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RESPONSE OF THE IRISH MARITIME LAW ASSOCIATION

CMI International Working Group on Vessel Nomenclature

Questionnaire #1 (March 2016)

The purpose of this questionnaire is to identify variations and conflicts in the definitions of "vessel," "ship" and related terms, both internally in your legal system and externally, between the laws of the member States and then to assess the impact of those variations and conflicts.

We assume for this exercise that the basic general definition of "vessel," in common understanding, might be that contained in Article 11b of the International Convention on Salvage, done in London 28 April 1989:

"Vessel means any ship or craft or any structure capable of navigation."

We also assume that the common understanding of the term "ship" is reflected in the International Convention for the Prevention of Pollution from Ships, London, 2 November 1973 and Protocol, London, 17 February 1978

Art. 2/4: Ship means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.

From this vantage point we ask that you respond as fully and completely as possible to the questions which follow.

Questions:

1. Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either "Vessel" or "Ship"? If so, which is (are) the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

There is no basic general definition of the word “vessel”, “ship” or related terms in Irish law.

However, there is a *definitions* section in the Merchant Shipping Act 1894 (which remains the principle Act in Ireland relating to Merchant Shipping) and this provides as follows:

“In this Act, unless the context otherwise requires, the following expressions have the meanings assigned to them, that is to say – *vessel* includes any ship or boat, or any other description of vessel used in navigation; *ship* includes every description of vessel used in navigation not propelled by oars; ...”

Many later Acts enacted by the Irish legislature (usually with the words Merchant Shipping in the title) are expressly to be construed as one with the 1894 Act and, therefore, will have the same meaning applied to the words *vessel*, *ship* and related terms unless the context requires otherwise. Apart from such express provision, the Irish courts will not import definitions from one Act into another Act except in a case where the court can be persuaded that the two Acts concerned are *pari materia*.

Where the legislature does not give a term a technical meaning the court itself will determine the ordinary meaning to be given to the term by reference to dictionaries or by itself taking judicial notice of the way English was spoken at the time the Act was enacted (per Kenny J. of the Supreme Court in *Re South Coast Boatyard (in voluntary liquidation) Barber v. Burke and ors*, unreported judgment delivered 31st July 1980). A copy of that judgment relating to the meaning of the term *ship* in the Companies Act is attached hereto.

2. In your system, does the definition of "vessel" (or equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labor, environmental, casualty, insurance or taxation law?

In general, the registration and flagging of ships, the registration of marine mortgages, the regulation of safety and seagoing labour and dealing with casualties, are regulated in Ireland by the Merchant Shipping Acts with a common definition for vessel and ship and related terms as mentioned above. Some divergence has been introduced by the Registration of Ships Act, 2014 which provides a definition for “ship” as including; “includes every description of vessel used in navigation not propelled exclusively by oars and includes personal watercraft and small fast powered craft. In turn “small fast powered craft” is defined as a ship (other than a recreational craft or a fishing boat) of less than 7 metres length overall with a total propulsion engine power of equal to or greater than 150 kW, or as prescribed under section 11(5) while personal watercraft is defined as ““personal watercraft” means a ship (other than a recreational craft) of less

than 7 metres in length overall which uses an internal combustion engine having a water jet pump as its primary source of propulsion, and which is designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of a hull, or as prescribed under section 11(5).

A distinction is drawn in Ireland between ships below 24 metres load line length and those above the former being exempted from having to be registered when operating domestically for pleasure.

Environmental, insurance and taxation law will not follow suit. International conventions ratified by Ireland do not take effect in Irish law unless and until they are enacted in domestic legislation; however, in modern times the Irish parliament, An Oireachtas, has adopted the legislative technique of incorporating international conventions as a "Schedule" to the relevant domestic Act so that each such convention takes effect in Ireland complete with its own internal definitions.

3. Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Yes, the Irish legal system provides for the arrest of ships for *maritime claims* as defined by the Convention on the Arrest of Sea-going Ships, 1952, which is a Schedule to the Jurisdiction of the Courts (Maritime Conventions) Act, 1989. Mortgages on Irish ships are registered under the Mercantile Marine Act, 1955, and take priority *inter se* according to the date of registration. Foreign mortgages (whether registered in their own country or not) are treated as unregistered mortgages and rank in priority immediately after registered Irish mortgages (per Walsh J., Griffin J. concurring, Henchy J. dissenting, in the *Fritz Raabe* unreported judgment of the Supreme Court delivered 1st August, 1974). There has been some litigation in Ireland in respect of whether an unregistered vessel, enjoying the exemption accorded to pleasure craft under 24m in length as to whether, being a vessel not registered under any flag, such a vessel was susceptible to an arrest under the 1952 Convention or otherwise. The reference to "flying the flag" in the 1952 Convention has been interpreted by the Irish Courts, in this context, to denote the nationality of the Vessel rather than a requirement for the same to be registered in order for the same to be susceptible to arrest under the Convention.

4. Has the 1993 Convention on Maritime Liens and Mortgages ("MLM-93") been adopted or followed in your jurisdiction?

No, neither adopted nor followed.

5. In your jurisdiction is the acceptance by a registrar or other governmental body of property as a "ship" or "vessel" or equivalent term dispositive of its status under your law?

No, though the courts tend to defer to the competent authority. A refusal by the Irish Registrar of Shipping to register a vessel for a number of reasons, inter alia due to it allegedly not satisfying the qualifying characteristics of a ship, is susceptible to an appeal to the District Court with a further appeal to the Circuit Court (section 22 of the Registration of Ships Act, 2014).

6. If property is categorized as a "vessel" in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

Having regard to the answers to questions 3 and 5 above, the Irish courts would categorize the property in accordance with Irish law and would treat the property accordingly. No decision has been yet furnished by the Irish Courts on the matters determined by the *Halcyon Isle* [1981] A.C. 221 as to whether, in respect of priorities, maritime liens, mortgage rights etc, it would be the *lex fori* or the *lex causus* which would determine this issue.

7. Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property:

1. non-self-propelled barges.

Yes, the *Von Rocks* [1998] 2 Lloyd's Rep. 199, (backhoe dredger having been towed across the North Sea should be regarded as a ship within the meaning of the Arrest Convention, per Keane J. Barrington J. and Lynch J. concurring).

2. self-propelled barges
3. accommodation barges
4. Mobile Offshore Drilling Units
5. wind turbine towers (floating or permanently fixed)
6. jack up drill rigs
7. construction barges
8. submarines
9. seaplanes
10. hydroplanes (air cushion)

11. Vessels under construction – See case referred to above – unreported decision of McGovern J. in *M/V Crownline* 270CR 23rd June, 2011 where (new) Vessel was not registered but nevertheless found susceptible to arrest.
12. unmanned vessels
13. Vessels devoted temporarily or permanently to storage of bulk commodities
14. Vessels in "cold layup"
15. Derelict Vessels or "Dead Ships"
16. Vessels under Conversion or Renovation.

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court's views. See the *Von Rocks* [1998] 3 IR 41 and [1998] 2 Lloyd's Rep. 199,

And what about floating nuclear power stations currently under construction in Russia and China?



8. We attach a most excellent summary by Professor Bulent Sozer of Istanbul regarding the variations in definitions, usages and limitations on application of terms in many international conventions. Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Owing to the legislative technique referred to above, there are no apparent variations in Irish law from the International definitions.

9. Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of "vessels", "ships" or equivalent terms have impacted results in any

legal proceeding of which you are aware? If so, please provide details.

Yes, *Re South Coast Boatyard (in voluntary liquidation) Barber v. Burke and ors*, unreported judgment delivered 31st July 1980 (referred to above). A copy of the judgment relating to the meaning of the term *ship* in the Companies Act is attached hereto.

