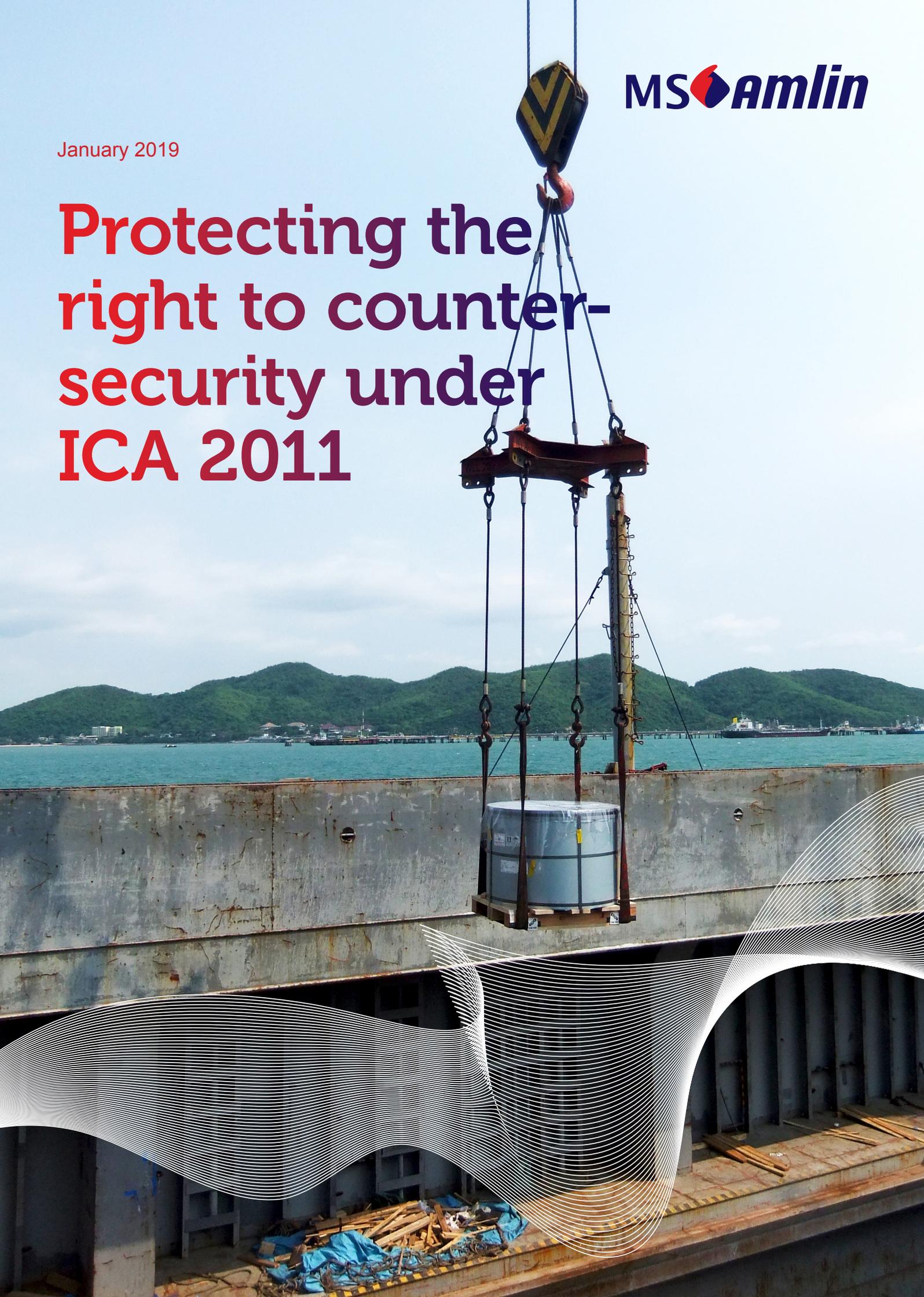


January 2019

# Protecting the right to counter- security under ICA 2011



## Almost five decades ago the Inter-Club New York Produce Exchange Agreement 1970 (the ICA) was first introduced with the purpose of providing a relatively simple mechanism for swiftly apportioning liability for cargo claims arising under the NYPE Form and Asbatime charterparties.

