

The Scope of the Implied Indemnity: *Sino East Transportation Ltd v Grand Amazon Shipping Ltd (The Grand Amanda)* [2025] EWHC 1990 (Comm)

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Introduction

Under a time charter, owners of a vessel are ordinarily entitled to be indemnified against losses or liabilities which arise out of their compliance with a charterer's orders.¹ Certain time charter forms contain express provisions to this effect, although the commonly used New York Produce Exchange Form 1946 ('NYPE Form') does not.² Nonetheless, an equivalent term has been implied in law and fact into the NYPE Form – such term being labelled the implied indemnity.³ The implied indemnity is generally treated as '[c]oupled with' clause 8 of the NYPE Form,⁴ which provides that:

"... *The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency...*"⁵

It is now general industry practice for time charters on the NYPE Form to incorporate the Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011) ('Inter-Club Agreement').⁶ The Inter-Club Agreement comprises 'industry standard' terms for apportioning liability for cargo claims between owners and charterers of a vessel, and their respective protection and indemnity insurers, or P&I Clubs.⁷ The Inter-Club Agreement's operative provision is clause 8, which sets out a regime whereby cargo claims of different kinds are apportioned in a 'mechanical' fashion.⁸ Clause 8 concludes with clause 8(d), which acts as a 'catch all' provision for 'all other cargo claims whatsoever' to be apportioned equally between owners and charterers.⁹ Relevantly, however, this provision contains a proviso which apportions liability 100% to either owners or charterers, where the claim 'arose out of the act or neglect of the one or the other'.¹⁰

The recent arbitral proceedings between Sino East Transportation and Grand Amazon required careful consideration and application of both the Inter-Club Agreement and the implied indemnity to a complex set of facts, where a shipment of cargo with inherent vice led to a foreign court imposing liability upon Grand Amazon. Upon appeal from those arbitral proceedings, the recent decision of the English High Court in *Sino East Transportation Ltd v Grand Amazon Shipping Ltd*¹¹ settled the question of whether the implied indemnity applies to a charterer's order to load cargo with inherent vice, even if that order is both lawful and permitted under the terms of the charterparty.¹² Henshaw J held that the indemnity applied in such circumstances.¹³ Important questions as to the nature and scope of the implied indemnity, as well as its interrelationship with the Inter-Club Agreement, were clarified in the process.

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¹ *Sino East Transportation Ltd v Grand Amazon Shipping Ltd (The "Grand Amanda")* [2025] EWHC 1990 (Comm) [47] ('*The Grand Amanda*'); Terence Coghlin et al, *Time Charters* (Informa Law, 7th ed, 2014) [19.15] ('*Time Charters*').

² *The Grand Amanda* (n 1) [49], there referring to the Shelltime 3 form clause 13(a) and Baltime form clause 9.

³ *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The "Island Archon")* [1994] 2 Lloyd's Rep 227, 233, 237 (Evans LJ, Mann LJ and Donald Nicholls VC agreeing) ('*The Island Archon*'); see also *Deutsche Ost-Afrika v Legent (The "Marie H")* [1998] 2 Lloyd's Rep 71, 72 (Timothy-Walker J) ('*The Marie H*'); *Action Navigation Inc v Bottigliere Di Navigazione SpA (The "Kitsa")* [2005] 1 Lloyd's Rep 432, 437 (Aikens J) ('*The Kitsa*'); *The Athanasia Comminos and Georges Chr Lemos* [1990] 1 Lloyd's Rep 277, 290 (Mustill J) ('*The Athanasia Comminos*').

⁴ *The Grand Amanda* (n 1) [47].

⁵ New York Produce Exchange Form 1946 clause 8 ('NYPE Form').

⁶ IG Circular: Inter-Club New York Produce Exchange Agreement 1996.

⁷ *Ibid*.

⁸ Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011) cl 8 ('Inter-Club Agreement'); *Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd (MV "Yangtze Xing Hua")* [2018] 1 Lloyd's Rep 330, 332 [11] (Longmore LJ, Hamblen and Henderson LJJ agreeing) ('*The Yangtze Xing Hua*').

⁹ *London Arbitration 10/22* [2022] 1102 LMLN (3 March 2022); Inter-Club Agreement (n 8) cl 8(d).

¹⁰ Inter-Club Agreement (n 8) cl 8(d).

¹¹ *Grand Amanda* (n 1).

¹² *Ibid* [35].

¹³ *Ibid* [101], [139].

Facts

Grand Amazon Shipping Ltd ('Owners') was the bareboat charterer and disponent owner of the *MV Grand Amanda*.¹⁴ Owners entered into a trip time charter with Sino East Transportation Ltd ('Charterers') to carry cargo to the 'Far East'.¹⁵ The charterparty was on an amended NYPE Form,¹⁶ which incorporated the Inter-Club Agreement.¹⁷ Charterers subsequently entered into a sub-voyage charter for the carriage of two consignments of soyabeans from Uruguay and Argentina to China.¹⁸ The bill of lading issued for the Uruguayan cargo incorporated the Hague-Visby Rules – Article IV(2)(m) of which contains an exclusion of liability for any damage arising out of inherent vice.¹⁹

Upon arrival in China, the Argentinian cargo was discharged in good order and condition.²⁰ However, the Uruguayan cargo had suffered damage during the voyage.²¹ Specifically, the soyabeans were mildewed, discoloured, caked and blackened.²² This prompted cargo interests and their insurer to commence proceedings in the Wuhan Maritime Court against Owners.²³

In the Wuhan Maritime Court proceedings, which were upheld on appeal,²⁴ Owners were held liable for a failure to take adequate care of the cargo.²⁵ In particular, the Court was not satisfied that the damage was caused by inherent vice.²⁶

