CMI Questionnaire – Legal treatment of mobile offshore renewable units in the UK.

Treatment of Domestic MORUs as property

1. *Would the courts in your jurisdiction, recognize any (or all) of the categories of MORU as a "vessel" or "ship" or other "marine equipment" or other special type of property? If so, please explain with reference to authorities.*

   a) The likelihood of the English Courts recognising a MORU as a "vessel" or "ship" will depend on the individual characteristics of the MORU in question. In that regard we would note that it is possible that not all of the MORUs as defined by the CMI will be viewed in the same way. For example, a floating substation at an offshore windfarm might be within the definition under (b) as "transmission" and an ammonia FPSO or hydrogen FPSO under (c) when powered by other MORUs (e.g. floating offshore wind). However, it would seem that it would not include the same FPSO when powered by other power sources (e.g. bottom-fixed offshore wind).

   b) According to Section 313(1) of the Merchant Shipping Act ("MSA") 1995, which applies in England, Wales, Scotland and Northern Ireland, a "…*"ship" includes every description of vessel used in navigation*". Therefore, for a MORU to be a "*ship*", it must (a) be a vessel which is (b) used in navigation.

   c) A substantial body of case law has built up over the years which consider what the terms "*ship*", "*vessel*" and "*used in navigation*" mean.

      (i) In *Steedman v Scofield* [1992] 2 Lloyds Law Reports 163, Mr Justice Sheen concluded that a jet ski was not a "*vessel used in navigation*" for the purposes of the Merchant Shipping Acts 1894-1988. Although the MSA 1995 has superseded those earlier Merchant Shipping Acts, the definition of "*ship*" at Section 313(1) of the MSA 1995 is the same as the definition considered in that case. Accordingly, Mr Justice Sheen's comments as to what is a "*vessel*", and what is meant by the term "*used in navigation*" are relevant for present purposes.

      (ii) Mr Justice Sheen explained "*as to (a) a vessel is usually a hollow receptacle for carrying goods or people. In common parlance "vessel" is used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transportation on water.*" Although Mr Justice Sheen did not consider that a jet ski met this test, he continued "*to consider (b) what is meant by "used in navigation"? Navigation is the nautical art or science of conducting a ship from one place to another. … The word "navigation" is also used to describe the action of navigating or ordered movement of ships on water. … To my mind the phrase "used in navigation" conveys the concept of transporting persons or property by water to an intended destination. … "Navigation" is not synonymous with movement on water. Navigation is planned or ordered movement from one place to another.*"

(iii) Considering one further, even earlier case, in *Merchants Marine Insurance Co Ltd v North of England P&I Association* [1926] 26 Lloyd's LR 201 the Court of Appeal concluded that the floating crane in question was not a ship or a vessel. In that case, whilst the structure on which the crane was fixed did not have its own propulsion nor its own steering, *per* Lord Justice Bankes what was material was that it was "*so unseaworthy that it can only be moved short distances, or comparatively short distances, and only when the weather is exactly favourable*". Instructive for our purposes are the remarks of Lord Justice Scrutton: "*…there may be an infinite degree of variety in the facts to which the definition is applied. It may depend on the use being made for the time, and for how long a time, of the particular object: it may have been a ship which ceased to become a ship by its use: it may depend upon the degree of stationariness and mobility- the extent to which the object remains stationary and the extent to which it moves, and it may depend upon the purposes for which the object is used: it may depend upon its adaptability and navigability, and further than that I do not feel able to go. One can only deal with the objects as they turn up, to see whether they are or are not ships or vessels.*"

d) A likely essential feature of any analysis is if the asset is capable of traversing water in a stable manner. That is, can she float or otherwise withstand the perils of the sea (and other bodies of water). Nevertheless, the complexity of predicting the approach of the court should not be underestimated. How, for example, would the court view a floating wind turbine that is unmanned, not self-propelled and one of many identical units that are intended to be towed from port and then moored in a (very) specific offshore location for (say) 10 years before being towed back to port for maintenance or disposal. As a further example, consider the case of an ammonia FPSO powered by a nearby floating offshore wind farm, where the FPSO is manned and based around a ship-shaped hull.

e) Relevant statutory provisions also recognise that assets will be defined very differently based on their individual characteristics. MORUs have been described both as units and installations. Such provisions include the Contracts for Difference (Miscellaneous Amendments) Regulations 2022 and the Energy Act 2004. The latter includes a definition of **"renewable energy installation"** but it does not add much to a debate about what is a ship.

