The Shipping Law Review

Tenth Edition

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PREFACE

The aim of the tenth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry, including international trade sanctions, ocean logistics, offshore, piracy, shipbuilding, ports and terminals, marine insurance, environmental and regulatory issues, decommissioning and ship finance.

We have invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

Each of these jurisdictional chapters gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered, as are the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims.

In addition, the authors address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included. The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are also examined. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction in the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development estimating that the operation of merchant ships contributes about US$380 billion in freight rates to the global economy, amounting to about 5 per cent of global trade overall. The significance of maritime logistics in facilitating trade and development has become increasingly apparent in the past year. Heightened and unstable freight rates, port closures, congestion and evolving shipping requirements as a result of covid-19 and the Ukraine conflict have all had far reaching effects beyond the shipping sector itself. As the international shipping industry is responsible for the carriage of over 80 per cent of world trade, with over 50,000 merchant ships trading internationally, the elevated shipping expenses and challenges to global logistics we have experienced this year have exacerbated inflation and supply chain disruptions, adding to the ongoing global crisis and hampering the maritime industry's covid-19 recovery. We have seen global maritime trade, which plunged by approximately 4 per cent in 2020, recover at an estimated rate of 3.2 per cent. In 2021, shipments reached 11 billion tonnes, a value slightly below pre-pandemic levels.

The disruption caused by the pandemic and the war in Ukraine have brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself, and the contributions to this book continue to reflect that.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2023

Chapter 11

SHIP FINANCE

Gudmund Bernitz[1]

I INTRODUCTION

The financing of ships is as ancient as international trade itself, but the way that financing is carried out has continuously evolved over history and continues to change today – maybe at a faster pace than ever. The types of financing products available have become increasingly diverse and the financiers offering them include banks, leasing houses and private equity funds, as well as bond and equity markets.

However, when providing financing against the security of a ship, it remains as important as ever to understand the nature of the secured asset and the legal landscape in which she operates.

II THE SHIPPING LOAN AGREEMENT

In its simplest form, a shipping loan agreement is fundamentally a contract documenting the lender's obligation to advance the loan (if certain conditions are met) and the borrower's obligation to repay that loan with interest. The loan agreement is designed to ensure that the loan is used for its proper purpose and to protect the lender's security in the ship that is being financed.

Consequently, the lender's obligation to lend is its only material obligation and, as far as the lender is concerned, the loan agreement will chiefly concern itself with the manner in which the loan is advanced and how the lender deals with information concerning the borrower. However, the borrower's obligation to repay the loan will be augmented by other obligations to preserve the lender's security and to keep the lender informed about the borrower, the borrower's business and the operation of the ship.

A shipping loan agreement can be divided into three constituent parts:

a the commercial terms;

b the key operative provisions; and

c the boilerplate clauses.

The following discussion is based on a bilateral term loan agreement between one lender and one borrower; club or syndicated shipping loans come with additional considerations beyond the scope of this chapter.

1 Gudmund Bernitz is a partner at HFW.

i Commercial terms

The commercial terms in a loan agreement include the tenor of the loan (i.e., the term of repayment) and, closely related to the tenor, the repayment schedule of the loan (including the distribution of the repayments – for example, whether the loan is amortised and the size of any balloon repayment at the end of the term of the loan).

Other important commercial terms include any fees that might be paid to the lender (although these may also be set out separately in confidential fee letters if the loan is syndicated), the interest rate (usually expressed as the margin above the interbank lending rate or the lender's cost of funds) and the availability of the funds.

ii Key operative provisions

Many of the operative provisions in a shipping loan agreement are general in nature and would be recognisable to general finance practitioners, whereas others are very specific to shipping loans and, in some cases, specific subsectors of the shipping industry.

These key operative provisions include the following:

a representations on and warranties of the borrower's condition and that of any other obligor, and its respective assets and businesses at the time the loan agreement is signed and, in respect of some representations and warranties, other agreed points during the tenor of the loan (often at each drawdown and at the beginning of each interest period);

b conditions precedent that must be satisfied by the borrower before it is entitled to draw on the loan. These conditions precedent protect the lender from having to advance the loan before it is comfortable with the condition of the borrower and all other obligors (including providers of security), and their respective assets and business; for example, the lender will want evidence that the borrower has good legal title to the ship, that the ship has been adequately insured and that she has all relevant trading certificates and, if the transaction has a project financing element, that the ship is employed under an acceptable charter for the duration of the loan;