Owners then sought contribution from Charterers in arbitral proceedings. In contrast to the findings of the Chinese courts, it was common ground between Owners and Charterers that the true cause of the Uruguayan cargo's damage was its own inherent vice.²⁷ The question was thus whether Owners were entitled to any contribution from Charterers, who had ordered Owners to load the Uruguayan cargo. Though Owners had originally relied on the Inter-Club Agreement and the implied indemnity as alternative avenues for recourse,²⁸ by the final hearing it had accepted that the Inter-Club Agreement did not apply.²⁹ Owners nevertheless succeeded on the implied indemnity ground.³⁰ Thus, Owners were entitled to a payment of 'US\$6,030,603.53 by way of indemnity' from Charterers.³¹

Charterers appealed to the English High Court, where Henshaw J ultimately upheld the tribunal's conclusion on the implied indemnity, and dismissed the appeal.³²

Legal Issues Before the Arbitral Tribunal

In the initial arbitration, five distinct issues arose. Only the last of these, pertaining to the implied indemnity, was subject to appeal. Nonetheless, the tribunal's consideration of the construction and application of the Inter-Club Agreement is likely to have significant influence upon future arbitrations concerning the same. Thus, all issues are canvassed below.

¹⁴ Ibid [1]–[2], [6].

¹⁵ Ibid [7].

¹⁶ Ibid [20].

¹⁷ Ibid [23].

¹⁸ Ibid [8].

¹⁹ Ibid [9].

²⁰ Ibid [13].

²¹ Ibid [11]–[12].

²² Ibid [12].

²³ Ibid [14]. A translated copy of the Wuhan Maritime Court's decision has been published in the Chinese Maritime & Commercial Law Reports: *Cofco Eastocean Oils and Grains Industries v Grand Changjiang Shipping* [2022] 3 CMCLR 21.

²⁴ *The Grand Amanda* (n 1) [18].

²⁵ Ibid [16]; *Cofco Eastocean Oils and Grains Industries v Grand Changjiang Shipping* [2022] 3 CMCLR 21, 51.

²⁶ *The Grand Amanda* (n 1) [16]; *Cofco Eastocean Oils and Grains Industries v Grand Changjiang Shipping* [2022] 3 CMCLR 21, 22, 50.

²⁷ *The Grand Amanda* (n 1) [17].

²⁸ Ibid [27].

²⁹ Ibid [37].

³⁰ Ibid [32].

³¹ Ibid [2].

³² Ibid [139].

A Preliminary Agency Issue

A preliminary issue pertained to agency. The issue was whether Fuk Hing Shipping, ‘a member of the same corporate group as Owners’,³³ had concluded a contract between Owners and Charterers as agent for Owners, or whether Fuk Hing Shipping had themselves entered into a charter with Owners.³⁴ However, beyond this point, the precise content of this issue is not entirely clear from the judgment. Presumably, Charterers had argued that they had not concluded any contract with Owners, but had rather contracted with Fuk Hing Shipping. If accepted, the consequence of such a submission would be that there was no contract between the parties, and therefore no contractual right to contribution. Further, there would be no arbitration agreement between the parties; the tribunal would be deprived of any source of jurisdiction.

Regardless, the tribunal accepted Owners’ position that on a proper construction of the contractual documents, Fuk Hing Shipping had contracted as agent for Owners as undisclosed principal.³⁵

Was the claim ‘Properly’ Settled or Compromised?

The second issue before the tribunal concerned the application of clause 4(c) of the Inter-Club Agreement. The Inter-Club Agreement will only apply where a ‘claim has been properly settled or compromised’.³⁶ Charterers argued that Owners had not *properly* settled the claim by cargo interests.³⁷ Presumably, Charterers’ argument was as follows: the bill of lading tendered to cargo interests was governed by English law, and contained an arbitration clause stipulating that all disputes were to be resolved in London-seated arbitration; despite this, when Owners faced a claim in the Wuhan Maritime Court, they omitted to take any steps to redirect the dispute’s forum to that which was contractually agreed; this omission rendered the claim not ‘properly settled’.³⁸

Resolving this issue required the tribunal to determine the scope and content of the propriety requirement within clause 4(c), then apply this threshold to the facts. As to the former, the tribunal construed the word ‘properly’ as importing a requirement to act reasonably when dealing with a cargo claim.³⁹ Subsequently, the tribunal found that Owners had, in fact, reasonably responded to the claim.⁴⁰ In particular, the three specific acts which Charterers alleged should have been taken – obtaining ‘a London arbitration award containing a declaration of non-liability’ or an award of damages, seeking an ‘English High Court anti-suit injunction’, and challenging ‘the jurisdiction of the PRC Courts’ – would all have been futile.⁴¹

It is suggested that the tribunal was correct in both its construction and application of clause 4(c). The ostensible purpose of the requirement that claims be settled ‘properly’ is to protect the party against whom apportionment is sought, who is not privy to the original claim, and thus has no input into how it is defended or the terms on which it is settled.⁴² On the other hand, the overarching purpose of the Inter-Club Agreement is to provide a ‘rough and ready’ scheme of apportionment which minimises the costs and time spent on allocating cargo claim liabilities.⁴³ The holding that the word ‘properly’ within clause 4(c) imports a requirement to reasonably respond to a claim strikes a desirable balance between these competing interests. It is further suggested that the tribunal was correct in deciding that the claim was properly settled, despite being resolved contrary to the contractually agreed forum, when Owners had no reasonable avenues available to procure a more advantageous settlement. To find otherwise

³³ Ibid [6].

³⁴ Ibid [28]; *Grand Amanda* Webinar by LSLC-YMP (15 October 2025) (‘Webinar’).

