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In a volatile market where parties are susceptible to cash flow problems, a stronger party entering into a long charterparty can for instance minimise the risk of their counter party defaulting and bringing the contract to an end for non-performance by finding a third party Nominee, willing to step in, since there is no legal obligation, to the ongoing contract and novate it thereby preserving the contract. Historically and in financially challenging periods, a large number of parties in the middle of the charterparty chains were defaulting on their obligations due to insolvency or bankruptcy. One way to circumvent the contract's life span being cut short and the innocent party having to claim damages against a financially insecure defaulting party was to have a Nominee on standby willing to perform the contract by novation on receiving notice to do so. An incentive for a third party becoming a Nominee would be for a sub-charterer to benefit from favourable hire rates under a long term charterparty. Usually a parent or affiliate company would act as a third party Nominee but it is not unusual for a Sub Charterer who has a vested interest in the charter remaining in force to agree to becoming a Nominee. What are Step-In Rights? Step-In Rights otherwise known as Step-In Agreements permit a third party to step in to the shoes of a defaulting contractual party and replace them in order to continue the performance pursuant to novation taking place, and the new contract replacing the old one. When a contractual party breaches the contract/cp by failing to pay hire or becomes insolvent during the life of the contract the Nominee will step in, fulfil and continue with the defaulting contractual party's obligations. A Step-In Agreement is a novation agreement between two parties and their Nominee who is subject to conditions precedent, being default by one of the parties and the service of a Step-In Notice. They are used to enable continuity with one party being replaced by a Nominee. What ensues is the Nominee steps in and under a novation and performs the contract in the normal way. This prevents the contract from coming to an end for want of frustration or repudiatory breach. This type of novation is particularly widespread in financing and construction agreements but also has an important role in shipping contracts. How can they be used in shipping contracts? In related shipping matters, they provide a contracting party with a degree of certainty that if their contractual counter party defaults in performing its obligations. Novation takes effect where two contracting parties agree that a Nominee, who also agrees, shall stand in the relation of either of them to the other. How are Step-In Rights formed? It can be entered into at the outset of the contract by way of a standard clause or as an addendum which lists events which give rise to triggering the Step-In Agreement. But the assignment of the contract as a whole is impossible see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] UKHL 4. Under English law there can be no assignment of a contractual burden through transfer of all obligations. Rather it is a novation agreement by consenting parties who effectively create a completely new yet identical contract. It is therefore imperative that the consent of all three parties is obtained for novation to take effect. (see *Chitty on Contracts* (32nd ed) Vol.1, para 19-087). Step-In Rights only seek to regulate what it concerns. If the parties have novated a 'head charter' it will only relate to that relationship. As soon as the contractual party defaults thereby satisfying the condition precedent, the Step-In Agreement novates the original charterparty and introduces the third party as the new contractual party. A further advantage of entering into a Step-In Agreement, rather than a performance guarantee, is the relative ease of enforcing it against the Nominee to perform or pay damages. Triggering the Step-In Clause? The contractual party defaulting in their obligations under a charterparty would trigger the other contractual party to serve and send a written Step-In Notice to the third-party Nominee requiring them to step into the charterparty causing the defaulting contractual party to step out. Usually a suitable Nominee would be a financial subsidiary or sister companies of the contractual party defaulting under the contract. The form of the Step-In Notice does not require any particular form; it need only be in writing and served on the third-party Nominee stating that the contractual party has defaulted and that the other contractual party requires them to assume the defaulting party's obligations under the charterparty. With the crisis in the shipping market now in its fourth year, bankers are putting to sea and seizing ships to protect the value of their loans to struggling shipowners. Lenders to the shipping trade, themselves lashed by the euro zone crisis, are recruiting management companies to take over and operate defaulting