c covenants on the borrower (and in some cases, some or all other obligors) whereby the borrower undertakes to do (or not to do) certain things throughout the tenor of the loan. These are designed to ensure the borrower (and some or all other security parties) maintains itself and its asset and business in a condition that remains acceptable to the lender. From the borrower's perspective, however, they should not be too onerous to fulfil since they would usually be aligned with what a prudent shipowner should be doing anyway;

d events of default, which delineate the circumstances in which the lender may demand its money back. The key event of default would be a failure to repay the loan or pay interest on time; however, there are other defaults that indicate that the borrower (or other obligors, or both) has failed to make payments to other creditors on time or failed to maintain itself and its ship and business in the required manner, or when the borrower has failed to perform its other obligations under the loan agreement (or other finance documents); and

e mandatory prepayment events whereby the borrower is obliged to repay the loan immediately (or after an agreed grace period) but with the respective event not being treated as a breach by the borrower, usually because it would be outside the borrower's control. Some examples of mandatory prepayment events include the total loss of the ship, the sale of the ship, a change of control or ownership of the borrower, it becoming illegal for the lender to maintain the loan and, in the case of pre-delivery financing, the non-delivery of the ship or the termination of the shipbuilding contract. Whether an event is an event of default (which may trigger cross-default provisions in other facilities the borrower or other group companies may have) or a mandatory prepayment event is commonly a matter of discussion between the parties.

iii Shipping-specific operative provisions

As a ship is subject to a variety of risks during its operations and is (by virtue of the ship mortgage) normally the most important piece of the lender's security package, the lender will want to ensure that the ship is adequately and appropriately insured and operated. Therefore, most shipping loan agreements will contain extensive vessel-specific undertakings, some of which relate to the insurance arrangements of the ship and others to the operation of the ship.

The loan agreement will contain insurance undertakings whereby the borrower undertakes to insure the ship for certain types of risks and, in respect of some insurances, the minimum amount for which the ship should be insured. This minimum amount is usually linked to the agreed value of the ship, which is determined by the valuations that the borrower is expected to procure (often from brokers agreed in advance with the lender) annually or semi-annually.

The lender will also expect the borrower to undertake, among other things, to pay premiums punctually and trade the ship within any limits set by her insurers. The insurance undertakings will also deal with what happens if the ship becomes a total loss or suffers a major casualty, and the borrower would usually undertake not to settle any claim in respect of these events without the prior consent of the lender.

The lender will also have a direct interest in ensuring that the ship is operated by the borrower in a prudent manner, both for reputational reasons and because the value of its security may decrease if the ship is poorly maintained. In that regard, the borrower will undertake to keep the ship in a good and seaworthy state of repair, and procure that the ship is kept in class. The lender will also want the borrower to undertake to ensure that the ship is not used for any illegal purpose and, in some cases, the lender will want the borrower to obtain its consent before employing the ship on certain types of charters (such as demise charters).

Apart from giving vessel insurance and operation undertakings, the borrower will further be required to undertake to keep the lender apprised of developments in respect of the ship and her employment and to provide the lender with material information about the ship, such as any arrest of the ship or any material incident involving the ship.

iv Boilerplate provisions

The boilerplate provisions are usually not negotiated at length and commonly include the following non-exhaustive list:

a a further assurance clause that obliges the borrower to do anything that may be required to perfect the lender's position under the loan agreement and security documents;

b a severability clause to deem unenforceable provisions to be deleted without impinging on the validity of the rest of the loan agreement;

c a governing law and jurisdiction clause that sets out, among other things, the dispute resolution mechanism and the governing law of the loan agreement;

d the notices provisions, which set out the methods of communication between the parties; and

e the transferability of the loan and security.

III SECURITY

In the context of taking security in a ship financing, there are various characteristics of ships to consider and these factors will dictate the structure of a typical security package given in favour of a lender and distinguish ship financings from other forms of finance.

Ships are movable assets and as such it is required that they maintain a national character. Broadly, this means that they must be registered with a nation state. Each state maintains its own public shipping register (or registers) that typically records ownership and security interests (most notably mortgages) over ships registered with that state. This is fundamental when taking security in connection with a ship financing, as shipping registers will generally provide prospective lenders with (1) a reliable source showing registrable encumbrances over a ship, and (2) a fairly straightforward way of perfecting registrable security interests over a ship.[2]

Other important considerations include the fact that ships are wasting assets with a limited economic life and that their market value and earning capacity are prone to fluctuation. Factors that determine the security interests that will be of practical value to a lender include:

a ships can be lost or completely destroyed or damaged beyond economic repair;
b they can be compulsorily requisitioned by their flag state;
c they can be captured by pirates or hostile states; they are potential sources of pollution; and
d they are subject to various regulatory regimes that may prevent them from navigating.