³⁵ *The Grand Amanda* (n 1) [30], [6]. On the law relating to undisclosed principals, see *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] AC 199, 207 (Lord Lloyd for the Court); Peter Watts and F.M.B Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters, 21st ed, 2018) [8-069]; *Time Charters* (n 1) [2.52]–[2.55].

³⁶ Inter-Club Agreement (n 8) cl 4(c).

³⁷ *The Grand Amanda* (n 1) [28].

³⁸ Ibid [9], [15], [31] citing the tribunal’s reasons at [123].

³⁹ Ibid [31] citing the tribunal’s reasons at [123].

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Charterers made a similar point, albeit in the context of the implied indemnity, at *The Grand Amanda* (n 1) [129]–[130].

⁴³ *D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co (The “Strathnewton”)* [1983] 1 Lloyd’s Rep 219, 223 (Kerr LJ, Sir Shaw LJ and Sir Donaldson MR agreeing) (‘*The Strathnewton*’).

would have been to require costly and time-consuming satellite litigation, which could at best result in a pyrrhic victory. Such a finding would be inconsistent with the aforementioned purpose of the Inter-Club Agreement.

Was the claim ‘Settled or Compromised’ at all?

The third issue before the tribunal also involved the application of clause 4(c) of the Inter-Club Agreement. However, this issue turned on the proper construction of the phrase ‘settled or compromised’.⁴⁴ At the commencement of the arbitration, both parties had readily assumed that the Inter-Club Agreement applied to cargo claims resolved by amicable settlement, arbitral award or court judgment.⁴⁵ It was a tribunal member who first raised the possibility that clause 4(c) may not apply to claims resolved via award or judgment.⁴⁶ Owners then adopted this point, and positively argued that the Inter-Club Agreement did not apply in such cases.⁴⁷ Such a forensic decision was likely taken because it was possible that the tribunal could order equal apportionment of liability under clause 8(d) of the Inter-Club Agreement, whereas, if Owners were successful on the implied indemnity, then they would automatically receive full indemnification.

Ultimately, the tribunal ‘concluded that Clause 4(c) was not satisfied where a cargo claim is established by award or judgment, rather than by a consensual settlement’, and thus there could be no apportionment in such a case.⁴⁸ The tribunal reasoned that where a claim is resolved via judgment, then an investigation into, and determination of, causation has already taken place.⁴⁹ In such circumstances, it could not be intended that a second review of the cargo claim’s cause must be undertaken for the purposes of apportionment under the Inter-Club Agreement.⁵⁰ It is suggested that the tribunal reached the wrong conclusion, and that the phrase ‘settled or compromised’ encompasses cargo claims resolved through negotiated settlement, arbitral award, or court judgment. In principle, there is no reason to treat the word ‘settled’ as anything other than synonymous with ‘resolved’. Previous decisions of the English High Court have acknowledged that the Inter-Club Agreement contemplates its own independent investigation into the true cause of a cargo claim, and it is suggested that this holds true even if a court or tribunal has first adjudicated the matter, for this may have been done on ‘some mistaken basis’.⁵¹ Further, the Court of Appeal has arguably already construed the word ‘settled’ as meaning ‘merely ... “paid”, or “dealt with”, or “disposed of”’.⁵² Similarly, in the context of an insurance policy, Henshaw J has held that the word ‘settlement’ extended to a ‘liability [whether] ascertained by judgment or award or ... by a compromise’.⁵³

At this point, it is worth acknowledging that the tribunal’s award is not binding precedent upon further disputes concerning the Inter-Club Agreement, whether arbitration or litigation.⁵⁴ Moreover, it is telling that the tribunal’s decision prompted the International Group – the group responsible for the drafting of the Inter-Club Agreement – to amend the Inter-Club Agreement. The 2025 version of the Inter-Club Agreement now specifies that ‘[s]ettled includes but is not limited to, claims adjudicated by any court or tribunal’.⁵⁵ Further, in the accompanying IG

⁴⁴ Inter-Club Agreement (n 8) cl 4(c).

⁴⁵ Webinar (n 34). For a previous award wherein a litigated claim resulting in a final judgment was subject to apportionment under the ICA, see *Asil Gida Ve Kimya Sanayii Ve Ticaret A.S., as Owner of the m.v. "Mustafa Nevzat" v Cosco Qingdao, as Charterers Award*, Society of Maritime Arbitrators, Case No 3820 (2 January 2004).

⁴⁶ Webinar (n 34).

⁴⁷ Ibid.

⁴⁸ *The Grand Amanda* (n 1) [31].

⁴⁹ Webinar (n 34).

⁵⁰ Ibid.

⁵¹ *Ben Line Steamers Ltd v Pacific Steam Navigation Co (The “Benlawers”)* [1989] 2 Lloyd’s Rep 51, 62 (Hobhouse J) (*‘The Benlawers’*); *Newcastle Protection and Indemnity Association v Assurance Foreningen Gard Gjensidig (The “Labrador”)* [1998] 2 Lloyd’s Rep 387, 406 (Colman J).

⁵² *The Strathnewton* (n 43) 227. Strictly speaking, however, it is possible to confine the Court’s comment to the specific rider clause in that case which incorporated the Inter-Club Agreement, rather than the Inter-Club Agreement itself.

⁵³ *Cultural Foundation v Beazley Furlonge Ltd* [2018] Bus LR 2174; [2018] EWHC 1083 (Comm), [352] (Henshaw J). Such a holding on construction was, of course, specific to the contract in question – see generally [342]–[355].