Note to responders: If you find that these questions do not invite easy or straightforward answers in the context of your legal system, please explain why and provide what information and descriptions you may believe useful to the IWG in its effort to determine the scope of the definitional issues.

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THE SUPREME COURT

(259/1979)

No. 280 Sp./1979

Walsh J.
Kenny J.
Parke J.

**In the matter of SOUTH COAST BOATYEARD (IN VOLUNTARY
LIQUIDATION)**

Between/

JAMES BARBER

Plaintiff

and

**BARRY BURKE, PATRICK HICKEY AND MALLINSON WOOD PRODUCTS
LIMITED**

Defendants

JUDGMENT delivered on the 31st day of July 1980 by Walsh J.

The facts in this case in so far as they are relevant are fully set out in the judgment Mr Justice Kenny is about to deliver and there is no need for me to recite them.

The essential point in the case is whether or not the yachts in question were ships within the meaning of section 99 of the Companies Act 1963. Unlike the Bills of Sale (Ireland) Acts 1879 and 1883, the Companies Act did not speak of both ships and vessels. I think it is valid to assume that all ships are vessels but that not all vessels are ships. For the purpose of the present case it is necessary to arrive at some definition of a ship within the meaning of the Companies Act to decide whether or not the yachts in question can be so classified.

A ship, technically speaking, designates a particular species of a sea-going vessel. Originally it referred to three-masted vessels, square rigged throughout, with tops and yards to each of the masts. In the generic sense a ship is a vessel of burden, irrespective of the rig, and without regard to the particular means of locomotion. There are at least one dozen statutes in each of which the words "ship" or "vessel" are given a statutory definition for the purposes of that particular statute and none of which are of any particular help in the present case. For example, in the Fisheries (Ireland) Acts a vessel includes "any ship, boat, cot, coble or curragh". The most recent definition of "ship" in Irish legislation is contained in the definition section of the Statute of Limitations 1957 which describes a ship as including "every description of vessel used in navigation not propelled by oars". Yet in the generic sense one could scarcely regard the very large vessels which carried hundreds of troops and were propelled by galleys of oarsmen as being other

than ships. The term "vessel" does not include everything that floats. For example, it would not include a raft but it would certainly include everything which would be called a boat or a ship. For my own part I derive no assistance whatever from the various statutory definitions of ships or vessels and I think the only sensible approach is to deal with the term "ship" in its generic sense. In my view, that means a vessel of burden, irrespective of rig and without regard to the particular form of locomotion. I note that Blackburn J. in In Re Ferguson 40 L.J.Q.B. 110, in dealing with section 2 of the Merchant Shipping Act 1854, concluded that "every vessel that substantially goes to sea is a ship". The vessels in question in the present case are ocean racing yachts the primary purpose of whose design would appear to be to make them as fast as possible, carrying as much sail as possible and as little weight as possible. The fact that they contain berths for six persons is in my view of no consequence as it is assumed that provision is made only for the crew. There is no suggestion whatsoever that these vessels were designed as vessels of burden and in fact all the evidence indicates the contrary. For that reason I am of opinion that they are not to be regarded as ships within the meaning of section 99 of the Companies Act 1963.

Judgment delivered 31st July 1980 KENNY J.:

South Coast Boatyard Limited ("the company") carried on the business of building ocean-going yachts at Cork Harbour and, by, 1978, had succeeded in establishing a considerable international trade in its products. The Governor and Company of the Bank of Ireland ("the bank") were its bankers. By a mortgage debenture of the 4th October 1974 the company charged all its assets with repayment to the bank of all moneys advanced by it. This was stamped to cover £155,000. The bank had imposed a limit of £80,000 on its advances to the company but this, together with the paid up share capital of £70,000, was not enough to make it possible to carry on the business of the company. The directors of the company began negotiations first with Foir Teoranta and then with the Bank of Ireland Finance Limited (a merchant bank associated with the bank) to secure more working capital and while these were going on, the bank allowed the company to overdraw its account with them up to £220,000.