owners ships rather than sell them at a heavy loss or take a writedown on their loan books. Earlier this month, Credit Suisse and a group of Chinese banks seized seven tankers from Singapore's Dongfang Shipbuilding to pay outstanding debts of around \$250 million after the Singapore Supreme Court ruled in favour of the creditors. The banks have so many problem loans today at a time of extreme political, social and regulatory pressure that they don't know which way to turn, said Nigel Prentis, head of research, consulting and advisory with HSBC Shipping Services Ltd. UK-headquartered Bibby Ship Management is among companies aiming to capitalise on the slump by offering to run vessels for a fee, including chartering out a ship on behalf of a bank. The group said it was in talks with a number of European banks. What we do is come in and provide technical management of the vessel and provide a full crew to run the vessel and get it to a standard where it is fit for resale by the bank or whoever they want to do, said Bibby's business development manager Brian Williams. Bibby has teamed up with asset recovery specialist Marine Risk Management (MRM) whose staff includes former special forces personnel, which can arrest a vessel from its owner on behalf of a bank and sail it to another jurisdiction with a letter of authority from an admiralty court. The biggest difference to the 1980s, which was the last major crisis, is the value of the assets could be up to 10 times higher (than then), which is why banks have been reluctant up to now to force anything in the hope that the market was going to recover. Clearly that's not going to happen, and banks are looking at taking other action now, MRMs chief executive John Dalby said. We are providing them with an option to technically and commercially manage a vessel and then sell it as a going concern subsequently. The alternative is writing off massive loans, which is not something anyone wants to do in this climate. Surplus capacity due to brisk ordering during the boom years has pushed the nominal resale value of a supertanker, used to transport crude oil, has fallen to around the \$90 million level from \$162 million in 2008. The value of a capesize ship, one of the largest carriers of dry bulk commodities such as iron and coal, has also slumped to \$44 million from just under \$100 million in 2008. Many banks are thought to have contingency plans to take over ships and run them through the cycle rather than further undermine values with an auction process, said HSBC's Prentis said. The correction in values has been enough to wipe out equity in many cases, meaning that many ships will be worth less than the outstanding loan: negative equity. Hence, this is a problem for many European banks. Faced with big writedowns, on top of haircuts on peripheral euro zone bonds, they have generally chosen forbearance. European lenders in particular are under growing pressure to cut their exposure to risky and dollar-denominated assets such as ship and trade finance to meet tougher capital rules and shore up reserves. Global syndicated lending to the shipping sector slumped to \$245 million in the second quarter of this year, down from over \$1.6 billion in the first quarter and over \$3.9 billion in the second quarter of 2011, Thomson Reuters LPC data showed. There is still pain on the horizon because of the deliveries and because of the slowing economy, said Harris Antoniou, managing director energy, commodities & transportation with ABN AMRO Bank. Genovates the ship operator Oldendorff Carriers is in talks with banks over providing them with options. These days we are offering banks to park the ships with us where we effectively take care of the technical and commercial management, said its chairman Henning Oldendorff. It is very straightforward and transparent. If the banks want to sell the ship, we can terminate the charter. A number of European banks, including Frances two biggest listed banks Societe Generale and BNP Paribas , are looking to wind down their shipping books. Industry officials say short-term asset play suits as hiring managers buys more time for banks. Banks are not ship owners, and therefore do not want to own lots of ships, said Keith McRae with DVB Banks restructuring and asset management unit. You may have to warehouse a ship for a period of time, but that's not a business plan for a bank it's an expedient measure. By Jonathan Saul Source: Oman Observer Bank loans are historically the most popular source of capital in the shipping industry to finance a newbuilding or second-hand ship acquisition (see Albertijn et al, 2011). They are based on relationship banking and provide faster access to the required capital in comparison to other sources of finance. This is especially important in a market where speed of decision-making can make the difference when striving to achieve the best deal within a short time window. Moreover, it leaves the ownership structure of the company unchanged, which is not the case for Initial Public Offerings (IPOs). In