⁵⁴ Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2023) [1.137] (*‘Redfern and Hunter’*). See, for example, *Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd (The MV Yangtze Xing Hua)* [2017] 1 Lloyd’s Rep 212, 217 [27]–[28] (Teare J).

⁵⁵ Inter-Club New York Produce Exchange Agreement 2011 (As Amended July 2025).

Circular, it is stated that: '[t]he intention of the Group Clubs has always been that the term "settled" encompasses a court judgment or arbitration award'.⁵⁶

These amendments have potential to give rise to questions surrounding which version of the Inter-Club Agreement has been incorporated in any given contract. The International Group has previously recommended a specific incorporation clause, which purports to incorporate the Inter-Club Agreement 'or any subsequent modification or replacement thereof'.⁵⁷ It is debatable whether the inclusion of this phrase alone is effective to incorporate future versions which could not have been foreseen nor known by the parties at the time of contract.⁵⁸ Further, it is unlikely that the IG Circular's proclamation of intention would be admissible to inform the construction of predecessors to the 2025 version of the Inter-Club Agreement.⁵⁹ Nonetheless, it is suggested that there are strong reasons for subsequent tribunals and courts to adopt the view that the word 'settled' includes judgments, regardless of which iteration of the Inter-Club Agreement is being considered.

If the ICA had applied, what apportionment was appropriate?

Notwithstanding the tribunal's prior conclusion that the Inter-Club Agreement did not apply, it proceeded to consider which apportionment scheme was appropriate, had it applied.⁶⁰ The dispute between Owners and Charterers hinged upon whether the head portion of clause 8(d), or the proviso, applied.⁶¹

The critical context for this issue is the Court of Appeal's decision in *The Yangtze Xing Hua*.⁶² In that case, it was held that the word 'act' within the proviso to clause 8(d) was to take its natural and ordinary meaning of 'any act', and does not include considerations of culpability.⁶³ That case had also concerned a shipment of cargo with inherent vice, but importantly, the cargo's damage had also been partially caused by an order 'to wait off the discharge port for over four months'.⁶⁴ There is thus no authoritative determination of whether an instruction to ship unstable cargo *alone* is sufficient to attract 100% apportionment under the Inter-Club Agreement.

Previous arbitral awards had considered this issue, but arrived at conflicting results. In *London Arbitration 10/22* the tribunal was 'not persuaded that inherent vice was sufficient to make a 100 per cent apportionment under clause 8(d) absent some contributory act ... which compounded the situation', and thus distinguished *The Yangtze Xing Hua*.⁶⁵ A similar result was reached in *London Arbitration 19/17*, where the tribunal reasoned that the loading of a particular cargo was not 'some specific and definable event or occurrence' but rather fell under the 'charterers' general compliance with their contractual obligations', and was therefore not an 'act' under clause 8(d).⁶⁶ In contrast, in *London Arbitration 30/16* it was decided that 'the shipment of an unstable cargo' constituted an 'act'.⁶⁷

In the present case, the tribunal took the view that an instruction to load a shipment of cargo with inherent vice, which then leads to a cargo claim, is sufficient to lead to 100% apportionment to charterers.⁶⁸ It reasoned firstly

⁵⁶ IG Circular: Inter-Club New York Produce Exchange Agreement 2011 (as amended July 2025).

⁵⁷ Jeb Clulow and Catriona Casha, 'ICA Incorporation Clauses', *Ship Law Log* (Blog Post, 15 October 2018) <https://www.shiplawlog.com/2018/10/15/ica-incorporation-clauses/>.

⁵⁸ The process of contractual interpretation is one of ascertaining the objective intention of the contracting parties at the time of contract: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, 114; [1998] 1 WLR 896, 912. It appears difficult to argue that contractual parties could have intended to be governed by a version of the Inter-Club Agreement which contained content that the parties could not have known about at the time of contract.

⁵⁹ Extrinsic evidence which post-dates a contract's formation is generally inadmissible: *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603; *Sattar v Sattar* [2009] EWHC 289 (Ch), [35]–[36], but see the possible exception referred to at [37]. The position is complicated by the fact that the Inter-Club Agreement's accompanying circulars have previously been described as 'an authoritative statement of intent rather like a statute's explanatory note': *Agile Holdings Corporation v Essar Shipping Ltd ('The Maria')* [2018] Lloyd's Rep Plus 79, [41] (Henshaw J).

⁶⁰ *The Grand Amanda* (n 1) [31].

⁶¹ *Ibid* [31].

⁶² *The Yangtze Xing Hua* (n 8).

⁶³ *The Grand Amanda* (n 1) [31] citing the tribunal's reasons at [131]; *The Yangtze Xing Hua* (n 8) [1], [26]–[27].

⁶⁴ *The Yangtze Xing Hua* (n 8) [2], [6]–[7].

⁶⁵ *London Arbitration 10/22* [2022] 1102 LMLN (3 March 2022).

⁶⁶ *London Arbitration 19/17* [2017] 982 LMLN (21 July 2017).

⁶⁷ *London Arbitration 30/16* [2016] 967 LMLN (21 Dec 2016).

⁶⁸ *The Grand Amanda* (n 1) [31] citing the tribunal's reasons at [131].

that ‘the shipment of an unstable cargo’ was an ‘act’,⁶⁹ and secondly that this act was instructed by Charterers, which attracted responsibility,⁷⁰ and thirdly that this act caused the cargo claim.⁷¹ Therefore, the case appears consistent with *London Arbitration 30/16*, and stands in opposition to *London Arbitration 10/22* and *London Arbitration 19/17*.

