

**First questionnaire from the
CMI Mobile Offshore Renewables Unit International Working Group**

REPLIES OF IRISH MARITIME LAW ASSOCIATION

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.

There was an extensive consideration, by the Irish Supreme Court, of floating structures not falling within the conventional understanding of a “ship” and whether such structures might be susceptible to arrest under the Arrest Convention 1952 as transposed into Irish law. In this regard, the Jurisdiction of Courts (Maritime Conventions) Act, 1989, section 13(2) of the Act of 1989 provides that:-

"For the purpose of the [Arrest Convention] and this Act, unless the context otherwise requires -

'Ship' includes every description of vessel used in navigation;

'Vessel' includes any ship or boat, or any other description of vessel used in navigation."

This definition of vessel was interpreted by the Supreme Court, in the Von Rocks [1998] 3 IR 41 as comprising, not just craft for the carriage of passengers or cargo, or with means of self propulsion, but craft which are structures “designed and constructed for the purpose of carrying out specific activities on the water, ... capable of movement across the water and in fact spends significant periods of time moving across the seas from one contracting site to another” these should be considered vessels susceptible to arrest under the 1952 convention as implemented in Ireland.

While this analysis, and definition might arguably be restricted to the case of marine structures susceptible to arrest under the Arrest Convention in Ireland, it is likely that the Supreme Court’s analysis would inform whether a marine structure was a vessel or not in the context of other maritime law rights and obligations. This would include in rem liability, maritime liens, susceptibility to marine mortgages etc.

- 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)?

As detailed above, while a DPS or cognate system might support a contention that the structure was a ship or vessel, this is not the defining characteristic under the “Von Rocks” test.

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

MORU in a public register?

In order for a MORU to be susceptible to have ownership interests in it recorded in a public register, it would have to enjoy the consideration of a Vessel. While marine mortgages are recognised and protected under the fundamental Irish Admiralty jurisdiction Act (the Court of Admiralty (Ireland) Act, 1867, which brought together and supplemented existing admiralty practice, section 34 refers to the “ship or the proceeds thereof” subject to “any mortgage duly registered according to the provisions of [1] the Merchant Shipping Act, 1854”. “Ship” in the 1854 Act, as in the Court of Admiralty (Ireland) Act, 1867, is defined as *“including every Description of Vessel used in Navigation not propelled by Oars”*. This is the same definition as that which is used in the Mercantile Marine Act, 1955 which modernizes Irish law on ship registration (and marine mortgages at section 50) and which also defines ship as *“include[ing] every description of vessel used in navigation not propelled by oars”*. While not yet commenced, the modern Act, the Merchant Shipping (Registration of Ships) Act 2014 will change the law in respect of ship mortgages (section 54) and has a slightly different definition of ship, not relevant in this case: *““ship” includes every description of vessel used in navigation not propelled exclusively by oars and includes personal watercraft and small fast powered craft”*.

It seems likely therefore, that the “Von Rocks” definition will be influential in determining whether a marine structure such as a MORU is susceptible to having a marine mortgage created over it, under Irish law. If no recognition is afforded to a MORU as a “ship” under the instruments described above, it seems unlikely that an ownership interest would be recorded in such circumstances as to offer protection to the person with such an ownership, or security interest. The effects of a public register of property interests towards third parties, while existing in respect of “real” or “immovable” property in Ireland, are not otherwise extended to “personal property” or “chattels”. There is no public register, for instance, in respect of land based vehicles subject to credit leasing / hire purchase arrangements.

- 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.

If coming in with the definition of ship, it would have to be registered as a ship.

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

See above, the register of ships, as a marine mortgage.

- 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.

In order to be susceptible to having a security interest such as a marine mortgage registered against it, the MORU would have to be considered an Irish ship. As such, it would have to be flagged as an Irish Vessel. See response above.

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.

No

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. While a previous registration may facilitate registration as an Irish ship, it is most likely that the relevant criteria for the Irish Registrar of Shipping will be compliance with the definition of ship in the Mercantile Marine Act of 1955.

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

No, the only security interests contemplated for recording on the Irish Register of Shipping are formal marine mortgages.

