Questionnaire from the CMI Mobile Offshore Renewables Unit
International Working Group Fall 2024 – Germany

Definition of Mobile Offshore Renewables Unit ("MORU")

For purposes of answering this questionnaire about MORUs, the MORU IWG has defined the term as follows:

"Mobile Offshore Renewables Unit" or "MORU" means any non-self-propelled, floating offshore unit or facility consisting of:

(i) a ship-shaped hull, SPAR, semi-submersible, tension-leg platform, barge, or other buoyant hull concept; AND

(ii) all internal and topsides equipment permanently attached to that hull,

provided that such floating offshore unit or facility:

(a) is primarily designed for the purpose of directly or indirectly generating electric power or other form(s) of renewable energy by conversion of wind, wave, tidal, or solar energy, or differences in water temperatures or salinity, or a combination of any of the foregoing; OR

(b) is primarily dedicated to the conversion, transformation, conditioning, transmission, distribution, and/or temporary storage and subsequent release of electrical power or other form of renewable energy originally generated by one or more MORUs described in paragraph (a) above; OR

(c) is primarily dedicated to the conversion of any electrical power or other form of renewable energy generated by one or more MORUs described in paragraph (a) above into chemical products; OR

(d) is a hybrid unit combining the functions of two or more of the classes of units described in any of the paragraphs (a), (b), and/or (c) above.

Questions related to ownership and other property interests in MORUs

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.

Yes, it is likely that German courts would recognize MORU's in all cases referred to in the introduction above as a ship (or vessel). Whether an object qualifies as a ship would be determined, under German law, in the first place with a view to the relevant area of law, eg property law, flag, manning, safety and security issues, as well as traffic regulations and procedural issues. If there is a particular definition of a ship, that would be applied in the respective sector. It would seem, however, that no such special definitions are provided. It should be noted that in some instances certain objects are excluded from the scope of application of the relevant regulations, or included even if they do not qualify as a ship.

In the absence of any special definition, German courts would look at the definition provided by the German Supreme Court in a decision of 1951. It says that a ship is

> *a hollow body of no insignificant size able to float, the designated purpose of which is to be navigated on water*

(this somewhat awkward wording seeks to capture every aspect of the definition). At the time the decision was rendered, German law featured regulations on rafts. In order to distinguish ships from rafts, the Court required that the object, in order to be recognised as a ship, must have a hollow body. As German law does not longer feature a particular law on rafts, the hollow body requirement should today be irrelevant. As to the size of the object, it has meanwhile been clarified that objects two to three meters in length may be ships. What has been translated here as "navigation" encompasses, in the words of the Supreme Court, any movement of the object on water. The term "to be navigated" does not imply that self-propelled units cannot be ships; rather, objects both self-propelled or not may qualify as ships. Whilst the initial definition only referred to navigation on water, it has meanwhile been accepted that navigation within the water, when the object is submerged, is sufficient.

It has been discussed, in the German legal literature, whether there is an additional requirement to the effect that an object only is a ship if it is designed to transport persons or goods on or within the water. If this is assumed, some MORU's may not qualify as ships. We discussed this point in detail and found that the Supreme Court definition should be relevant and that the transportation aspect should be disregarded.

An object remains a ship even if it is designed to operate in a stationary situation for a longer period of time; if it is tied up to some berth; if it is in dry dock or otherwise taken ashore for repairs; if it lies at anchor, even for a longer period of time; and if it is aground. An object is not a ship if it is constructed stand on the seabed on extendable legs, for the time it remains in that position.

German shipping law in many respects distinguishes between ocean and inland waterway vessels. it is assumed, for the purpose of this Questionnaire, that MORUs are ocean-going ships.

a. 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)?

Yes, we think that German Courts would recognize any category of MORU (as identified in the introduction to this Questionnaire) as a ship, as the MORU's would proceed to the operation site either themselves (if self-propelled) or in tow and would thus "be navigated" (see above). And dynamic positioning in relation to the seabed normally requires navigation through the water.

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

   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.

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

German law distinguishes between the private property in a ship and related issues such as transfer of property and security interests, and the flag of a ship, which is an administrative concept and refers to its nationality and a ship's duty or a ship's right to fly the German flag. Neither the law relating to property in a ship nor the regulations concerning the flag define the ship. As a result, the definition of the German Supreme Court would be relevant (see above), to the effect that all MORU's identified in the introduction are subject to the German ship property and flag legislation.

