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Insurance Issues and the Allocation of Risk

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Introduction

- Aim of presentation:
 - Discuss how each party in a Charterparty might try to protect its financial position if anything goes wrong during the charter

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Types of “Risk”

- Financial risk – risk of adverse financial consequences
- Safety risk
- Environmental risk
- Reputational risk
- Here we are concerned with financial risk management
- Think ahead as to how to protect bottom line should adverse situations arise
- Main possibilities
 - Assume the risk yourself and bear the financial loss
 - Try to pass on the risk to the counterparty
 - Seek insurance cover

Where does the risk lie if not covered by contract?

- If contract (including Charterparty) does not cover a particular situation the loss lies where it falls for example:
 - Damage to or loss of property – the owner bears the loss
 - Loss of profit – the loss stays where it lies
- Unless:
 - It can be shown that the loss was caused by someone else's fault – then can sue the party at fault to try to recover damages to compensate for the loss

Indemnity clauses

- Also known as “Knock for Knock” clauses
- Trend has developed over decades that for certain types of loss it makes commercial sense to regulate by contract where losses should be borne without having to prove fault
- “Your People, Your Property, Your Problem”
- Purpose to try to make disputes easier to resolve by not having to prove fault
 - Can result in significant cost savings

Indemnity clauses (cont'd)

- For example Supplytime 2017
 - Clause 14(a)(i) indemnities by Owners
 - Clause 14(a)(ii) indemnities by Charterers
 - Clause 14(b) excluded losses
- Indemnity clauses seek to redistribute who bears the loss
- Need to be clear what you are trying to do

Indemnity clauses (cont'd)

- Be careful with definitions for example
 - “Owner group”
 - “Charterer group”
 - “Owner personnel”
 - “Charterer personnel”

Consequential damages

- Guilty party liable to compensate for the reasonable and foreseeable consequences of the breach of contract
- But, this might result in catastrophic consequences for your business

Consequential damages (cont'd)

- Often contract will provide that certain damages are either not recoverable at all or are restricted to a certain level, e.g.
 - Consequential loss
 - Loss of profit
 - Loss of business
 - Loss of use
 - Business interruption
 - Loss of revenue
 - Loss of production
- Parties need to be clear what they intend these terms to mean
- Clause 14(b) of Supplytime 2017

Limitation of liability

- In shipping, liability can be limited based on the gross tonnage of the vessel – Limitation Convention 1976 and Merchant Shipping Act 1995
- But, possible to contract out of limits in damages for breach of contract
- Try not to contract out
- Clause 14(c) of Supplytime 2017:
 - “Nothing contained in this Charter Party shall be construed or held to deprive the Owners or the Charterers, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention ...”
- If you are considering contracting out of limits get consent of your insurers

Insurance considerations

- Businesses want/need to put in place insurance cover to provide protection in respect of certain risks
 - Employer's liability
 - P&I cover for third party risks
 - Hull & machinery
 - Special operations cover
 - Business interruption
- Try to balance cost of premium against risk of occurrence

Insurance considerations (cont'd)

- Bear in mind the level of the deductible/excess
- Owners/Charterers must advise insurers of indemnity clauses before finalising the Charterparty to ensure cover if contractual obligation incurred
- Major potential risk if contractual obligation incurred but not covered by insurance
- Supplytime 2017
 - Clause 17(a)(i) "The Owners shall obtain and maintain in effect for the duration of this Charter Party, with reputable insurers, the insurances set forth in Annex B."

Insurance considerations (cont'd)

- Clause 17(a)(ii) “The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers’ Group. Co-insurance and/or waivers of subrogation shall be given only in so far as they relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party.”
- Clause 17(c) “If the Charterers take out insurance that covers risks for which they indemnify Owners, the Charterers shall ensure that their underwriters waive subrogation rights against the Owners Group, but only insofar as these relate to liabilities which are properly the responsibility of the Charterers under the terms of this Charter Party.”

Conclusion

- In summary, important to give thought prior to contracting as to what might go wrong. Think how you want to cover individual risks you foresee potentially occurring and decide whether you want to cover these:
 - Yourself
 - By the counterparty via indemnities
 - By obtaining insurance cover

Any Questions?

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