It is suggested that the issue of whether shipment of cargo with inherent vice alone is sufficient to attract 100% apportionment under the Inter-Club Agreement is a finely balanced one, and that this is reflected by the fact that there is no clear consensus among the arbitral awards which have confronted this issue. In theory, such an issue should not arise, as shipowners exclude their liability for cargo damage arising from inherent vice under Art 4(2)(m) of the Hague-Visby Rules,⁷² which the Inter-Club Agreement stipulates must be incorporated into any bill of lading for it to apply.⁷³ In practice, however, such claims do occur, whether they arise from a negotiated settlement for commercial reasons, or for more complex reasons, as in this case. On one view, the shipment of an unstable cargo is plainly an ‘act’ that may cause a cargo claim. However, there remains room for nuanced argument that mere shipment of a particular lawful cargo is more appropriately characterised as an ordinary incident of the performance of a charterparty, noting again the non-binding nature of the tribunal’s decision in this respect.⁷⁴

Implied Indemnity issue

As the tribunal held that the ICA was inapplicable, it was critical for Owners to establish their claim under the implied indemnity. The starting point was that Owners were entitled to be indemnified for consequences arising out of an order by Charterers as to the vessel’s agency or employment, other than ordinary risks and costs associated with the performance of the charter, or risks that Owners had agreed to bear on a proper construction of the charterparty terms.⁷⁵

It is trite that an order to load particular cargo constitutes an order as to the vessel’s agency or employment.⁷⁶ The critical issue was whether the risk of an adverse judgment in China was either an ordinary risk, or a risk that Owners had agreed to bear.⁷⁷ The tribunal held that the risk fell into neither of these categories, and thus was prima facie recoverable under the indemnity, subject to causation.⁷⁸ As to causation, the tribunal reasoned that the loss ‘arose directly from the Charterer’s orders’.⁷⁹ There was no break in the chain of causation, for Owners’ omissions in response to the claim were entirely reasonable, as discussed earlier in the context of the ICA.⁸⁰ Thus, the implied indemnity operated so as to indemnify Owners for their liability under the PRC Judgment, and their costs incurred in those proceedings.⁸¹

Legal Issues before the High Court

Generally, there is no appeal mechanism from arbitral awards, excepting certain limited grounds which are ordinarily jurisdictional or procedural in nature.⁸² However, the UK is a notable exception to this general rule. Section 69 of the *Arbitration Act 1996* (UK) permits appeals from arbitral awards on substantive points of law, but is limited to instances where the decision of the tribunal is either obviously wrong, or if the issue is of general

⁶⁹ Ibid.

⁷⁰ *The Grand Amanda* (n 1) [31] citing the tribunal’s reasons at [132].

⁷¹ Ibid.

⁷² *Protocol amending the International Convention for the unification of certain rules of law relating to bills of lading, 25 August 1924, as amended by the Protocol of 23 February 1968*, Arts III(2), IV.2(m) (‘Hague-Visby Rules’).

⁷³ Inter-Club Agreement (n 8) cl 4(a)(iv).

⁷⁴ *Redfern and Hunter* (n 54) [1.137].

⁷⁵ *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The “Kos”) (No 2)* [2012] 2 AC 164, [9]–[11] (Lord Sumption JSC, Lord Phillip PSC and Lords Walker and Clarke JSC agreeing) (‘*The Kos*’); *The Island Archon* (n 3) 238.

⁷⁶ *The Island Archon* (n 3) 233, 237; *The Marie H* (n 3) 72; *The Kitsa* (n 3) 437; *The Grand Amanda* (n 1) [52].

⁷⁷ *The Grand Amanda* (n 4) [29].

⁷⁸ Ibid [32] citing the tribunal’s reasons at [140].

⁷⁹ Ibid.

⁸⁰ Ibid [32] citing the tribunal’s reasons at [141].

⁸¹ Ibid [34].

⁸² *Redfern and Hunter* (n 54) [1.128], [10.32].

public importance, open to serious doubt.⁸³ A considerable portion of appeals under this section are from maritime arbitrations, owing to the fact that the LMAA Terms do not exclude the right of appeal, unlike some other rules of arbitration.⁸⁴ Successful appeals under this provision are, in practice, rare.⁸⁵

In the present case, Charterers sought permission to appeal on questions relating to both the Inter-Club Agreement and the implied indemnity.⁸⁶ However, permission to appeal was refused regarding the Inter-Club Agreement.⁸⁷ Andrew Baker J, who heard the initial application, reasoned that the parties had both taken the position that the Inter-Club Agreement was inapplicable, albeit for different reasons.⁸⁸ The parties having agreed on the issue, it could not have been a ‘question ... which the tribunal was asked to determine’ and thus could not be appealed.⁸⁹ Permission to appeal was, however, granted on the implied indemnity question; the issue was of general public importance, and ‘the correctness of the arbitrators’ reasoning’ was ‘open to serious doubt’.⁹⁰

Thus, in the substantive judgment, Henshaw J addressed the question of whether the implied indemnity was enlivened.⁹¹ His Honour first addressed the general nature and scope of the implied indemnity. Then, His Honour turned to addressing whether the implied indemnity’s application was excluded, because Owners had accepted the risk of bearing the liability in question. Finally, His Honour determined whether the implied indemnity was ousted by the incorporation of the ICA into the charterparty.

General Nature and Scope of the Implied Indemnity

Henshaw J began by canvassing the general nature of the implied indemnity, reiterating that the indemnity constituted a ‘*prima facie* implied right of indemnity in favour of the owner for losses or liabilities arising from the charterer’s orders’.⁹²

Then, His Honour reiterated that the indemnity’s scope extended to consequences arising from orders ‘to load a particular cargo’ or to ‘visit particular ports’.⁹³ This was clearly demonstrated by prior authorities,⁹⁴ including *The Ann Stathatos*,⁹⁵ *The Athanasia Comminos*,⁹⁶ and *The Island Archon*.⁹⁷ The implied indemnity thus could not be limited to cases where charterers had presented bills of lading with terms more onerous than, and inconsistent with, the terms of the charterparty.⁹⁸

A Risk Which Owners Had Agreed to Bear?