The ICA has since inception been amended on three occasions, first in 1984 and thereafter in 1996. Although substantially improved, the 1996 Agreement required for the claim to be properly settled or compromised and paid, as a condition precedent to the right to indemnity. This particular term led to costly disputes between the parties associated with issues of security amongst them.

With this in mind a third review was undertaken in 2011, incorporating a Security Provision (clause 9) which entitles the parties to security on the basis of reciprocity. Use of the 2011 Agreement has been recommended in the market since 1 September 2011 and this is a practice we supported via a Circular on this topic issued at the time.

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### Incorporation Practices

It is not often the case that the full text of the ICA is transcribed into charterparties. As such, the parties incorporate the ICA terms by reference to it. Some older charter forms may rely on tailor made provisions, whereas more recent forms already address this in their standard wording. For example:

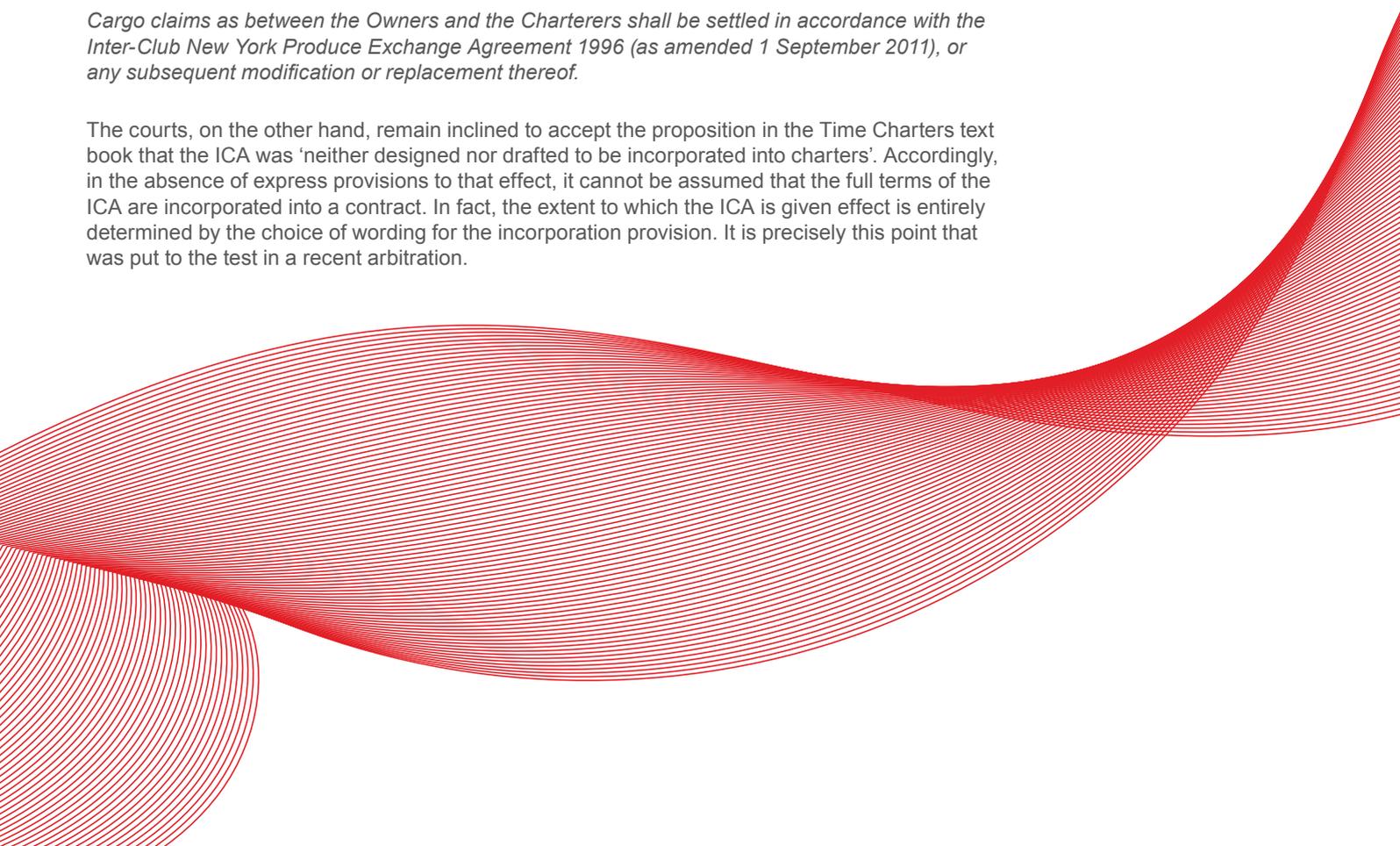
#### **NYPE 1993, clause 27 Cargo Claims**