Would the courts in your jurisdiction recognize any of the categories of MORU as a "vessel" or "ship" if it were equipped with an integrated dynamic positioning or other station-keeping system, (including any automated system, or remotely or autonomously directed system)?

The Courts will likely focus on whether the MORUs are being "*used in navigation*". Navigation generally describes a vessel that can transport cargo or persons by water to an intended destination. Provided that navigation is a significant part of the function of the vessel, even if incidental to its actual use, as a matter of jurisdictional fact, the vessel is likely a ship. Thus, most drilling rigs and semi-submersibles are ships. As are many barges (self-propulsion is not a necessary or an essential function).

2. *Is it possible in your jurisdiction to record ownership interests in any (or all) of the categories of MORU in a public register?*

If a MORU were to meet the criteria and be defined as a "ship" or "vessel", then it could be registered in the U.K. Ships Register under Part II of the MSA 1995.

Failing that, it would be recorded as an asset of a corporate entity registered at Companies House. In such a case, the closest thing to a "public register" would be licensing/environmental/CFD information made public, but it would be administrative in nature.

a) *If so, would it be registered as a "vessel" or "ship" or other "marine equipment" or other special type of property? If so, please explain with reference to authorities.*

Pursuant to section 2 of the Merchant Shipping (Registration of Ships) Regulations 1993, the U.K. Ships Register is divided into four parts: (1) part I for ships, owned by persons qualified in accordance with the Regulations that are not "fishing vessels," or "small ships," (2) part II for fishing vessels, (3) part III for small ships, and (4) part IV for ships that are registered as "bareboat charter ships" and are registered under the MSA 1995.

MORUs would fall either in Part 1, Part 3 or Part 4 depending on their individual characteristics.

b) *If so, would it be registered in your jurisdiction's public register of ships, or in another public register?*

If a MORU can be registered as a "ship" or "vessel" in the U.K., then it will appear on the U.K. Ships Register.

c) *If it is registered in your jurisdiction (whether as a "vessel" or "ship" or other "marine equipment" or other special type of property), would it be entitled to fly the flag of your jurisdiction and be deemed to have that nationality? If so, please explain with reference to authorities.*

Yes, under MCA Part I Section 2, every British Ship is entitled to fly the red ensign.

There is also the possibility for a ship to have the qualification of British Ship if registered in any of the international shipping registries operated by the United Kingdom itself, the three Crown Dependencies (Isle of Man, Guernsey, and Jersey), and the eight U.K. Overseas Territories (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena, and the Turks & Caicos Islands).

Such ships are entitled to fly the Red Ensign, that is, the British Merchant Shipping flag. Should any Red Ensign group member permit registration of a MORU as a ship, then the flagged MORU presumably would be considered a "British Ship" registerable under the MSA 1995. However, it is not clear how the United Kingdom, would treat MORUs registered by a Red Ensign flag state as a "British ship" when used in its EEZ.

3. *Assuming that a MORU is the subject of leases, subleases, or charters (including demise charters) or sub-charters in your jurisdiction, is it possible to record such lease interests in any (or all) of the categories of MORU in a public register in your jurisdiction? If so, please describe. If so, please also describe the procedure to file such agreements or notice thereof.*

   If the MORU qualifies as a "ship" or "vessel" then some bareboat charters can be recorded.