Having addressed the general nature and scope of the implied indemnity, Henshaw J turned to outlining the only potentially relevant limitation to its application in this case. The overarching issue was whether ‘Owners’ liability to Cargo Interests in respect of the damaged Montevideo Cargo was ... an ordinary cost or risk associated with the performance of the chartered service, or one of the broad range of physical and commercial hazards which are

⁸³ *Arbitration Act 1996* (UK) s 96.

⁸⁴ *Redfern and Hunter* (n 54) [10.71]; ‘UK Supreme Court rules on section 69 challenge to an arbitral award: do the courts plan to take a more active role in arbitration?’, *Herbert Smith Freehills Kramer* (Blog Post, 19 May 2016) <https://www.hsfkramer.com/notes/arbitration/2016-05/uk-supreme-court-rules-on-section-69-challenge-to-an-arbitral-do-the-courts-plan-to-take-a-more-active-role-in-arbitration>.

⁸⁵ *Redfern and Hunter* (n 54) [10.71]; ‘Commercial Court Report reveals sustained rise in arbitration applications’, *Dentons* (Blog Post, 25 April 2025) <https://www.dentons.com/en/insights/articles/2025/april/25/commercial-court-report-reveals-sustained-rise-in-arbitration-applications>.

⁸⁶ *The Grand Amanda* (n 1) [35]–[37].

⁸⁷ *Ibid* [37].

⁸⁸ *Ibid* [37].

⁸⁹ *Arbitration Act 1996* (UK) s 96(3)(b).

⁹⁰ *The Grand Amanda* (n 1) [35]–[36].

⁹¹ *Ibid* [35].

⁹² *Ibid* [47].

⁹³ *Ibid* [52], [91].

⁹⁴ *Ibid* [55].

⁹⁵ *Royal Greek Government v Minister of Transport (The “Ann Stathatos”)* (1950) 83 Ll L Rep 228.

⁹⁶ *The Athanasia Comminos* (n 3).

⁹⁷ *The Island Archon* (n 3).

⁹⁸ *The Grand Amanda* (n 1) [56], [69]–[70], [126].

normally incidental to the chartered service, or one which Owners had expressly or impliedly agreed in the Charterparty to bear'.⁹⁹

However, as aforementioned, Charterers could only appeal questions of law.¹⁰⁰ Henshaw J did not expressly determine whether the identification of the risks which a shipowner has accepted is 'strictly one of law or of mixed fact and law'.¹⁰¹ Nonetheless, His Honour acknowledged that the question is not purely a question of 'construction of the charterparty' but 'may require an informed judgment about essentially commercial matters'.¹⁰² Thus, His Honour saw it appropriate to accord deference to the tribunal's conclusion that Owners had not accepted the risk of 'liability to Cargo Interests in respect of the damaged Montevideo Cargo'.¹⁰³ It is suggested that Henshaw J's approach is justifiable on the basis that the issue is one of mixed fact and law.¹⁰⁴

The issue could thus not be framed as whether the arbitrators were correct in finding that Owners had agreed to bear the risk in question. Rather, the appeal could only succeed if the arbitrators had made an error of law which preceded their ultimate conclusion on Owners' assumption of risk.¹⁰⁵ The relevant error of law, and therefore what the case turned on, was whether or not the arbitrators had misunderstood the key authority of *The Island Archon*.¹⁰⁶ Charterers' main contention in this respect was that on a 'proper interpretation' of the authorities, in particular *The Island Archon*, shipowners accept the risk of a foreign court wrongly imposing liability, unless that risk could not have been foreseen (for example, due to a change in circumstances between the time of contract and time of discharge).¹⁰⁷

Accordingly, Henshaw J was required to determine whether the arbitrators had correctly applied the law as set out in *The Island Archon*. *The Island Archon* was significant, for it is an appellate authority wherein the implied indemnity was held to apply to a lawful order to proceed to a certain port, which caused the shipowner loss in the form of a liability to cargo interests, such liability having been imposed by the local courts.¹⁰⁸ Such a fact pattern appears analogous to the present case, and would indicate that the indemnity also applied in the present case, subject to the specific charterparty terms.

However, Charterers argued that the outcome in *The Island Archon* hinged upon a change in circumstances between the time of contract, and the time when the relevant order was given. In that case, the circumstances surrounding the risk in question – 'a state of affairs in which it was almost inevitable that cargo claims would be made against a ship discharging cargo, ... and that those claims would lead to adverse judgments, regardless of the actual state of the cargo' – were not notorious at the time of contract, but had only become notorious by the time of charterer's order to proceed to Iraq.¹⁰⁹ In that case, Evans LJ had indicated that there would be 'some substance' in the contention that shipowners had agreed to bear the risk in question if the state of affairs had been 'notorious at the date of the charterparty'.¹¹⁰ By way of contrast, in the present case it was arguably foreseeable at the time of contract that cargo with inherent vice might be loaded, and that a subsequent cargo claim could wrongly impose liability upon Owners.¹¹¹

However, Henshaw J held that Evans LJ's comments in *The Island Archon* did not constitute a holding of law that shipowners assume all risks associated with the shipment of a particular cargo to a particular port, unless there is an change in circumstances.¹¹² In summary, His Honour found that the *Island Archon*'s result did not turn on the

⁹⁹ Ibid [60], [101]

¹⁰⁰ Ibid [40]–[45].

¹⁰¹ Ibid [117].