*Cargo claims as between the Owners and the Charterers shall be settled in accordance with the Inter-Club New York Produce Exchange Agreement of February 1970, as amended May, 1984, or any subsequent modification or replacement thereof.*

#### **NYPE 2015, clause 27 Cargo Claims**

*Cargo claims as between the Owners and the Charterers shall be settled in accordance with the Inter-Club New York Produce Exchange Agreement 1996 (as amended 1 September 2011), or any subsequent modification or replacement thereof.*

The courts, on the other hand, remain inclined to accept the proposition in the Time Charters text book that the ICA was 'neither designed nor drafted to be incorporated into charters'. Accordingly, in the absence of express provisions to that effect, it cannot be assumed that the full terms of the ICA are incorporated into a contract. In fact, the extent to which the ICA is given effect is entirely determined by the choice of wording for the incorporation provision. It is precisely this point that was put to the test in a recent arbitration.



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## London Arbitration Award 18/18

**Facts:** The subject vessel was chartered by the head Owners to the disponent Owners on an NYPE 1946 form with additional clauses. The latter then sublet the vessel to the Charterers on essentially back-to-back terms. Clause 35 of the rider clauses read as follows:

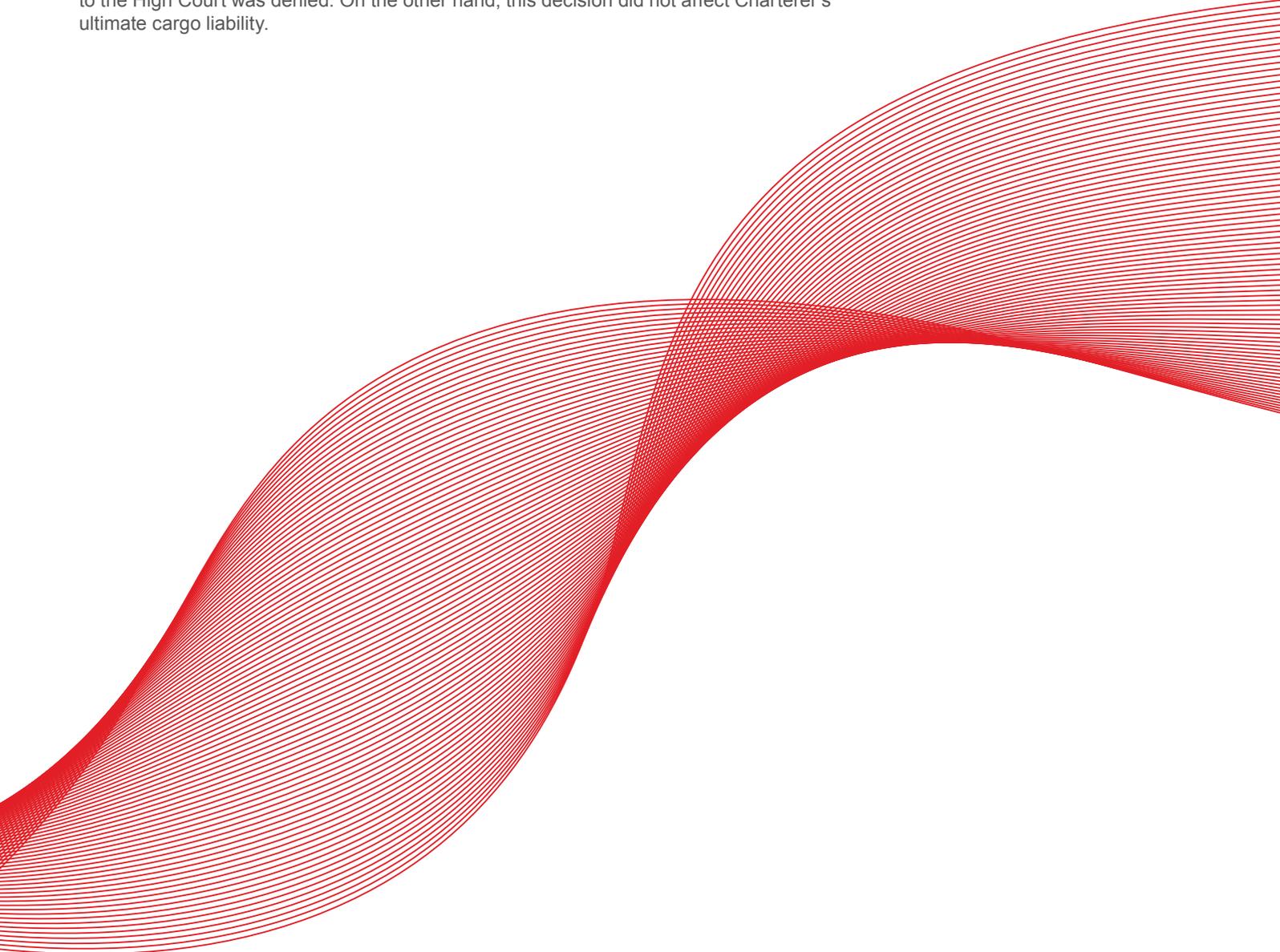
*“**Liability** for cargo claims, as between Charterers and Owners, shall be **apportioned/settled** as specified by the Interclub New York Produce Exchange Agreement effective from 1996 and its subsequent amendments.”*

At the end of a voyage a cargo claim was raised for alleged damage amounting to USD 900,000.00. In order to avoid the arrest of the vessel, the head Owners' P&I insurers provided security to cargo interest in the form of a Letter of Undertaking. Security for the same amount was promptly requested down the contractual chain. Having taken the view that the ICA 2011 terms applied, and as such this was a valid request for counter-security under clause 9 (the Security Provision), the disponent Owners duly provided this and in turn requested the same from their Charterers.