   Merchant Shipping (Registration of Ships) Regulations 1993 (MSR 1993) Section 17 permits the registration of a foreign-flag vessel that is chartered on bareboat charter terms by a charterer who is qualified to own a British ship. A bareboat chartered ship which is 'flagged-in' to the UK Register will be registered in Part IV of the Register. The vessel is required to be surveyed, and the applicant is required to submit documents.

   Other types of maritime leases, subleases, and sub-charters are generally not recorded on a public register. These agreements are typically documented privately between the parties involved.

4. *In your jurisdiction, is the acceptance by a registrar or other governmental body of a MORU (or type of MORU) as a "ship" or "vessel" or equivalent term dispositive of its legal status as a "ship" or "vessel" or equivalent term under your law for purposes other than registration under domestic law?*

   If an asset was registered in the U.K. Ships Register as a "ship" or "vessel", then it could claim all benefits available to British ships. Nonetheless, the eligibility and validity of registration can be reviewed and terminated (MCA Part II, Section 9 (3)).

   In Baumwoll von Carl Scheibler v Furness [1893] AC 8 *Lord Herschell L.C. said in the relation to the statutory registration system "all that it (the Act) has done is to make the register prima facie evidence of ownership. In fact it assumes that anybody may displace altogether the statutory effect which has been given to it by proving what the facts really are".*

   According to the High Court of Singapore in "ECO SPARK" [2023] SGHC 353 while registration is not determinative of the status of a vessel as a "ship", the absence and/or existence of registration to a flag state is an indicium as to whether a vessel is a "ship" and/or "used in navigation".

5. *Is it possible in your jurisdiction to record liens, maritime liens, claims, encumbrances (e.g. mortgages or hypotheques) against any such category of MORU in a public register? If so, please explain details and limitations on such register.*

   It will depend on whether MORUs can be registered in the U.K. Ships Register under Part II of the MSA 1995.

   Even if they can be registered, it is only possible to register mortgages on ships registered in Part I or (if it is a full registration) Part II. It is not possible to register

mortgages on fishing vessels registered in Part II (if it is simple registration),[1] small ships registered in Part III[2] or demise chartered ships registered in Part IV.[3]

The register of mortgages over UK ships is the responsibility of the centralised Registry of Shipping and Seamen in Cardiff, Wales (the Registry). Filings are made to the Registry.

A mortgage creates a fixed security over the ship, which attaches to the ship in rem. The mortgage will survive a change of ownership. It entitles the lender to sell the ship and use the sale proceeds to pay off the amount owing to it if the owner is in default. Under the Merchant Shipping Act every registered mortgagee shall have power, if the mortgage money or any part of it is due, to sell the ship or share in respect of which he or she is registered, and to give effectual receipts for the purchase money.

Where the shipowner is a UK company, the mortgage and deed of covenants should also be registered with Companies House within 21 days of the creation of the charge. A copy of the security document will be placed on the register at Companies House and will be open to inspection by a search against the company. A failure to register with Companies House within this time limit renders the charge void against a liquidator, administrator or any creditor of the company.

Non-mortgage liens may not be recorded.

6. *Is there any priority given to a registered creditor in such property in your jurisdiction? If so, please explain.*

Mortgages rank for priority in order of registration. Failure to register a mortgage at the Registry does not render the mortgage void. However, an unregistered mortgage will be an equitable mortgage and an unregistered mortgagee will not have priority over a subsequently registered mortgage.

Additionally, a party intending to take a mortgage over a ship may obtain priority by delivering to the Registrar an executed notice of mortgage intent (Form MSF 4739). The Registrar will record details of the notice on the Register for a period of up to 30 days. A notice may be renewed for a further 30 days on written request.

Claims for maritime liens will rank higher than a registered mortgage, even if they arise after the mortgage has been created or registered. A possessory lien (eg, a shipowner's right to retain possession of cargo until money owed to it by the ship's charterer have been paid) will also rank higher than a mortgage lien.

Typically, a mortgage will have priority over statutory liens, unless a claim has been made and a writ in rem has been issued against the ship prior to the date of the mortgage.

[1] Reg 3(a) of the Registration Regulations.