The German ship register concerns private property issues. It relates only to ships and ships under construction, and does not address any other categories of watercraft. As a result, it should be possible to have MORUs entered in one of the German ship registers, as ships.

Further, we think that a MORU is a ship also for the purposes of the German flag legislation. Its owner therefore may be required or entitled to fly the German flag on the MORU. Oceangoing ships owned by German nationals domiciled in Germany must fly the German flag; the ships are of German nationality. Oceangoing ships owned by nationals of EU member states domiciled in Germany may fly the German flag; the ships are of German nationality once the permission to fly the German flag has been granted. Ships flying the German flag are entered in a flag register. The German nationals and nationals of EU member states may apply permission for the vessel to fly a foreign flag.

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.

There is no public register in Germany allowing the record of leases etc. in relation to ships and thence to MORUs.

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?

No. If an object which is not a ship is entered in the ship register, this does not by itself transform the object into a ship for other purposes.

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.

The regular ship register allows the entry of a mortgage on the ship. A mortgage is created, as a matter of German law, if the ship owner and the mortgagee agree on the creation of the

mortgage and if the mortgage is entered in the register. This applies to all ships including MORUs. Maritime liens that secure claims that arise in the course of the operation of the vessel cannot be entered in the register.

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

There is no register in relation to the ship's creditors or their claims. Rather, creditors with claims that are secured by a mortgage (which must be registered in order to come into existence) are preferred creditors in case of insolvency of the shipowner or in case of a judicial sale of the ship.

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?

If the law of such foreign register provides that the entry has certain effects, eg that it creates a statutory presumption (rebuttable or not) that the details of the entry are correct, this would basically be accepted (to the same extent) by a German court and German public authorities. This applies to ownership as evidenced by the register and to any category of MORUs referred to in the introduction of this Questionnaire. However, we need to make one reservation in cases of non-rebuttable statutory presumptions which would not accepted by a German court if the results would not be in line with the German ordre public.

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:

   a. purposes of arrest of the MORU?

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

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

   d. any or all other purposes?

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?

The question really does not arise in relation to Germany, because it would seem that all types of MORUs identified in the introduction to this Questionnaire are considered to be ships. Otherwise, where the law applicable to the principal issue (eg arrest issues, mortgages, maritime liens) refers to a preliminary question (eg whether the relevant object qualifies as a ship) is determined by the substantial law applicable to that preliminary question. That substantial law, according to the prevailing opinion in the German legal literature, is

determined by the international law principles of the state whose law is applicable to the principal issue. In practice, a German court likely would apply German law to establish whether the relevant object is a ship and disregard the qualification under any other substantial law.

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?

As a matter of German international private law, the rank of competing rights in a MORU (mortgages, maritime liens) is determined by German law principles; see Art. 45 (2) sentence 2 and Art. 43 (1) of the Introductory Act of the Civil Code (English translation https://www.gesetze-im-internet.de/englisch_bgbeg/index.html). Basically, maritime liens would have priority over mortgages. The rank of registered mortgages would be as determined in the register, and in respect of maritime liens, the older one would prevail (there are, however, a number of exceptions to that rule, to the effect that the younger lien would have priority over an older lien).

   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?

   Germany has not ratified either the 1926 or the 1993 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?

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

    a. Foreign-owned but not registered, or

    b. operated in the territorial sea of your jurisdiction?

In order to determine the law applicable to a S&P contract, including one relating to a MORU, a German court would, in the first place, look for a choice of law clause in the contract. If there is no such clause, the law of the state in which the seller is domiciled will govern the contract. It is of no relevance where the MORU is operated at the time the contract was made and whether the MORU is foreign owned or registered.

A change of ownership would be considered, by a German court, on the basis of the law of the state where the MORU is registered; see Art. 45 (1) no. 2 of the Introductory Act of the Civil Code (English translation https://www.gesetze-im-internet.de/englisch_bgbeg/index.html). If there is no registration, the law of the state of the home port would govern all issues relating to property. Again, it would not be relevant whether the MORU was foreign-owned or where it is operated.

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);

    b. Offshore wind turbines (fixed or floating);

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

    d. FSUs and FPSOs

    If so, please attach copies.