addition, bank loans do not require the shipping company to disclose in the general public any of its business information, which again is not the case for IPOs and bond issues. For a thorough discussion on this, see Kavussanos and Tsouknidis (2014). In the general corporate finance literature, a system of credit risk assessment, namely the 5Cs of credit, standing for Capacity, Capital, Collateral, Conditions and Character, has emerged from the 1960s (for details see Smith, 1964), and is widely used for the systematic classification of the default risk drivers in loan facilities (see for instance Chen et al, 2009). Later, a sixth C is added to account for the Company effect. When assessing credit risk, several explanatory variables could be used in a credit scoring (logit) model to assess the PD of a shipping company, a shipping loan or a shipping bond. For example, Kavussanos and Tsouknidis (2011; 2016), using proprietary data, developed for the first time a credit scoring model for the assessment of credit risk in shipping bank loans. A wide set of variables is included in their credit scoring model. This is to ensure that the credit risk assessment takes into account not only the specific characteristics of the loan under consideration but also the state of the shipping industry and the macroeconomic climate in general. Table 13.7 presents the set of factors examined by Kavussanos and Tsouknidis (2016) as possible explanatory variables when constructing a logit (credit score) model for shipping Table 13.7 Default risk drivers used as explanatory variables of shipping bank loan defaults Croup of explanatory variables Panel A: Financial, company and loan related variables 6Cs mapping Description Expected sign Dependent variable Default Indicator: Takes value 0 if the loan is still active and follows the repayment schedule and value 1 if a missed payment for a loan is recorded for a period longer than 90 days. Financial-specific variables Capital/Company Leverage = Total Liabilities (TL)/Total Assets (A); Leverage measures the total debt burden of the company compared with its total assets. + Capital/Company Debt Coverage Ratio 1 = Current Liabilities (CL)/EBITDA: The debt coverage ratio measures the current liabilities of the company in comparison with its current EBITDA. + Capital/Company Debt Coverage Ratio 2 = Long Term Debt (LTD)/EBITDA: This debt coverage ratio measures the long term liabilities as a percentage of EBITDA. + Capital/Company Debt Coverage Ratio 3 = TL/EBITDA: This ratio measures the total liabilities of the company in comparison to its EBITDA. + Capital/Company Debt Coverage Ratio 4 = Interest Expenses/ EBITDA: This ratio measures the interest expenses of the company as a percentage of its EBITDA. + Capital/Company Liquidity Ratio 1 = Current Ratio = Current Assets (CA)/Current Liabilities (CL): The current ratio measures how many times the current assets of the company cover its current liabilities. Capital/Company Liquidity Ratio 2 = Cash Reserves Ratio = Cash and Cash Equivalents/Total Assets (A): This ratio measures the proportion of the total assets of a company which is kept as cash and cash equivalents. Capital/Company Profit Margin Ratio = EBITDA /Revenue: The profit margin measures the percentage of profit for each unit of revenue. Character/Capacity/ Company Age: The time period the shipping company exists. Company characteristics- specific variables Character/Capacity/ Company Years of cooperation with the bank (YOCB): The number of years of cooperation between the bank and the shipping company since the first loan agreement made between them. Character/Capacity/ Company TC Policy: A dummy variable taking the value of 1 for time chartered vessels and 0 for voyage chartered ships. Loan-specific variables Arrangement Fee/Amount of Loan: The arrangement fee is the main source of profit for the bank along with the margin (spread) charged. These fees are computed as a percentage of the whole amount of the loan. Life to Final Maturity (tenor of the loan): The number of years from the initiation of the agreement until the final maturity of the loan and the balloon payment. Margin: The spread over LIBOR charged. Internal Bank Rating: The variable internal bank rating, refers to the internal risk rating assigned by the bank, based on the overall assessment of each credit loan application (1 = Completely Safe, 7 = Acceptable risk, >7 Non-acceptable risk). + + /- + + Collateral Asset Coverage Ratio (ACR) Contractual: The market value of the ship over the amount of loan. This ratio is defined by the bank as a threshold which should be maintained at lower levels than the ACR actual. Collateral/Conditions Asset Coverage Ratio (ACR) Actual: The market value of the ship as estimated by ship- brokers or internal sources of the bank over the amount of the loan. This ratio changes over time since the price of the vessel may fluctuate and the debt outstanding is also been reducing during the repayment schedule of the loan. Source: Kavussanos and Tsouknidis (2016) bank