¹⁰² Ibid [117] relying on *The Kos* (n 75) [11].

¹⁰³ Ibid [117].

¹⁰⁴ As held in *The Kitsa* (n 3) 437 [25].

¹⁰⁵ *The Grand Amanda* (n 1) [42]–[43].

¹⁰⁶ Ibid [36].

¹⁰⁷ Ibid [38](ii).

¹⁰⁸ Ibid [69].

¹⁰⁹ Ibid [115].

¹¹⁰ *The Island Archon* (n 3) 236; *The Grand Amanda* (n 1) [76]–[78].

¹¹¹ Cf *The Grand Amanda* (n 1) [135].

¹¹² Ibid [79].

change of circumstances which occurred after contract formation,¹¹³ and that the tribunal had thus not misunderstood the case.¹¹⁴ There was therefore no error of law discernible from the tribunal's reasons.

Notwithstanding Henshaw J's general deference to the tribunal's determination, it is possible to discern from the judgment some key general principles regarding how to determine the risks which a shipowner has agreed to bear:

1. The foreseeability of a risk at the time of contract is a relevant, but not determinative, consideration.¹¹⁵ Thus, it was entirely possible for a foreseeable risk to remain one which Owners did not agree to bear.
2. There is no blanket rule, akin to the category of navigational risks,¹¹⁶ that shipowners necessarily assume the risks stemming from ordinary cargo claims.¹¹⁷
3. The implied indemnity can arise in respect of liabilities imposed by foreign courts, even if the law being applied is not unusual, and charterers are not at fault.¹¹⁸
4. An important consideration is the extent to which the parties are in control of the risk. Where charterers have 'discretion over the particular cargo selected for shipment and the selection of the ports of loading and discharge', this will render it more likely that related risks, such as the imposition of liability by a foreign court, are covered by the indemnity.¹¹⁹
5. The scope of the indemnity should not necessarily be construed by reference to the Hague-Visby Rules.¹²⁰ Thus, it was not conclusive that Owners had excluded liability for inherent vice under Article IV(2)(m).¹²¹
6. Nor should the scope of the indemnity be construed by reference to the parties' insurance.¹²² A party taking out insurance for cargo claims does not mean that they have contractually accepted the risk over same.¹²³
7. There is no special rule for inherent vice.¹²⁴

Interrelationship between the Implied Indemnity and the Inter-Club Agreement

The final issue addressed by Henshaw J pertained to the interrelationship between the implied indemnity and the Inter-Club Agreement. The uncontroversial starting point is that '[w]here the ICA apportionment applies, it overrides other rights and liabilities under a charterparty'.¹²⁵ Thus, if the Inter-Club Agreement had applied, there could be no parallel and overlapping implied indemnity claim.¹²⁶

Taking that proposition a step further, Charterers submitted that the Inter-Club Agreement was a 'complete code for the imposition of liability in respect of cargo claims'.¹²⁷ Accordingly, where the Inter-Club Agreement had declined to provide for apportionment because one of its prerequisites – clause 4(c) – was not satisfied, the parties had contractually agreed that no recovery would be available under the implied indemnity.¹²⁸

However, this argument was quickly dismissed.¹²⁹ Mr Justice Henshaw heavily relied upon the decision in *The Benlawers*, where Hobhouse J commented that '[i]nsofar as any cargo claim might fall outside the scope of the Inter-Club Agreement the question of indemnity would have to be dealt with under the ordinary law and the other provisions of the charter-party if applicable'.¹³⁰ Ancillary reliance was placed upon an excerpt from *Time Charters*

¹¹³ Ibid [118].

¹¹⁴ Ibid [106].

¹¹⁵ Ibid [135].

¹¹⁶ Ibid [74], [82], [121].

¹¹⁷ Ibid [119]–[120].

¹¹⁸ Ibid [119], [121].

¹¹⁹ Ibid [122], [127]–[128].

¹²⁰ Ibid [55].

¹²¹ Ibid [55], [97], [114]. Cf *London Arbitration 10/22*.

¹²² *The Grand Amanda* (n 1) [131]–[133].

¹²³ Ibid [131]–[133].

¹²⁴ Ibid [137]–[138].

¹²⁵ Ibid [98].

¹²⁶ *Grand Amanda* (n 1) [98]. This in fact occurred in *The Benlawers* (n 51), rendering the relevant comments made by Hobhouse J in that case obiter. See also *London Arbitration 10/22* [2022] 1102 LMLN (3 March 2022).

¹²⁷ *The Grand Amanda* (n 1) [38](i); [111].

¹²⁸ Ibid [111].

¹²⁹ Ibid [112].

¹³⁰ *The Benlawers* (n 51) 57; *The Grand Amanda* (n 1) [99].

which suggested that, in cases where one of the Inter-Club Agreement's prerequisites were not satisfied, its effect is to leave 'liability to be dealt with independently of it', and it would not prevent claims for contribution under other heads, such as the implied indemnity.¹³¹ Thus, it was held that the Inter-Club Agreement was not 'a provision for the distribution of the burden of cargo claims falling outside its scope'.¹³²

Though not discussed in these terms in the judgment, this issue can be viewed as one of inconsistency between an implied and express term of the contract. An implied term must not be inconsistent with any express terms of the contract.¹³³ However, English law has indicated that a slightly different test may apply to terms implied in law – that, by virtue of their ordinarily automatic implication into certain types of contracts, they will be implied unless they have been expressly excluded.¹³⁴ The implied indemnity has been recognised as a term implied in law.¹³⁵ Thus, a requirement of express exclusion would support the view that the implied indemnity co-exists with the Inter-Club Agreement – the presence of the Inter-Club Agreement alone being unlikely to constitute an express exclusion of the implied indemnity.