The Charterers' P&I insurers, however, were of a different view and refused to provide countersecurity as they argued that the wording of clause 35 was inapt to incorporate the whole ICA 2011. Through arbitration proceedings the disponent Owners then sought an order for specific performance against the Charterer.

**Held:** The Tribunal on this occasion sided with the Charterers, and took the view that as a matter of strict construction clause 35 does not incorporate the full text of the ICA 2011. As worded, the clause only relates to terms dealing with apportionment and settlement of cargo claims, but does not go far enough to include the terms on provision of security which was fundamental to support the disponent Owners' demands.

Given the wide use of similar clauses in the market, it was surprising that permission to appeal to the High Court was denied. On the other hand, this decision did not affect Charterer's ultimate cargo liability.



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## Recommendations

Concerns regarding unnecessary time and costs to deal with countersecurity under the ICA have clearly not been extinguished with the introduction of the ICA 2011. For those parties interested in the Agreement to be fully effective it is relevant to ensure its terms are adequately incorporated into their contracts, bearing in mind that a simple reference to apportionment/settlement does no longer suffice. Our Assureds are therefore encouraged to review the pertinent Cargo Claims clauses in their time charterparties and make sure their rights to counter-security are protected.

In response the market was swift to present a charterparty clause that addresses this issue head on. This is one solution that we can recommend to our Assureds, in particular those acting as Owners or disponent Owners.

*“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.”*

**“For those parties interested in the Agreement to be fully effective it is relevant to ensure its terms are adequately incorporated into their contracts...”**



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