loans. Financial-specific, company-specific and loan-specific variables have been examined as potential default risk drivers of shipping bank loans. Also, each variable has been mapped to the 6Cs. The results reveal that the important factors in predicting the probability of default are those that measure current and expected future conditions in the shipping market, the risk appetite of the obligor as captured from their choice of the chartering policy of the vessel and the relationship banking effect as captured in the pricing of the loan through the arrangement fee variable. These results can be generalised to risky international industries operating under conditions of perfect competition. Specifically, factors mediating the volatile cash-flow risks are considered to be the most important, while more traditional types of information such as that carried in financial ratios seem to come second in line, without being irrelevant. Typically, such credit scoring models are used by the credit analysis departments of banks specialising in transportation and ship finance or by shipping departments of commercial and investment banks lending to the industry. Shipping bank loans can be classified into syndicated and non-syndicated ones. The term syndicated means that more than one bank is co-financing a shipping project. Syndicated loans carry the benefit of diversifying the multiple risks faced by a bank financing a shipping project and this is the reason that this type of loan has grown in popularity. Specifically, syndicated loans are always organised in principle by an arrangement bank which plays the leading role in the whole process. If a default occurs, typically there is negotiation between the two parties where the arrangement bank may agree to provide a refinancing of the loan by extending its maturity and/or charge a higher spread. In this case, the borrower is downgraded in the internal credit rating scale of the bank and the whole amount of the loan is added to Non-Performing Loans (NPLs) which eventually harms the financial statements of the bank. Thus, it is extremely useful for banks to mitigate the credit risk originating from NPLs by identifying from the outset the correct risk level entailed in a bank loan application and as a consequence the potential defaults. Even if a bank does not eventually lose the whole amount of a defaulted loan, the process of refinancing and amending the terms of the loan is a major issue, i.e. extending its maturity, charge higher spreads, transfer the missed payment to the remaining payments. This is because such arrangements create substantial operational cost and may significantly alter a banks asset value and operational strategy. For these reasons it is a priority for a financial institution to develop a model that can detect such cases from the outset. In the current market the Club is often asked to advise on owners rights and remedies should charterers stop paying hire. This article highlights some of the issues to be borne in mind when considering the options open to owners in the event of default. It is not a substitute for seeking advice from the Club under your FDD cover. Payment of hire is a contractual obligation, the non-payment of which will put charterers in breach of charter. The first question that needs to be looked at is whether hire is actually due and outstanding. And, if so, how much? Are Charterers in default? Charterers cannot be in default of payment until after midnight on the due date for payment. - see The Afvos [1983]. Payment means receipt of cleared funds which means attention must be given to where payment is to be received. Legal complications may also arise when payment is due on a weekend. The preferred answer is that if a full instalment, i.e 15 days, is due on a weekend, payment must be made on the last working day before the weekend: The Zographia M [1976]. What if the vessel is off-hire when payment is due? The Letuetian [1982] is support for the proposition that hire need not be paid on the due date if the vessel is off-hire on that date. What if hire has been paid, but in a lesser amount than owners believe is due. Consideration must be given to whether charterers have made a bona fide and reasonable deduction from hire. For example, is there an express right to make a deduction or adjustment for an off-hire event, or is there an express right to deduct agreed claims? Charterers may have made a deduction for a damages claim of their own purporting to rely on the doctrine of equitable set-off. Whilst the general rule is that charterers are not entitled to set-off claims for damages, they may do where owners breach of charter has deprived charterers of the use of the ship and the claim arises out of the same transaction or are closely connected with it as per Lord Denning in The Nanfri [1978]. What does that default mean? Most owners are surprised to learn that mere non-payment of hire, even on more than one occasion, may not be legally considered a repudiatory breach of charter such as to entitle owners to treat the