The security package will vary from deal to deal, depending on factors such as the bargaining position of the parties, regulatory considerations, the ownership structure of the ship, whether the ship is chartered out and current market conditions, as well as the condition of the ship itself. Nevertheless, most secured ship financings will include most, if not all, of the following security documents:

a ship mortgage (and collateral deed of covenants where relevant);
b assignment of insurances;
c assignment of earnings;
d assignment of charter rights;
e account security;
f shares security; and
g subordination undertakings from managers and charterer.

Given that ships tend to be owned by single-purpose companies, the lender may also seek a parent company guarantee (or a personal guarantee from an individual shareholder).

2 Aside from maintaining their respective registers, national ship registries administer regulatory oversight over ship operations. This generally covers technical and maintenance requirements, rights of seafarers, the tax treatment of ships and their earnings, and ship ownership requirements, which are of particular interest when discussing security. Some registries may require that a ship is owned by a locally registered entity.

i Ship mortgage

A ship mortgage is fundamental to any secured ship financing, as it provides the lender with the power of sale and the power to take possession of a ship to satisfy the borrower's loan obligations. A ship mortgage will be governed by the laws of the flag state, which determine both perfection requirements and the rights conferred by the mortgage. Any potential lender is able to inspect the public register maintained by the flag state to determine whether a ship is subject to other mortgages. The aim is to provide a lender with a degree of certainty with respect to where its mortgage will rank in comparison with competing mortgages (if any). Not all interests that attach to ships are registrable (some of which will take priority over a mortgagee's rights) and, as such, a lender is unable to ascertain with absolute certainty whether a ship is free from all encumbrances.

Apart from the laws of the flag state, the lender's rights and remedies are contained in the mortgage instrument (in the case of a 'long form' mortgage) and, where appropriate, a separate deed of covenant that supplements the mortgage instrument (in the case of a 'statutory' mortgage). Whether a long form or statutory mortgage is appropriate depends on the ship's flag state. As discussed in Section IV, the lender's right to take possession of a ship can be important in the event of enforcement.

ii Assignment of insurances

The operation and navigation of a ship in international trade exposes it to perils, unlike most other asset classes. Hence, the terms of the loan agreement will impose an obligation on the borrower to maintain appropriate insurance for the ship. The type of insurance will depend on, among other factors, the type of ship, her intended use and where she will be employed.

Recourse to insurance proceeds of a ship is a key component of a secured ship financing. For instance, if the vessel has suffered damage, the lender will want to see that the insurance proceeds are applied in repairing the ship. Furthermore, if the ship becomes a total loss, the lender will want to be able to directly apply the insurance proceeds in prepayment of the loan.

An assignment of insurances will generally also include an assignment of any requisition compensation, which is payable by a flag state to a shipowner in the (unlikely) event that the flag state appropriates title to the ship.

Pursuant to English law, there are various requirements to perfect a legal assignment.[3] In the context of security documentation, of particular relevance is the requirement to give notice to the other party to the assigned rights,[4] which, in the case of an assignment of insurances, will be the relevant insurer. In addition to the notice, a lender will usually require a letter of undertaking from the insurer in which the insurer typically undertakes to notify the lender of any material changes to the ship's coverage (for example, should coverage cease or the borrower not make premium payments), confirms that the lender's interests are noted and undertakes to pay out in accordance with the agreed loss payable clause (which notes the lender's interest).

3 Law of Property Act 1925, Section 136.

4 Should a legal assignment be defective because the notice requirement has not been satisfied, the assignment will be equitable in nature.

iii Assignment of earnings and accounts security

Similar to other assets, commercially operated ships derive most of their value based on their capacity to generate earnings. Since ships tend to be owned by single-purpose companies, the ship's employment earnings are commonly the only way that a borrower can satisfy its loan obligations. As earnings are so important in a ship financing, it is desirable for a lender to have a degree of control over them, and this often takes the form of an assignment of earnings in favour of the lender.