Management accounts for the three months from April to June 1978 became available in August and showed a considerable loss during that period. On 4th September 1978 the bank required immediate payment of the amount of the overdraft in excess of £80,000 and warned the directors of the company that they would not honour its cheques until this amount was paid. Barry Burke and Patrick Hickey ("the lenders"), who are the first and second named defendants, were directors and shareholders of the company and believed it would prosper if it could survive. They agreed to lend the company £140,000 out of their own moneys if they got as security a transfer of the yachts some of which were in course of construction and were in the company's yard and others of which were at sea or in ports in and outside Ireland. The company's directors agreed to accept this offer.

On 8th September a written agreement was made the material parts of which read:

"AGREEMENT made 8th September 1978 BETWEEN The South Coast Boat Yard Limited ... (hereinafter called "the company") of the one part Barry Burke and Patrick Hickey (hereinafter together called "the lenders") of the other part whereby it is agreed as follows:

1. The lenders agree to lend the company on the security of the boats set out in the Schedule hereto the sum of £140,000 (hereinafter called "the loan") and the company hereby transfers to the lenders all of the said boats (hereinafter called "the boats") as security for repayment of the loan.

2. Such transfers are in each case subject to the provisions hereinafter set out
3. If within 6 months from the date of this agreement the company proffers to the lenders in cash or by bank draft the portion (hereinafter called "the appropriate sum") of the loan secured by one or more of the boats together with interest on the appropriate sum at the overdraft rates charged from time to time by the Irish Clearing Banks on accounts with a single A rating for the period during which the appropriate sum was outstanding, the lenders shall forthwith transfer such boats back to the company".

There were 13 yachts mentioned in the Schedule. 7 of these were being constructed in the shipyard, one was at sea, two were in Holland, one in Hamburg, one in Sydney and one in Cork Harbour. All of them were described as Shamrock racers and had a specification which read: "General Classification, I.O.R. rating 21.5 approx. 3 Ton Mask Head Sloop. Length 30 feet. Beam 10 feet 2 inches. Draft 4 feet 6 inches. Weight:3 tons. Keel lead. Inboard Engine. Diesel 15 H.P. 6 berth cabin with galley, W.C. and chart table"

The agreement was not registered as a charge with the registrar of companies under s. 99 of the Companies Act, 1963 because the lenders' solicitors advised, them that this was not necessary.

When the agreement of 8th September had been signed, the lenders paid £140,000 to the bank to the credit of the company.

When the management accounts for the period July/August 1978 were produced, they showed a further substantial loss. The directors of the company decided that this further loss together with the continuing international depression in the boat market made it necessary to liquidate the company which was then insolvent. The plaintiff was appointed liquidator of the company at a meeting of its creditors on 28th September 1978 and was advised that the agreement of 8th September was invalid because it had not been registered under s. 99 of the Companies Act, 1963. He has now brought these proceedings seeking a determination by the High Court of the question whether the agreement of 8th September 1978 was void. The third named defendants were joined to represent the unsecured creditors. In the High Court, Mr. Justice McWilliam held that the yachts were not ships and that the agreement did not require registration. The unsecured creditors have now appealed to this Court.

Before dealing with the legal issues I think I must say something about the meaning of the terms used in the specification, "I.O.R" means "International Offshore Rules". All yachts which are keel boats and which engage in long distance offshore racing have to be measured and allocated an I.O.R rating for handicap purposes. The measuring authority for the Republic of Ireland and the United Kingdom is the Royal Ocean Racing Club. The purpose of the rating is to enable "a corrected time" for races to be worked out. This is done by taking the actual time taken and then taking account of the rating, the corrected time is calculated. Thus boats of substantially different design and dimension can race notionally on level terms. "Weight 3 tons" means the displacement of the yacht i.e. the weight of water displaced which is the weight of the boat itself. In design the specified displacement should be the weight of the complete boat in seagoing state with fuel stores and crew but, in pamphlets and advertisements the weight given is often the weight of the boat only. The weight is not the same as "the registered tonnage". The Matter is, speaking broadly, measured on the cubic capacity of the ship. Section 91 of the Mercantile Marine Act, 1955 provides that the tonnage of every ship to be registered under that Act was to be ascertained in accordance with regulations made by the Minister for Industry and Commerce: the relevant regulations now are the Merchant Shipping (Tonnage) Regulations 1967 (S.I. No. 213 of 1967).