charter as at an end. The Brimnes [1972]. Payment of hire is rarely a condition of the charter and if charterers have not paid hire they may have similar difficulties honouring any indemnities. Anti-technically Notices Where the charterparty incorporates the requirement for such a notice, the giving of it is a condition precedent to the contractual right to withdraw. Such notice cannot be given until after the actual due time/date, as discussed above. Notices come in various forms with potentially differing requirements. There is a plethora of authority as to the strict requirements for giving such notices and the form they must take. The notice must require payment within the contractual period provided for in the charter and must clearly and unequivocally state that if the notice is not complied with, the vessel WILL be withdrawn. A notice that threatens withdrawal will not be an effective one. Further, if owners have previously accepted late payments without sufficient protest, they may be found to have waived the right to punctual payment (again this will depend on the form of notice incorporated as, for example, the BIMCO Non-Payment of Hire Clause expressly addresses this issue). A further notice may be required in that situation to reassert the need for strict compliance before an anti-technically notice can be given. Further, whilst owners would be allowed a reasonable period of time to consider rights following non-payment, an anti-technically notice must be given within a reasonable period of time. An owner that had not served an anti-technically notice in a reasonable time period may be held to have waived the right to do so and thus lose the subsequent right to withdraw. Withdrawal If charterers have not made payment under the terms of the anti-technically notice owners can then give notice of withdrawal. It is recommended that owners do so promptly to avoid any suggestion that the right to withdraw has been waived. A reasonable period of time would still be allowed to owners, for example to check whether payment had been received by their bank. As per Lord Wilberforce in the Laconia [1977]: What is a reasonable time depends on the circumstances. In some, indeed many cases, it will be a short time-viz the shortest time reasonably necessary to enable the shipowner to hear of the default and issue instructions. A notice that the vessel has been withdrawn takes effect at the time received by the charterers and brings the charter to a complete end. It does not have a temporary suspensive effect. It is therefore a draconian measure that the courts are at pains to ensure must be exercised correctly. If hire is earned, or other sums are due, at the time of withdrawal, owners have a right to claim those monies. However, as the law currently stands, absent a repudiatory breach (and the mere non-payment of hire is not likely to be a repudiatory breach) there is no right to claim damages at large. If the charter rate of hire is at variance with the current market rate, this means the owners loss subsequent to withdrawal may be significant and one that is not capable of being claimed as damages against charterers. As such there is some degree of tension when considering whether to withdraw: forego a claim for damages or (at least until charterers conduct does evidence an intention no longer to be bound by the charter) continue a charter when hire is not being paid and might never be recovered. Often the most important consideration for owners is whether the vessel is laden at the time of withdrawal. Withdrawal will not release owners from pre-existing obligations to cargo interests as carrier under a bill of lading or potentially otherwise as bailee. The Kos [2010] reiterates the position that recovery of compensation from charterers for the time and expense involved in such obligations would not be automatic. However this is to be contrasted with a recent arbitration award where a tribunal awarded owners hire and bunkers for completing their obligations under the bill of lading on a quantum meruit basis on the grounds that the requirements set out by Goff J in the The Tropwind (No2) [1981] had been met. In that case charterers had expressly asked owners to complete the voyage and discharge the cargo at a time when charterers were already in breach of charter and owners had not yet withdrawn the vessel. It should also be noted that a charter term that gives owners the right to withdraw for any breach of charter is likely to be interpreted by the courts as only applicable to repudiatory breaches of the charterparty. As non-payment of hire is not, of itself, a repudiatory breach, the right to withdraw will not exist unless it is expressly said to arise in the event of non-payment of hire. What if charterers are in repudiatory breach? Measure of loss The measure of damages for repudiatory breach of contract is to put owners, in so far as money can do it, in the same position as if the charterparty had been performed, Robinson v Harman [1848]. The starting point is, therefore, the amount owners