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

Priority is determined in accordance with admiralty practice, inspired to a very large degree in jurisprudence from previous admiralty practice, and historic (and more recent) precedent in admiralty cases from the Courts of England and Wales. As such, a registered mortgage holder would have a significant amount of priority in the context of claims, in admiralty, against the Vessel, but this priority would be trumped, for instance, by a maritime lien. The priority of claims against a ship, under Irish law, while generally determined in a manner similar to that in England and Wales (in that the same order as regards maritime liens is followed, after that marine mortgages in order of registration, and then “statutory” in rem claims) is ultimately a matter for the exercise of the Court’s equitable jurisdiction.

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?

There is no formal structure for the recognition of a public register of another jurisdiction as definitive, or superior evidence of ownership. An Irish Court would have regard to such a registration, but it would not result in any automatic effect, save where the interest, and subject of that interest, were a marine mortgage and a ship respectively. (see above).

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? **There is no direct authority on the point, but it seems likely that the relevant consideration for an Irish Court would be the legal characterisation of the MORU under Irish law, in that Irish law considers an arrest to be a procedural matter, for the lex fori. As regards substantive law, and the recognition of rights created under a foreign law applicable to the structure (whether by way of registration, or the lex causae) there has not been any pronouncement by the Irish Courts on the decision of the Privy Council in the Halcyon Isle, and this matter remains to be determined.**
- b. purposes of foreclosure on a mortgage / hypothecation of the MORU? **There is older Irish authority which refuses to recognise the priority of foreign marine mortgages which had not properly registered under the applicable foreign law. It is possible that the inverse argument could be made as regards the applicability of that law in respect of the internal functioning of the security instrument. Despite the above however, it seems most likely that the subject matter of the security instrument would still have to fall within the peculiar type of property (ships) to which marine mortgages are applied.**
- c. purposes of enforcement of maritime liens on the MORU? **Unlikely. See above comments on the recognition of maritime liens, and whether an Irish Court would look to the lex causae or the lex fori to recognise the same. It seems more likely that an Irish Court would apply Irish law for the determination of and thus recognition of a maritime lien.**
- 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?

This seems more likely.

- 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?

This depends on the context in which the tension between the relevant secured parties arises. If it is as a result of the security instrument, then yes. If however different security instruments are involved, and the case involves a tension between the same, the question becomes more difficult, however if all interests are recorded on the same registry, then possibly. If the lienors and recorded creditors are of different character (i.e. holders of a maritime lien recognised under Irish law, holders of a ML recognised under US Federal law, and mortgagees and holders of registered charges under the law of the flag of registry, then Irish Courts would more than likely apply Irish law.

- 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?

N/A

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?

While the Irish State purports to exercise jurisdiction over the EEZ in certain matters involving the usage of the maritime area (over and above traditional fishing rights), there is no attempt to extend its legal jurisdiction beyond the territorial sea in respect of private law rights involving a sale or change of ownership.

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?
Possibly. If operated in the territorial sea it would not have the consideration of a foreign vessel in transit, and might therefore be considered to be susceptible to Irish law in respect of sale or change of ownership, including susceptibility to the provisions of Irish fiscal law.

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.

None beyond the “Von Rocks” cited above, copy attached.

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)?

This question depends, to some degree, on whether “arrest, seize, detain or otherwise proceed in rem” is intended to identify the jurisdiction traditionally available to “arrest” a vessel (in common law terms and as defined by article 1(2) of the 1952 Convention) rather than terrestrial interlocutory relief such as that available under a Mareva or freezing injunction. It is assumed to refer to the former and also presumed to refer to detention for security for a claim, rather than execution (saisie conservatoire rather than saisie exécutoire).

The answer depends, as previously stated and considered in the “Von Rocks” on whether the MORU is a vessel under the 1952 Arrest Convention as implemented in Ireland. While the fact

that a MORU is inarguably “built to do something on the water” and generally should be capable of traversing the surface of the sea, a query arises as to whether the regular traversing of large expanses of water is a necessary element to qualify as a Vessel to make the structure susceptible to arrest. It seems at least possible that an Irish Court might refine this definition to say that it was, but there is also an argument to say that the essential characteristic of continuous mobility arguably required in the ratio decidendi of the “Von Rocks” would exclude MORU’s from consideration as vessels susceptible to arrest.