No, there are no reported decisions.

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)?

    a. If so, on what grounds?

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

Germany is a contracting state of the Arrest Convention, 1952. Ships may be arrested in Germany in relation to maritime claims identified in Art. 1 (1) of the Convention. As outlined, we think that MORUs qualify as ships for the purpose of the Arrest Convention. An arrest may only be brought in respect of claims against the owner of the MORU, but not for claims against a charterer, including a bareboat charterer. German law does not know in rem *proceedings.*

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

Yes, an arrest of a MORU is basically possible in respect of claims of any nature, ship related or not, as long as the claim is against the owner of the MORU. However, if the Arrest Convention, 1952, is applicable (ie if the MORU flies the flag of a contracting state), an arrest may only be brought in relation to maritime claims (Art. 1 (1) Arrest Convention).

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. If so, please provide authority.

Yes, see s.923 Code of Civil Procedure (English translation https://www.gesetze-im-internet.de/englisch_zpo/index.html)

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?")?

Germany is a contracting state of the LLMC 1996 as amended by Resolution LEG.5(99) of the IMO Legal Committee of 19 April 2012. A German court likely would assume that MORUs as identified in the introduction to this Questionnaire are ships for the purpose of the LLMC 1996. As a result, it would apply the LLMC 1996 in favour of the owners and the salvors of the MORU, who would be entitled to limit liability in accordance with the Convention.

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?

There are no reported decisions and no legal opinions in the literature on this interesting point. It would seem that it depended on the circumstances whether a German court would apply the exception of Art. 15 (5) (b) LLMC 1996 in the scenario described above or not. The relevant exception concerns, in the words of the Convention,

"… floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof."

We think that normally a MORU that is designed to provide power to any facility and only randomly has been chosen to support an exploration platform does not fall under the exception of Art. 15 (5) (b) LLMC 1996, to the effect that the Convention would apply. If, however, the MORU at the outset was designed to provide power to a particular exploration platform or to a type exploration platforms or to exploration platforms in general, the MORU would be regarded as an external plant of the exploration platform; the energy producing facilities could have been mounted on the exploration platform but were placed outside to save space and to increase flexibility. Here, the exception of Art. 15 (5) (b) LLMC 1996 would take effect, so that there would be no limitation of liability.

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.

Outside of LLMC 1996, there are no provisions of German law which seek to limit the MORU owners' liability for third party damages. Corresponding regulations can be found in the Oil Pollution Convention, 1992, as well as the HNS Convention, 2010, which feature built-in limitations of liability for oil pollution and HNS damage claims. The Oil Pollution Convention is not applicable to MORUs, which do not carry oil as cargo, and the HNS Convention is not yet in force (and would in any event also only relate to HNS carried as cargo).

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))?

A German court would assume that all type of MORUs identified in the introduction to this Questionnaire are ships also for the purpose of UNCLOS. As a result, the MORUs would enjoy the right of innocent passage also in those German internal waters that are subject to Art. 8 (2) UNCLOS. Further, even if it is assumed that the MORUs do not qualify as ships, the right of innocent passage afforded to the tug(s) would extend to the MORUs in tow.

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))?

See the response to Question 1, which applies the more so in Germany's regular territorial sea.

   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?

   No, Art. 27 UNCLOS would remain the relevant basis to exercise criminal jurisdiction on board a foreign-registered MORU.

   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?

   No, Art. 28 UNCLOS would remain the relevant basis to exercise criminal jurisdiction on board a foreign-registered MORU.

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)?

There are no such straits in Germany.

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))?

Germany is not an archipelagic state.

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)?

Enforcement proceedings against objects are prohibited in certain circumstances, in relation to claims for payment. The first scenario concerns objects which are indispensable to fulfil the administrative duties of the relevant state entity which is liable. Enforcement proceedings are further excluded if a forced sale of the object is against the German public interest. It really depends on the circumstances whether either or both scenarios are relevant and would

prevent enforcement proceedings against a MORU. This restriction does not apply to claims for repossession.

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?

If a leased MORU is protected from enforcement proceedings as outlined in the response to Question 1, the relevant state entity is <u>not</u> entitled to waive such protection, as it is based on public interest considerations and not on a private right of the debtor.