It is suggested that the issue of inconsistency between the Inter-Club Agreement and the implied indemnity is finely balanced. The fact that the Inter-Club Agreement contains a detailed, bordering on comprehensive, regime for apportioning cargo claim liabilities is compelling support for a finding that it is in fact a 'complete code'. This is arguably reinforced by the parties' language in clause 43 of their charterparty, which provided that 'liabilities for cargo claims shall be borne ... in accordance with [the ICA]' (emphasis added).¹³⁶ It may seem surprising that the implied indemnity can operate as a backdoor to contribution, in cases where the Inter-Club Agreement has declined to provide for apportionment. Henshaw J's view that a contrary finding would 'have arbitrary results' is only true insofar as the Inter-Club Agreement's prerequisites to apportionment are construed in arbitrary ways.¹³⁷ Finally, Hobhouse J's comments in *The Benlawers* are ambiguous. That case concerned the 1984 version of the Inter-Club Agreement,¹³⁸ which did not purport to cover all types of cargo claims.¹³⁹ Thus, the reference to the Inter-Club Agreement's 'scope' was potentially referring to instances where the Inter-Club Agreement had made no provision for a certain type of claim, rather than cases where a prerequisite to apportionment is not met.

On the other hand, Henshaw J's holding is understandable, considering that the Inter-Club Agreement does not expressly exclude the implied indemnity from operating where a cargo claim cannot be apportioned under the Inter-Club Agreement. In contrast, there is strong textual evidence that the implied indemnity survives the incorporation of the Inter-Club Agreement; clause 3(c) of the Inter-Club Agreement expressly envisages its concurrent operation with an 'indemnity under the charterparty'.¹⁴⁰ Further, if commercial parties or the maritime industry generally do not find this aspect of the judgment's outcome desirable, they can amend the Inter-Club Agreement or their particular contracts to expressly exclude the implied indemnity's application to cargo claims. Thus, it is suggested that His Honour reached the correct conclusion on this issue.

Comments

It is suggested that both the tribunal and Court identified the legally and commercially desirable outcomes to the issues before them, with the exception of the tribunal's finding that cargo claims resolved via judgment are

¹³¹ *The Grand Amanda* (n 1) [100].

¹³² *Ibid* [113].

¹³³ *Marks & Spencer Plc v BNP Paribas Securities Services Trust* [2016] AC 742, [28] (Lord Neuberger JSC, with whom Lord Sumption and Lord Hodge JJSC agreed) ('*Marks & Spencer*').

¹³⁴ *Geys v Societe Generale* [2013] 1 AC 523, 547 [55] (Lady Hale JSC); approved in *Marks & Spencer* (n 133) [15]. However, it was suggested in *Barton v Morris* [2023] AC 684 [221] (Lord Burrows JSC) that linguistic inconsistency will constitute express exclusion.

¹³⁵ Sir Nicholas Hamblen, 'Under charterers' orders – to indemnify, or not to indemnify' [2019] (2) *Lloyd's Maritime and Commercial Law Quarterly* 200, 202, 206. His Honour suggests that recognition of the indemnity's implication at law has been confirmed at the level of the UK Supreme Court in *The Kos* (n 75), in addition to the Court of Appeal in *The Island Archon* (n 3).

¹³⁶ *The Grand Amanda* (n 1) [23]; *Osman v Natt* [2014] EWCA Civ 1520, [39]. See also *London Arbitration 19/17* [2017] 982 LMLN (21 July 2017); Joseph Kimble, 'The Many Misuses of Shall' (1992) 3 *The Scribes Journal of Legal Writing* 61, 64.

¹³⁷ *The Grand Amanda* (n 1) [112].

¹³⁸ Inter-Club New York Produce Exchange Agreement (As Amended May 1984) cl 2.

¹³⁹ Cf Inter-Club Agreement (n 8) cl 8(d); see also Hazelwood, Steven J. and David Semark, P. & I Clubs Law and Practice (Lloyd's List, 4th ed, 2010) [15.71].

¹⁴⁰ Inter-Club Agreement (n 8) cl 3(c).

excluded from apportionment under the Inter-Club Agreement. However, further clarification of the scope of the implied indemnity, perhaps at the appellate level, may still be desirable. This will have to come from a future dispute, as leave to appeal Henshaw J's decision was not granted.¹⁴¹

Those involved in the shipment of soya beans to China have observed that for reasons relating to international relations and tariffs, China has recently decreased its importation of soy beans from the USA, and has instead turned to South American sources.¹⁴² However, the voyage time from South America to China is significantly longer, which consequently allows for increased deterioration in cases of cargo with inherent vice.¹⁴³ Accordingly, in the near future there is an increased potential for cargo claims akin to the present case to arise.¹⁴⁴ Apportionment of liability for such claims will, of course, need to be resolved by the application of the Inter-Club Agreement and/or the implied indemnity. The findings of the tribunal and Court in the *Grand Amanda* will be of significance.

¹⁴¹ Webinar (n 34).

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ This is especially so due to a unique feature of Chinese law, which essentially does not recognise arbitration clauses incorporated into bills of lading. See Liang Zhao and Zhen Jing, 'Conflict of Jurisdiction between the UK and China and enforcement of arbitral awards and judgments' [2023] (2) *Lloyd's Maritime and Commercial Law Quarterly* 259, 260–3; Liang Zhao and Lianjun Li, 'Incorporation of arbitration clauses into bills of lading under the PRC law and its practical implications' (2017) 33(4) *Arbitration International* 647, 653–7; Liang Zhao and Lianjun Li, *Maritime Law and Practice in China* (Informa Law, 2017) ch 26.