The Jurisdiction of Courts (Maritime Conventions) Act, 1989 determines and limits what maritime claims a vessel flying the flag of a contracting state may be arrested for. If a MORU was not flying the flag of a contracting state, then it might be arrested (if a vessel) for the maritime claims stipulated at Article 1(1) of the 1952 Convention, or those maritime claims provided for by the Courts of Admiralty (Ireland) Act, 1867, or permitted by existing admiralty jurisdiction. In reality, the decision of the Supreme Court in the “Von Rocks”, which involved a review of existing common law authority on the definition of a ship, is likely to inform the exercise of this jurisdiction and power of arrest as well.

- a. If so, on what grounds?
See above, the maritime claims pursuant to article 1(1) 1952 Arrest Convention, maritime liens recognised by Irish law, “statutory in rem” claims (those recognised by the Courts of Admiralty (Ireland) Act, 1867 and existing admiralty practice.
- b. Is the answer to this question determined by flag state law or the domestic maritime law of your jurisdiction?
Domestic law (Irish law implementing the 1952 Convention, and existing Irish law).
2. Is it possible to arrest, seize, detain, or otherwise proceed against a MORU for *non*-maritime claims in your jurisdiction?
Yes, although by means of interlocutory relief, either as a “mareva” or freezing injunction, or an injunction in aid of execution. This involves invoking the ordinary civil jurisdiction in respect of property, which is subject to stricter procedural and evidential requirements (including proof of likelihood of success, and counter security/undertakings as to damages) not applicable to in rem actions and ship arrest.
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, while Order 64 of the Rules of the Superior Courts (the Irish equivalent to the English CPR) provides for the giving of “bail”, in reality the Courts accept monetary security (lodged in Court or by way of guarantee) or a suitably solid letter of undertaking. The Irish Courts (“The Sonata”) have approved the principles established in the “Moschanthy” for the measure of security, being the claimant’s best arguable case, plus interest and costs.
In respect of ordinary civil interlocutory relief, the granting of a freezing order, where circumstances obtained to justify the same, could be modulated by the offering of sufficient security.

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 was given the force of law in Ireland by the Merchant Shipping (Liability of Shipowners and Others) Act, 1996. Subsequent amendments have been introduced to update Irish law in accordance with the 1996 and 2012 protocols. Section 7 of the act gives the Convention the force of law in Ireland, simpliciter. The question as to whether an owner or salvor of a MORU might benefit from the LLMC depends, therefore, on whether it has the consideration of ship under the convention text. Section 7 of the Act is of some utility, in this regard, where it refers to: “*References in the 1976 Convention to a ship shall be construed as including references to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or a part of a ship.*” Aside from this, the answer to the question depends on how an Irish Court would interpret the term “ship” in the Convention. Previous discussion of the meaning of “vessel” in the “Von Rocks” refers.

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?

The answer this question is more likely to depend on whether the MORU meets the definition of “ship” than the purpose to which it is being dedicated, namely the provision of power to an excluded category of structure.

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.
No. There is no other basis for limitation of liability.

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))?

As part of a tug’s cargo, it would be afforded innocent passage in the same way as any another vessel. Given the orography of the Irish Coast, however, this would not arise.

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))?
Yes, see reply above.

- 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?

Yes, section 10 of the Maritime Jurisdiction Act, 2021 provides: “10. (1) Every offence committed on board or by means of a foreign ship that is within the territorial sea or internal waters is an offence within the jurisdiction of the State and may be dealt with by a court of competent jurisdiction.”

- 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?

The Irish State would exercise civil jurisdiction over civil wrongs committed on board a foreign MORU in its territorial sea. See also section 15 of the 2021 Act, which extends civil and criminal jurisdiction to the exclusive economic zone of Ireland.

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

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)?

N/A

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)?

No. Sovereign immunity affords protection to the property of an organ of the State in its capacity as such. The mere fact of ownership, or private law rights by another State would not necessarily afford it protection from arrest, where the same were being commercially exploited. The issue was reviewed in detail in the case of : in one of the judgments, delivered by McCarthy J. where he adopted Lord Wilberforce’s dicta in the “Congreso del Partido” [1983] A.C. 244 at p. 267 as being a correct statement of the current generally recognised principles of international law - that is that one must decide “*whether the relevant acts upon which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character . . . or whether*” it “*should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.*” This is probably the correct statement of the law as matters stand. The “absolute” nature of sovereign immunity, such as it might ever have existed in Ireland, must have been further attenuated by decisions of the European Courts, albeit principally in the context of human rights.

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?

As above, unlikely to arise, but yes, there would be no difficulty with a waiver of sovereign immunity.