BRIEFINGNOTE

STEPHENSON HARWOOD
(SINGAPORE) ALLIANCE

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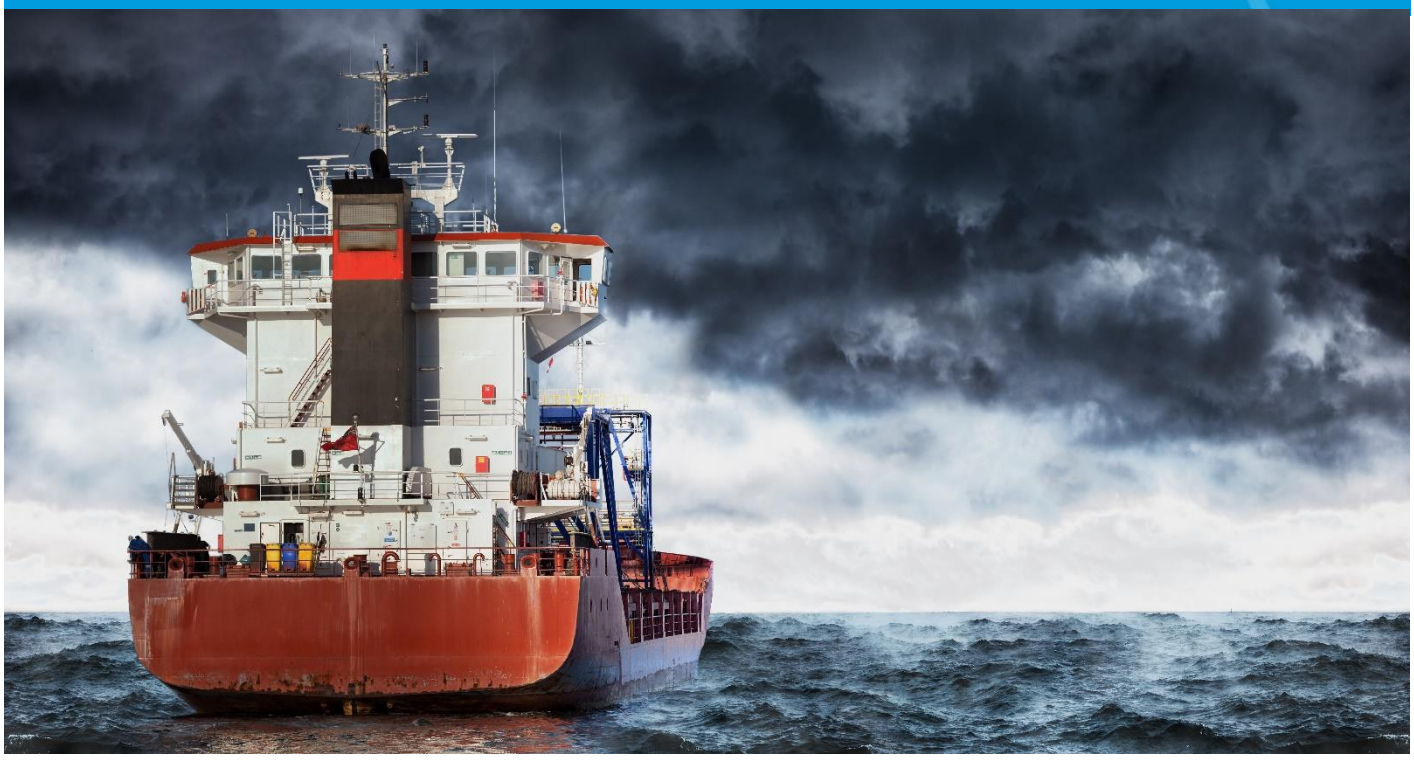
保留权利书，保留权利条款

Reservation of rights letters and "no waiver" clauses



一场金融危机正在逼近，或者说已经到来。融资方正面临着日益增多的还款违约以及暂停还款和豁免利息等请求。

A financial crisis looms, or has already arrived. Increasingly, financiers face payment defaults and requests for moratoriums on payment, interest waivers, and similar.

仔细起草的融资合同估计会允许融资方宣称违约事件发生，不管是因为直接的还款违约，或（较不直接）重大不利变更，还是债务人在担保资产价值下跌后不能提供进一步的附带担保。触发违约事件提供的救济一般包括加速还款、终止合约、执行担保以及在融资租赁下要求（或强制）还船的权利。

Tightly drafted financing documentation will probably allow the calling of an Event of Default, whether for straightforward payment defaults, (less straightforward) material adverse changes, or inability to provide further collateral following drops in the valuation of secured assets. In turn, an Event of Default generally allows remedies including acceleration, termination, and enforcement over securities and, in lease financings, repossession of ships.

融资方可能选择暂时不采取这些救济措施并考虑债务重组。这可能是出于各种因素，反应了融资方同某个特定债务人的商业关系或是融资方更宽泛的考量，比如当时在融资方账面上坏账的比重，又或是交叉违约会给债务人集团公司带来的更广泛的影响。

A financier may choose to temporarily refrain from exercising such remedies, and discuss restructuring the debt. This could be for any number of reasons, reflecting the commercial relationship with a particular debtor or broader considerations such as the existing proportion of bad debt on a financier's books at the time or even wider ramifications as to cross-default implications on the debtor's group of companies.