As part of the security package, the loan agreement will generally provide that the borrower must procure that the ship's earnings are paid into a specified account or series of accounts in its name, held with the lender, over which the lender will take security. The account will typically not be blocked unless a default has occurred but the borrower will be under an obligation to apply the ship's income in a predetermined way, possibly by distributing funds to specific blocked accounts to satisfy certain loan obligations; for example, interest payments.

iv Assignment of charters

When a ship is employed on a long-term charter (rather than being employed on the spot market), it is not unusual for the lender to require a specific assignment of the owner's rights under that charter. This is to give the lender a degree of control over the charter to be able to preserve it should the borrower fail to do so.

Just as in the context of assignments of insurances and earnings, notice is required to perfect an assignment of a charter. Although an acknowledgment is not required to ensure that the assignment is perfected, a lender often requires this from the charterer and includes a contractual obligation for the borrower to obtain this from the charterer. This acknowledgment from the charterer to the lender creates a direct contractual link between the lender and charterer and often includes additional rights in relation to the charter (for example, a right for the lender to step in and perform the charter) or obligations (for example, an obligation for the charterer to notify the lender directly of any breaches by the borrower) rather than the lender relying solely on its rights as an assignee.

The content of such notices and acknowledgements will depend on the commercial agreement between the parties and agreement with the charterer.

v Shares security

Another common requirement by lenders is security over the shares in the borrower. The typical ownership structure of a ship, in which she is owned by a single-purpose company, is advantageous here for a lender, as it effectively provides the option to take control of a ship in the capacity of shipowner in the case of an event of default, without exercising a ship mortgage. One risk of exercising share security, however, is that liabilities in connection with the ship can attach to the owner, which can inadvertently expose a lender to certain claims (for example, certain environmental liabilities).

vi Subordination undertakings from managers and charterers

As a result of the commercial operation of a ship, there are potentially numerous third parties that may have claims against the borrower or the ship, which, in the event of the borrower's insolvency or other default, may compete with (and may rank higher than) claims of the lender. To minimise the risk of competing claims against the borrower, the lender may request that certain third parties provide undertakings that subordinate their claims to those of the lender arising under the finance documents, and only once the borrower's obligations to the lender are satisfied may those third parties commence enforcement.

Typically, these undertakings are given by charterers, ship managers (both commercial and technical managers where relevant) and other co-assureds to the ship's insurance policies. Whether subordination undertakings form part of the security package will depend on the parties involved and their respective bargaining positions.

IV DEFAULT AND ENFORCEMENT

Other than as specified in the loan agreement, a lender does not normally have a right to demand early repayment of the amounts outstanding under a term loan. Therefore, the loan agreement will specify certain events of default (i.e., events, circumstances or conditions that would give the lender the right to demand early repayment of amounts outstanding under the loan agreement).

The loan agreement may provide the borrower with the opportunity to remedy some defaults, particularly in respect of matters that are of comparatively less importance to a lender. Only with the expiry of the relevant grace period would the lender be able to exercise its rights and remedies under the loan agreement and to enforce its security.

Even so, when an event of default has occurred, in practice the lender is likely to reserve its rights in the first instance while it assesses its options. The earliest decisions that the lender will have to make include whether to negotiate with the borrower or to enforce its security. What the lender will choose to do often hinges on the state of the shipping market, the nature and severity of the default, the strength and outlook of the borrower, among other things.

i Negotiation

If the lender chooses to remain in the loan, instead of enforcing its security, it has a number of options:

a not to do anything (e.g., if it expects an upturn in the market); or

b reschedule or restructure the loan; for example, by agreeing a moratorium on the principal, extending the maturity date of the loan (and agreeing a balloon payment at the end of the maturity period), or advancing more funds to the borrower as working capital with the intention that the borrower will get back on its feet and service its debt properly again.

ii Enforcement of the ship mortgage

The lender's most valuable security is the mortgage over the ship. Therefore, although the lender has the option of appointing a receiver and the right of foreclosure, in practice the lender will commonly exercise one of the following options:

a arrest the ship and realise its security by way of a judicial sale;

b arrange a private sale; or

c take possession and operate the ship.

The viability of arresting a ship depends on where the default is effected. Each jurisdiction will have its own characteristics and the lender will want to consider carefully the procedure for arrest, the efficiency of the judicial system, the procedure for a judicial sale (including how long it would take for sale proceeds to be released) and, importantly, the relative ranking of different creditors. The lender should also consider the timing of the arrest – whether the ship is laden with cargo and whether she is currently chartered out.

A judicial sale has a number of advantages: first, the borrower will find it difficult to allege that a proper price has not been paid; and second, the buyer of the ship will obtain good title, free of maritime liens and encumbrances. However, the procedure can be costly and may take some time, depending on the jurisdiction.