The relevant parts of s. 99 of the Companies Act, 1963 read:

"99 (1) ... every charge ... being a charge to which this section applies, ... shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, ... are delivered to or received by the registrar of companies for registration ... within 21 days after the date of its creation.

(2) This section applies to the following charges:

(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

(h) a charge on a ship or any share in a ship".

There is therefore a reference in the section which we have to construe to the Bills of Sale (Ireland) Acts 1879 and 1883. "Bill of Sale is defined in s. 4 of the Act of 1879 and the relevant parts of the definition read:

"The expression "bill of sale" shall include bills of sale, assignments, transfers ... and other assurances of personal chattels ... and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred but shall not include the following documents; ... transfers or assignments of any ship or vessel (emphasis added) or any share thereon"....

The yachts are certainly vessels so that the agreement of 8th September 1978 did not require registration under sub-s. 2(c) of s. 99 of the Act of 1963. The definition of bill of sale has however particular significance for the instant case. The exception relates to ships or vessels and shows that there may be vessels which are not ships and that a wider class of vessel is contemplated by the Act of 1879 than that in s. 99(2) (h) of the Companies Act, 1963

There are numerous definitions of "ship" in Acts dealing with various aspects of shipping but little help is to be got from them. In the Merchant Shipping Act, 1894 and in the Mercantile Marine Act, 1955 ship is defined as "including every description of vessel used in navigation not propelled by oars" while in the Merchant Shipping (International Labour Conventions) Act, 1933 ship is defined as meaning "any seagoing ship or boat of any description which is registered in Saorstát Éireann and includes any fishing boat entered in the fishing boat register in Saorstát Éireann but does not include any tug, dredger, sludge vessel barge or other craft whose ordinary course of navigation does not extend beyond the seaward limits of the jurisdiction of the harbour authority of the port at which such vessel is regularly employed if and so long as such vessel is engaged in her ordinary occupation". The dictionaries do not help. In the most recent, Collins Dictionary of the English Language (1979 Edition) which has a most diverse and learned board of consultants, ship is defined as:

"1. a vessel propelled by engines or sails for navigating on the water esp. a large vessel that cannot be carried aboard another as distinguished from a boat. 2. Nautical a large sailing vessel with three or more square-rigged masts. 3. the crew of a ship."

While the Shorter Oxford English Dictionary (1933 Edition) has this entry for ship: "A large seagoing vessel (opp. to a boat); spec, (in modern times) a vessel having a bowsprit and three masts, each of which consists of a lower, top and topgallant mast".

The Court is, in my opinion, entitled to have regard to the way in which English was spoken and used in 1963. If, in that year, any Irishman or, indeed, Englishman went to Dun Laoghaire during the sailing season and saw the many yachts in the harbour and was asked by a linguistic philosopher how he would describe the vessels in the harbour, he would say that the British Rail vessel was a ship, that the yachts were yachts and the rowing boats were boats. If he were pressed on what he called yachts, he would say that they were vessels. He would never dream of calling any of the yachts there, irrespective of their size, ships.

This last mentioned matter and the contrast between the language of the Companies Act, 1963 and the Bills of Sale (Ireland) Act, 1879 persuade me that none of the 13 vessels mentioned in the agreement of 8th September were ships.

In my opinion the judgment of Mr. Justice McWilliam was correct, the first question posed by the liquidator should be answered 'No' and the appeal should be dismissed.