同时，确保融资方的权利得到保护也是重要的。

It is important to ensure the financier's rights are preserved in the meantime.

如果融资人在违约事件发生后不采取行动会怎样?

该问题的出发点是，融资方保持沉默本身一般较难等同于放弃权利或阻止融资方诉诸救济措施。您可能会联想到融资合同中常见的"不弃权"或者"除书面方式外无变更"之类的条款（下文将进一步讨论该类条款）。

What if the financier does nothing following an Event of Default?

The initial position is, silence alone is unlikely to amount to a waiver of the financier's rights, or estop the financier from relying on its remedies. You may have in mind the "no waiver" or "no variation except in writing" clauses common in financing documentation (more on such clauses below).

然而这很容易发生变化。可能是因为融资方面对重复违约持续保持沉默，也可能是融资人做出了某一行动或者给出了某一表述，债务人合理地依赖于这样的行动或表述并相信融资方不会严格坚持其法律权利。这样的例子可能包括在违约事件发生后：（1）融资方允许债务人从一个贷款额度持续地提款；（2）融资方保留了债务人用以接收租约收入的营业账户并允许债务人用该账户持续支付经营支出；（3）融资方同意就债务妥协进行初步协商并同意合同履行暂时停止。

However, that can easily change. Perhaps there is continued silence in the face of repeated breaches. Perhaps there is an act or representation reasonably relied upon by the debtor who therefore believes the financier will not insist upon strict legal rights. Examples might include, after an Event of Default has occurred: (1) a financier allowing continued drawdowns from a facility, (2) a financier maintaining the debtor's operating account which receives charter income, and allowing continued payments of operating expenses from that account, or (3) a financier entering into preliminary discussions to compromise the debt on the understanding of a standstill in the interim.

违约事项可能比预计的持续了更长时间，融资方后来才决定要执行其权利。对于融资方来说，谨慎的做法是至少在采取下一步行动前向债务人发出最后警告，为债务人纠正违约事件明确指定一个合理时间，并且正式声明融资方无意放弃其违约事件项下的权利。

It may be the Event of Default continues for a longer time than initially anticipated, and the financier later decides to enforce. At a minimum, it would be prudent for the financier to provide a final warning to the debtor, stating a reasonable time for the debtor to rectify its Event of Default, before proceeding further, and also to formally state that it is not the financier's intention to forego its rights to subsequently rely on that Event of Default.

"不弃权"条款

这类条款几乎存在于每一套融资文件中以保护融资方的利益并尽力确保融资方不会在债务人违约的情况下无意地或非正式地放弃了主张相应救济措施的权利。

"No waiver" clauses

These clauses exist in almost every suite of financing documentation, in favour of the financier, to try to ensure that the financiers do not by inference accidentally or informally waive their rights to any remedies in the event of a breach of the contract by the debtor.

然而，英国法院关于"不弃权"条款的看法也随着时间而变化。

However, English judicial opinion on them has varied over time.

在 21 世纪初直到 21 世纪第一个十年的中后期，英国法出现"不弃权"条款本身是可以被放弃的说法。例如："*当一个人看待此种条款时，立场是这样的：该条款和其它任何条款一样，都可以成为放弃的对象，并且放弃权利应当满足的格式要求也是可以被放弃的。这些条款最终带来的不过是建立本案中曾存在过弃权的证明责任。*"

In the 2000s and up to the mid-late 2010s, there appeared acknowledgment that a "no waiver" clause could itself be waived. For example: "*When one looks at a clause of this kind, however, the position is this. This clause, along with any other clause, can be the subject of waiver, and the requirement for a waiver to be in any particular form is one which can itself be waived. These clauses, inevitably, give rise to little more than an evidential requirement to establish that there truly has been a waiver in the case in question*."[1]

然而最近似乎再次出现了对于当事人意思自治以及合同文本本身的关注。例如在 *SMBC v Euler Hermes* 案中，SMBC 是履约保函下权利的受让人（作为担保受托方）。如果法院认定依据原合同应付款项比已付款项少，该保函要求其受益人退回已付款项。如果保函受让人确认接受这一退款义务的话，该保函可以被转让。转让通知发出后义务人接受了该保函。

However, more recently, there appears to have been a re-focusing on party autonomy and the literal words of the contract. For example, in *SMBC v Euler Hermes*[2], SMBC was the assignee (as security trustee) of rights under a performance bond. The bond required its beneficiary to later repay sums paid if a Court decided that less was payable under the underlying contract. The bond could be assigned, if the assignee confirmed acceptance of this repayment obligation. A notice of assignment was issued and accepted by the obligor.

SMBC 从未确认接受这一退款义务。相反的是，转让通知指出转让人保留任何义务的责任，而受让人在被转让的保函下没有任何责任（只有权利）。同其他的论点一起，SMBC 声称在其获得转让产生的利益前，这一转让通知是对受让人确认接受退款之义务的弃权。

SMBC never confirmed acceptance of the repayment obligation. Instead, the notice of assignment indicated that the assignor retained responsibility for any obligations and that the assignee had no liability under the assigned document (only rights). Among other things, SMBC argued that this notice of assignment amounted to a waiver of the need for it to confirm acceptance before it could take the benefit of the assignment.