However, a private sale can be a more timely and cost-effective option (relative to arrest proceedings). The lender could either request that the borrower sells the ship itself or, depending on the jurisdiction, exercise its power of sale under the mortgage. In the case of a private sale, any maritime liens will follow the vessel and this may negatively affect the price that the lender can achieve.

Finally, the lender could simply take possession of the ship and operate it. This may be a temporary measure taken prior to selling the ship in a more favourable location, or the lender may choose to wait for an upturn in the market. Either way, however, the lender has certain obligations as a mortgagee in possession; for example, the lender becomes liable to pay the expenses incurred in the future operation of the ship (including any crew wages earned).

V RECENT DEVELOPMENTS

This new decade continues to be eventful with the shipping industry having to deal with the impact of the covid-19 pandemic, armed conflict and dramatic shifts in the oil price. However, even as the world grapples with widespread disruption, the market will have to address the discontinuance of a number of interbank lending rates and the growth of interest in environmental, social and governance (ESG) considerations.

i Discontinuance of interbank lending rates

Current position

Several major interbank lending rates (otherwise known as screen rates) used as benchmarks for the setting of interest rates under shipping loans have now been discontinued, including the majority of London Interbank Offered Rates (LIBOR) tenors. One, three, six and 12 month USD LIBOR will continue to be published until 30 June 2023, but since June 2021 the Alternative Rates Committee has recommended that no new loan products referencing USD LIBOR should be issued. In November 2022, the UK Financial Conduct Authority (FCA) proposed maintaining the publication of an unrepresentative ‘synthetic’ one, three and six USD LIBOR until the end of September 2024, after which publication would end entirely. This is undergoing a consultation process at the time of writing.

Lenders have therefore been actively transitioning existing loans away from LIBOR. The Secured Overnight Lending Rate (SOFR) published by the Federal Reserve Bank of New York is the recommended alternative to USD LIBOR. To facilitate a transition in the syndicated loan market, the Loan Market Association published exposure drafts and recommended forms of facility agreement that incorporate provisions for either a switch to risk-free rates (RFRs) or day one use of RFRs. These have been widely used by banks in the London loan market as the basis for documenting new USD loans referencing SOFR and re-documenting existing loans to reference SOFR instead of USD LIBOR. These forms can also be used for documenting bilateral USD loans that use SOFR, if amended appropriately. A key feature of amendments for transitioning loans is credit adjustment spreads. As LIBOR represents the higher risk to lenders of lending over a term period, compared to the lower risk of an overnight rate, credit adjustment spreads allow for a fair conversion of LIBOR to SOFR without the lender having to accept a lower overall interest rate. On new loans, the credit adjustment is built into the margin.

Alternative reference rates for US dollars

As noted above, SOFR has been selected as the recommended alternative to USD LIBOR. Unlike LIBOR, which is a forward-looking term rate, SOFR is a backward-looking overnight rate. This means that a methodology for using SOFR to calculate the interest rate that applies to each interest period of a loan needs to be adopted. SOFR can be applied in the following ways:

a SOFR compounded in arrears;

b SOFR compounded in advance;

c simple daily SOFR in arrears; and

d term SOFR.

There are other possible alternatives to USD LIBOR, which include fixed rates, base rates and 'credit sensitive rates' (e.g., AMERIBOR and the Bloomberg Short Term Bank Yield Index).

Fixed rate and base rate referencing loans could be more appropriate for smaller loans where borrowers are not familiar with RFRs as such rates avoid the complexity associated with using RFRs such as SOFR, particularly when the compounding in arrears methodology is used.

Some US regional banks have been reluctant to use SOFR and have been using credit sensitive rates such as AMERIBOR. However, for UK regulated banks, the FCA has warned that it does not want to see transition to these rates because there is doubt as to whether they adequately address the problems identified in relation to LIBOR.

SOFR compounded in arrears

Compounding in arrears is the most common way in which SOFR and other RFRs have been applied. This approach is encouraged by both the Alternative Reference Rates Committee (ARRC) and the Sterling Working Group as being the most robust, being based on actual overnight rates.