[2] ibid. reg 91

[3] The Merchant Shipping Act 1995, s 17(7)

Treatment of Foreign MORUs as property

7. *Does your jurisdiction recognize ownership of any such property (i.e. any category of MORU) as evidenced by an entry in a public register of another jurisdiction?*

Again, Baumwoll von Carl Scheibler v Furness [1893] AC 8 the register is prima facie evidence of ownership.

8. *If:*

(i) a MORU (or any type thereof) is categorized as a "vessel" or "ship" or other "marine equipment" or other special type of property in another jurisdiction and is registered and/or flagged as such in that jurisdiction, BUT

(ii) the MORU would not be considered a "vessel" or "ship" under the domestic laws of your jurisdiction, would the courts or relevant authorities in your jurisdiction nonetheless treat the foreign-registered MORU as a "vessel" or "ship" for:

Relevant for answers a) to c) : According to the High Court of Singapore in "ECO SPARK" [2023] SGHC 353 while registration is not determinative of the status of a vessel as a "ship", the absence and/or existence of registration to a flag state is an indicium as to whether a vessel is a "ship" and/or "used in navigation".

a) purposes of arrest of the MORU?

Unclear. It appears that the Courts would examine the foreign-registered MORU to see if it qualifies as a "vessel" or "ship" under English law.

b) purposes of foreclosure on a mortgage / hypothecation of the MORU?

Unclear. It appears that the Courts would examine the foreign-registered MORU to see if it qualifies as a "vessel" or "ship" under English law.

In the UK, mortgages on 'foreign' flag ships are recognised.

c) purposes of enforcement of maritime liens on the MORU?

Unclear. It appears that the Courts would examine the foreign-registered MORU to see if it qualifies as a "vessel" or "ship" under English law.

If the owner is in default under the mortgage documents, the mortgagee has the right to apply to the court for the arrest and sale of the ship if it is located within UK territorial waters.

The Admiralty Court in England and Wales has jurisdiction over all ships in territorial waters irrespective of their flag.

d) any or all other purposes?

Unclear, same as above.

In the alternative, would your courts in such cases decline to enforce an asserted claim or mortgage if the (foreign) MORU is not recognized as a vessel or ship in your jurisdiction?

If the Courts proceeded with a case-by-case analysis of the MORUs to determine whether they qualify as "vessels" or "ships", then it is probable that failure to meet such qualification could result in declining to enforce such claims.

9. *Would your jurisdiction accord the same priority of lienors and recorded creditors of a foreign-registered MORU as such lienors and creditors would have in the jurisdiction where the MORU was originally recorded or registered?*

   The priority of the foreign mortgage will be the same as if it had been a similar mortgage over a UK-flagged ship.

   a) *If your jurisdiction is party to the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages 1926 or the International Convention on Maritime Liens and Mortgages 1993, would your jurisdiction recognize a MORU as a "vessel" or "sea-going vessel" (respectively) for purposes of that Convention?*

      The UK is not a party to either Convention.

10. *What law would your jurisdiction apply to, or what law would it consider to govern, a sale or a change of ownership of a foreign-registered MORU which is operated in the EEZ of your jurisdiction?*

    The determination of applicable law would be made according to the private international law rules governing conflicts of law. Freedom of choice of the parties is the starting point for determining the applicable law in contracts.

Would your answer vary (and if so, how would it vary) if the MORU was:

   a) *Foreign-owned but not registered, or*

      No

   b) *operated in the territorial sea of your jurisdiction?*

      No

11. *Are there any reported decisions in your jurisdiction which address the legal classification (as "ship", "vessel" or other "marine equipment" or other special type of property) of:*

   a) *MORUs (of any type);*

      No

   b) *Offshore wind turbines (fixed or floating);*

      The MCA guidance on UK Navigational Practice states: Offshore Renewable Energy Installations (OREI) include offshore wind farms, marine current turbines, wave generators and any other installation, with the potential to affect

marine navigation and safety, proposed for United Kingdom (UK) internal waters, territorial sea or in a Renwable Energy Zone (REZ) beyond the territorial sea.