would have earned had the charterparty been performed. It is generally straightforward to calculate the sum which owners would have earned had the charterparty been performed. For a time charter, the basic calculation is hire multiplied by the outstanding period of the charterparty plus other sums payable under the charterparty as at the date of termination. If any period of the unperformed charterparty is after the date of an assessment of damages, that part of the damages will be reduced for accelerated receipt. Damages will be based on the minimum obligation of the charterers. Thus, where the redelivery date has a tolerance within charterers option, the earliest redelivery date will be taken in assessing the charterparty period to be claimed for. Further, if at the time damages are assessed events have occurred which mean that the charterparty would have been terminated early in any event, this will be taken into account and damages awarded for the shorter charterparty period. The Golden Victory [2007] Duty to Mitigate Owners will not be able to recover damages for any loss which they could have avoided by taking reasonable steps in mitigation (usually by re-chartering the vessel.) There is a general rule that if at termination there is an available market on which owners could promptly have re-chartered the vessel for the balance of the charter period on terms similar to the original charterparty (the available market), the amount which would have been earned under such a replacement fixture is considered as representing the owners position at termination. The general position is that in order to mitigate its loss, the reasonable step for the wronged party is to enter the market and obtain a replacement for that which has been lost. The Elena Damico [1980]. The general rule is inapplicable if there is no available market at the time of termination. In those circumstances, account will be taken of the actual sums earned by owners in consequence of steps taken to mitigate their loss. Account will also be taken of any other benefit which is gained (or cost incurred) in consequence of the steps taken in mitigation. The reasonableness or otherwise of steps taken (or not taken) in mitigation is to be assessed at the time of termination that is, at a time when owners would not have the benefit of knowing which way the market would move. It is therefore inappropriate for the tribunal to consider the reasonableness of owners actions for the purpose of mitigation with the benefit of hindsight. The burden of proving that owners ought to have taken certain steps, or that their conduct was not reasonable, is on the charterers. Securing the claim This is an entire topic in its own right but relevant considerations are whether arrest of an asset owned by charterers is possible, and if so where? Some jurisdictions allow the arrest of bunkers (on another vessel chartered to the charterers) assuming it can be proved they are owned by charterers. One or two jurisdictions even allow the arrest of a charterers interest in a vessel. Consideration can also be given to such possibilities as freezing bank accounts or sister ship arrests. Bunker arrests or attachments are often problematic, particularly of bunkers on the vessel that has been withdrawn. It cannot be assumed that legal ownership of bunkers supplied by charterers vests back in the owners in any situation other than a contractual redelivery. Although this particular issue has not been tested before the English courts, there is House of Lords authority, The Span Terza [1984] that upon cancellation (as it was in that case) of a charter, owners right to use and consume bunkers ceased and owners were merely bailees of the bunkers as against charterers. Exercising a lien on cargo is another route that may be open to owners. But it is one that is fraught with difficulty and legal complications. The enforceability of a lien is likely to depend on whether charterers own the cargo or not and whether the lien clause is incorporated into the bill of lading. Local law of the place where the lien is to be exercised is also relevant. Owners must always be wary of exposing themselves to delay claims under the contract of carriage. Is there a commercial answer? There are also commercial considerations and solutions when charterers have not paid hire. These are, though, beyond the scope of this article but can include: hire holidays or a reduced rates of hire for a set period, perhaps backed by performance guarantees to allow charterers to work their way out of the immediate financial difficulties, or allowing a viable sub-charterer (if there is one) to step into their immediate charterers shoes by way of an assignment of the charterparty, or a negotiated termination on such terms as are acceptable to both parties. Article by Sian Morris Please refer to the decisions in the Astra and Fortune Plum both of which post-date the above article. Stephenson Harwood, When Things Go Wrong, Piraeus, Client Briefing, 1997. 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