While the ARRC encourages the use of SOFR compounded in arrears for most loans, there are some disadvantages. The main disadvantage as against term rates such as LIBOR is that it is not possible at the start of the interest period to calculate the interest payment that will be due at the end of the interest period. This has obvious implications for the borrower in terms of managing cashflows. Furthermore, the drafting required to document the use of a compounding in arrears methodology is considered by many to be more complex than the provisions used to document LIBOR based loans. This method of calculating interest can also give rise to operational issues (and additional costs) for lenders in terms of their preparation for issuing loans that use SOFR compounded in arrears. SOFR compounded in arrears is most commonly used in syndicated loans (and, in particular, where these have linked interest rate hedging), as the higher liquidity of the overnight market compared to the Term SOFR derivatives market generally results in lower costs for obtaining hedging.

SOFR may be compounded in advance using rates observed over a specified period prior to the start of the interest period. As with LIBOR, this allows the interest amount that will be payable at the end of the interest period to be calculated at the start of the interest period. However, this may be unattractive to lenders as it will not reflect fluctuations in SOFR that occur through the interest period and may be perceived as being stale.

It is for this reason that SOFR compounded in arrears is most commonly found in syndicated loans incorporating interest rate hedges, with the hedging product providing the borrower with protections against adverse interest rate fluctuations.

Term SOFR

To avoid some of the disadvantages of using backwards looking RFRs compounded in arrears, much discussion has centred around the possibility of constructing term rates from overnight RFRs, which work in a similar way to LIBOR based loans. These are based on derivatives traded in the market that reference the relevant RFR. Such term rates would represent a market expectation of the average value of the relevant RFR over a designated tenor.

Term SOFR is published by CME Group and was endorsed by ARRC in July 2021 for business loans, particularly for multi-lender loans, mid-market loans and trade finance. The ARRC does, however, continue to encourage the use of overnight SOFR given its robustness. Notably, different regulators have differing approaches to the use of forward-looking RFR linked term rates, including Term SOFR, which may have contributed to the much slower uptake of Term SOFR in European syndicated loan markets in comparison to the equivalent US markets. Term SOFR is also still less widely used because lenders may have already made changes to loans prior to July 2021, before Term SOFR had been launched. Lenders may well be reluctant to incur costs in making further amendments.

Where suitable for use, the FCA has indicated that ARRC recommended practice for Term SOFR would be relevant for lenders undertaking USD business in London. The LMA published an exposure draft of its developing markets form of facility agreement that incorporate Term SOFR, noting that there was a particular demand for the use of Term SOFR in USD loans to entities in developing markets. The exposure draft, however, needs to be amended or supplemented, or both, to cover for certain eventualities, for example regarding fallback provisions in the case of the unavailability of SOFR.

ii ESG criteria

The general rise of impact investing has also led to the growth of interest in ESG criteria within the shipping industry, where many lenders are taking an increasingly close interest in the way borrowers' businesses are run. This in part is leading the rapid development of the kinds of environmental undertakings in loans, as well as the stringency of such undertakings. For instance, it is becoming increasingly commonplace for borrowers to undertake to ensure ships are recycled in an environmentally responsible fashion (commonly known as green recycling) and to provide lenders with data on carbon dioxide emissions that is specific to the financed vessel. At the time of writing, a total of 12 European financiers are now members of the Responsible Ship Recycling Standards (RSRS) for banks. These were drawn up by three Dutch banks in 2017 to create standards for responsible ship recycling, which their borrowers will have to sign up to. In addition to conventional vessels, mobile offshore units, such as oil and gas platforms, are now also included in the scope of the RSRS. Further, access to finance may also be conditional on compliance with the Poseidon Principles. Established in 2019 and now with 18 signatories, they create a commitment between the finance and shipping sectors to implement the International Maritime Organization's policies on climate change into ship financing transactions. Compliance with these standards in exchange for lower margins for borrowers is becoming increasingly common. Shipowners who fail to adapt will increasingly have a competitive disadvantage in terms of access to financing on competitive terms.

Sustainable finance is now part of the European Union's Green Deal, which links the credit rating of financial institutions to ESG performance of their portfolio companies. Through more concrete regulations and principles, environmental considerations will become an integral part of loans and a key consideration for financial institutions, which will lead to shipping companies having to implement more rigid internal policies and encourage compliance with these policies.

It remains to be seen whether the role of ESG criteria and the rise in sustainability-linked loans will mark the next stage in the evolution of ship finance. Nevertheless, we would expect both to be key factors going forward.

iii Russia and Ukraine

Since 24 February 2022, numerous vessels have become stranded in Ukrainian ports following the imposition of navigation restrictions or the risk of seizure or attack by Russian forces. This serves as a reminder to financiers (and all other interests) of the need to carefully review each vessel's insurance cover (including war risks) and, where appropriate, require their borrowers to take out loss of hire insurance.