c) *Mobile Offshore Drilling Units ("MODUs");*

The Maritime Labour Convention, 2006 states MODUs are to be considered ships**.**

d) *FSUs and FPSOs*

FPSOs appear to be registered and treated as conventional ships. Consider

a) Treated FPSO as a ship: *Oleochem (Scotland) Ltd v Revenue and Customs Commissioners* [2009] 1 WLUK 79, [2009] STC (SCD) 205, [2009] STI 513.

b) Treated FPSO as offshore installation: *Lockhart v Revenue and Customs Commissioners* [2017] 7 WLUK 225, [2017] UKFTT 559 (TC).

Questions related to arrest

1. *Would it be possible to arrest, seize, detain, or otherwise proceed in rem or otherwise against a MORU for a maritime claim in your jurisdiction (whether under domestic law or binding convention)?*

Unclear, it will depend on whether MORU qualifies as a "ship" or "vessel". Vessel arrests may be brought only pursuant to an admiralty claim in rem (that is, in this case, against a vessel itself). The Admiralty Court has jurisdiction over such claims.

a) *If so, on what grounds?*

Grounds for admiralty claims are prescribed in an exhaustive list at Section 20(2) of the Senior Courts Act 1981. These include damage received or done by a ship, loss or damage to goods carried in a ship, claims in respect of a mortgage on a ship, towage and pilotage. It is not possible to base an arrest on a claim for bunkers, legal costs or insurance premiums.

b) *Is the answer to this question determined by flag state law or the domestic maritime law of your jurisdiction?*

If the Admiralty Courts have jurisdiction, an arrest can be issued. Whether the Admiralty Court issues such an order, will likely depend on whether MORU qualifies as a "ship" or "vessel". The right to arrest a ship exists within the jurisdiction of the Admiralty Court irrespective of the country of registration (Admiralty Courts Act 1840 AJA 1956)

2. *Is it possible to arrest, seize, detain, or otherwise proceed against a MORU for non-maritime claims in your jurisdiction?*

Unclear, it will depend on whether MORU qualifies as a "ship" or "vessel". If it qualifies, then it is possible to issue such an order in respect of ship mortgages.

3. *If a MORU were arrested, seized, detained, etc. in your jurisdiction, would it be possible to obtain a release of the MORU from such arrest/detention on posting of an adequate security?*

A claimant is not required to provide security for an arrest, although he or she must provide an undertaking as to the arrest expenses of the Admiralty Marshal.

Security may be provided by the defendant to procure release of the vessel in the form of a payment into court or by issuing a guarantee acceptable to the claimant. On the application of any party, the Admiralty Court may order that any security provided to procure the release of an arrested vessel, or to prevent an arrest, be reduced, or that a claimant may arrest or rearrest the property to obtain further security (unless that security would exceed the value of the vessel itself).

a) *If so, please provide authority.*

Convention Relating to the Arrest of Seagoing Ships, Brussels, 1952, Article 5.

Questions related to limitations of liability

1. *Assuming that a MORU was not used for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof (cf. Art. 15(5) of Convention on Limitations of Liability for Maritime Claims, 1976), would the owner or salvor of a MORU benefit in your jurisdiction from the limitations of liability found in the Limitations of Liability for Maritime Claims, 1976 and/or its Protocols ("LLMC 1976/1996/2012?")?*

The LLMC is presently implemented in the UK by Section 185 of the Merchant Shipping Act (**MSA**) 1995.

Broadly Article 1 of the LLMC provides that shipowners and certain other parties interested in the operation of a "*seagoing ship*" may limit their liability for the claims set out in Article 2 subject to the terms of the convention. In the UK, the MSA 1995 extends this to "*any ship whether seagoing or not*" (Paragraph 2, Part II, Schedule 7 of the MSA 1995).