英国高等法院不同意这一看法。在做出判决时，法院仔细审阅了"不弃权"条款，认为该转让通知没有达到这些要求，因为该转让通知没有特别提及退款义务："*12.1 条下的没有弃权应当成为对于过去或者将来违约事件的弃权，它也不应修改、删除或者增加该保函的条款、条件或条文，除非在弃权中已经明确说明（且仅限于明确说明的程度）。*"

The English High Court did not agree. In so deciding, it read the "non-waiver" clause closely – and found that the notice of assignment did not meet those requirements because it had not made specific reference to the repayment obligation: "*No waiver under clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Bond unless (and then only to the extent) expressly stated in that waiver*."

尽管不弃权条款在每个案子中是不同的，法院还是讨论了一些更早的案件（包括上文引述的案件）并强调："*…如果说一项弃权阻止了合同一方对于不弃权条款的依赖，那么必须有相关证据来证明这一弃权是有效的，即使它违反了不弃权条款并且相比于对原始权利本身的弃权，它需要更有力的证明。*"

Although the non-waiver clauses were different in each case, the Court also discussed the earlier cases (including that cited above) and emphasized: "*…if it is said that waiver prevents reliance on a no waiver clause there would have to be something which indicated that the waiver was effective notwithstanding its noncompliance with the non-waiver clause and something more would be required for this purpose than what might otherwise simply constitute a waiver of the original right itself.*"[3]

在任何情况下，融资方审慎的律师都应尽量避免关于此类条款具体应用的争论（或关于某一特定条款与 A 案而非 B 案中的条款更相似的争论）- 并明确表明弃权或者禁反言根本不会发生。

In any event, the prudent counsel for financiers would be to avoid arguments about the operation of these clauses altogether (or arguments about how a particular clause is more similar to a clause discussed in case A than that in case B) – and expressly make clear that no waiver or estoppel at all can arise.

[1] *Credit Agricole Indosuez v BB Energy BV*, [2004] EWHC 750 (Comm) at [33].

[2] *Sumitomo Mitsui Banking Corporation Europe Limited v Euler Hermes Europe SA (NV)*, [2019] EWHC 2250.

[3] *Ibid.* at [64].

权利保留函

这样的函件并非罕见，而且其措辞通常是穷尽式的。这类函件有意排除债务人关于融资方已放弃其权利或应被禁止依赖其权利的主张。这类函件的确是融资方没有意图放弃权利的证据，然而它并不是决定性的。法院或仲裁庭会综合地考虑整个案件，尤其是融资方在这些函件之后采取的行动或不作为。因此从融资方的角度来看，如果没有和解安排的话，考虑不时更新这些权利保留函可能是一项明智之举。

Reservation of rights letters

Such letters are not uncommon, and are usually exhaustively worded. They are intended to exclude arguments by the debtor, again, that the financier has waived its rights or is estopped from relying on them. They are indeed evidence that the financier did not intend to do so. However, they are not conclusive. A Court or Tribunal would consider matters overall, including in particular acts or omissions later in time than such letters so from a financier's perspective it may be prudent to consider refreshing such letters from time to time in the absence of settlement arrangements.

在这些函件中也往往可以见到合同中的措辞。例如对其所依据的合同条款的冗长列举以及对准据法和管辖地域的提及。然而，如果这样的函件仅仅是保留融资人的权利的话，它们就并不是合同，而这样的用措辞也很可能是不必要的。（情况有时会有所不同，举例来说，如果函件也提及了融资方做出的特定让步或者更新了某些融资条款，在这情况下，函件也许是反映了一个要约或者承诺，或是记录了一项合同变更 – 假设成立合同的其它要件也都存在。）

It is also usual to see wording in such letters that you would expect to see in a contract. For example, a lengthy recital of contract clauses relied upon and reference to governing law and jurisdiction. However, if and to the extent that such letters simply reserve the financier's rights, they are not a contract and such wording is probably unnecessary. (The position would be different if, for example, the letter also indicated the financier's agreement to make certain concessions or restructure some financing terms. In that event, the letter might either reflect an offer or an acceptance, or record a variation – assuming the other elements of a contract are present.)

不管您是（1）面临着债务人违约或中止付款等请求，亦或是怀疑债务人即将违约的融资方，还是（2）寻求免除债务、保护或者重组的债务人，欢迎随时联系我们罗夏信律师事务所的团队。尽早获得精确的意见有助于您厘清现实可行的选项并在合理的范围内最大程度地保护您的权利。

Whether you are a (1) financier facing defaults, requests for a moratorium or similar, or suspect impending defaults, or (2) a debtor seeking relief, protection, or restructuring, please don't hesitate to reach out to the Stephenson Harwood team today. Early and accurate advice can help clarify the options realistically available and help ensure proper protection of your rights, to the greatest extent possible.

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