Fundamentally, it affects the shipowners ability to limit their liability for third-party claims for loss or damage relating to the operation of a "*ship*" and means that a ship owner can limit liability for death, personal injury, and property damage "*occurring on board or in direct connection with the operation of a ship"*. The definition of a "*ship owner*" also includes a charterer, manager, or operator. If a claim falls within Article 2 of the LLMC, it is difficult to break limits in the UK.

Insofar as MORUs are concerned, an owner's entitlement to limit liability turns on whether a MORU is considered a "ship".

The LLMC does not define the term "ship" and only provides some hints as to the scope of the term.

On the assumption set out in the question a MORU may be entitled to limitation pursuant to the terms of the LLMC if it is otherwise a "*ship*".

2. *Assuming that a MORU is used to provide electrical power to other types of floating units or fixed or subsea facilities which were themselves exploring or exploiting the natural resources of the sea-bed or the subsoil thereof (cf. Art. 15(5) of LLMC), would the owner or salvor of that MORU benefit in your jurisdiction from the limitations of liability found in LLMC 1976/1996/2012?*

   Same as above

3. *Would a MORU benefit from any other (non-LLMC based) forms of limitations of liability under the domestic law of your jurisdiction? If so, please explain with reference to authorities.*

   It appears that if MORUs do not fall within the UK definition for "ship" or "vessel", their liability would be "unlimited".

Questions related to innocent passage and transit

1. *Would a right of innocent passage be recognized in your jurisdiction for a foreign-registered MORU being towed through your jurisdiction's internal waters (cf. UNCLOS Art. 8(2))?*

   Yes. Merchant Shipping Act 1995 (c. 21)

2. *Would a right of innocent passage be recognized in your jurisdiction for a foreign-registered MORU being towed through your jurisdiction's territorial sea (cf. UNCLOS Art. 17, 24(1))?*

   Unclear, no distinction appears to be made for towed vessels. Merchant Shipping Act 1995 (c. 21)

   a) *Would your jurisdiction recognize its own criminal jurisdiction on board a foreign-registered MORU passing through your jurisdiction's territorial sea other than in accordance with UNCLOS Art. 27?*

      It does not appear to be the case.

   b) *Would your jurisdiction recognize its own civil jurisdiction on board a foreign-registered MORU passing through your jurisdiction's territorial sea other than in accordance with UNCLOS Art. 28?*

      It does not appear to be the case.

3. *If there are straits used for international navigation in the waters adjacent to your jurisdiction, would a right of transit passage (or innocent passage) be recognized in your jurisdiction for a foreign-registered MORU being towed through that strait (cf. UNCLOS Art. 38, 45)?*

   Yes Merchant Shipping Act 1995 (c. 21)

4. *If your jurisdiction is an archipelagic State (within the meaning of UNCLOS Art. 46), would a right of innocent passage be recognized in your jurisdiction for a foreign-registered MORU being towed through your jurisdiction's archipelagic waters (cf. UNCLOS Art. 52))?*

Not applicable?

Question related to sovereign immunity and rights of owners or creditors to remove property from established MORU operations

1. *In your jurisdiction, does the sovereign prohibit by law the arrest, repossession or seizure by a creditor of property under lease or contract with an organ of the state (such as a public utility)?*

   Unsure about other property but with regards to vessels:

   if vessel used for commercial purposes + cargo intended use for commercial intended purpose then no sovereign immunity for claims in rem. (Subsection 10(4)(a) State Immunity Act 1978 + *Argentum* [2024] 1 Lloyd's Rep 585)

   But if state immunity in rem, claims still available in personam. (Subsection 10(4)(b) State Immunity Act 1978 + *Argentum* [2024] 1 Lloyd's Rep 585)

2. *In your jurisdiction, may the sovereign/state waive immunity by contract for the benefit of creditors or lienors seeking to recover leased property (e.g. a leased MORU) or damages in the event of a default by the sovereign or another responsible party under a contract or lease to produce or supply energy to a sovereign- or state-owned entity?*

   Yes, there are various exceptions from immunity under the State Immunity Act 1978, Part I, Sections 2 to 11. State Immunity Act 1978