POLSKIE STOWARZYSZENIE PRAWA MORSKIEGO

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I. 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.

Under Polish law MORU is not treated as the vessel. It does not fall under the definition of the vessel given in Polish Maritime Code (PMC). According to the art. 2§1 of the PMC, a seagoing vessel is any floating device intended for or used for maritime navigation, hereinafter referred to as "vessel". MORUs do not move, so they do not sail. They are usually used as a floating platform for offshore equipment, so their purpose is not sea navigation.

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)?

Please see above.

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

No. It is, however, possible to encumber a MORU with the registered pledge which is evidenced in the Register of the Pledges.

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.

It will be registered as the movable item.

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

No.

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.

No.

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.

Yes.

If so, please also describe the procedure to file such agreements or notice thereof.

You need to conclude a pledge contract in writing and to register the pledge with the court. The pledge registry is accessible to the public. Please see Polish Act on the Registered Pledge for details (Journal of Law from 1996, No. 149, item 703).

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?

Under several conditions you can register the vessel in the Maritime Office - provided it is not subject to registration in the Maritime Chamber or the yachting registry and is not used for the purposes the international navigation (in practice we talk about shipyard pontoons, small unmanned auxiliary vessels and other similar equipment).

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?

See response to question No. 2

If so, please explain details and limitations on such register.

As MORU will be considered a movable item under Polish civil law, it might be encumbered with a pledge which is registered in a Registry of Pledges, while a MORU might be operated by its owner. .

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

The registered pledge has priority before other claims.

I. 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?
Not in a strict sense – i.e. there is no provision of private international law which would provide that ownership or any real rights in MORU are subject to the law of the state of their registration or which would recognize validity of such a registration. An entry in a public register of another jurisdiction would, however, be treated as evidence by way of public document of data attested in report from such a register / certificate of such entry. Depending on the jurisdiction in which it was produced, it would be valid and on par with Polish public documents on the territory of Poland subject to legalization, apostille or without any formalities.

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?

It is difficult to predict what the court or relevant authorities would do and whether there would be any consistency in treatment of foreign MORU's in such circumstances. One can only speculate on the legal arguments that could be made under Polish law.

Certainly, since Polish law does not treat MORU's as ships it could be reasonably concluded that Polish courts or authorities would be in position to disregard the fact that a given MORU is registered as a ship or vessel in another jurisdiction and not treat it like one for purposes a. to d., applying instead its own national law when it comes to qualification of the term "ship" for the purposes of determining law applicable.

At the same time, a ship as defined in the Polish Maritime Code (which does not include MORU's) could be distinguished from a "watercraft" (Polish "statek wodny") under art. 42 of the Polish Private International Law Act of 4 February 2011. Since "watercraft" has no official definition, it could be argued that a MORU registered as a "ship" in a public register of another jurisdiction on production of evidence of such registration public document is "watercraft" for the purpose of the said article. Art. 42 of the Private International Law provides: "Property rights on an aircraft, watercraft, or railway vehicle are governed by the law of the state where the vessel or vehicle is registered, and in the absence of a register or registration, by the law of

the state of the home port, station, or other similar place.". This means that such a MORU could be treated as a ship under point b. and d., to the extent that matter would be linked to the property in the MORU.

On the other hand, there might be an alternative method of qualification of the term "ship" for the purposes of determining the law applicable. A Polish court might apply the substantive maritime law of the law of a permanent registry to treat a MORU as a "ship" and thus, apply to it maritime conflict of law norms which regulate "ships" to determine the applicable law.

It is up to the court to choose applicable method of qualification, and thus a conflict of law norm. The easiest to apply, and thus highly likely, would be a court's own understanding of the term "ship", arising from its own national law.

We believe that It is unlikely for the courts or public authorities to treat such a MORU as a ship for the purpose of point a. as it is strictly maritime in nature and subject to maritime law conventions so the definition of a ship under the Maritime Code would prevail.

Pursuant to art. 1 of the International Convention for The Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926, at force in Poland, Polish courts and authorities should recognize such a MORU as a ship for the purpose of point b, if a mortgage/hypothecation and other similar charge is registered in a public register of a party to the 1926 Convention. In respect of maritime liens, we believe that a foreign MORU could be treated as a ship and a Polish court or authorities would not necessarily decline to enforce an asserted claim in the (foreign) MORU. This is because the MORU would be subject to ordinary powers of the courts and bailiffs to seize property or enforce a foreign judgment or award against property in the Polish jurisdiction.

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?

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?

As noted earlier (see p. 8), a Polish court might treat MORU as a ship, since it might adopt a qualification of the law of a permanent registry. Then, according to the Polish conflict of law norms applicable to maritime liens, a Polish court would apply lex fori to establish priority among the privileged claims (according to special conflict of law norm for maritime liens which applies the law of the state in which a claim is being pursued, art. 355§4 of the PMC).

In case a Polish court treats a MORU as a watercraft under the above-mentioned art. 42 of Private International Law Act of 2011, the priority of creditors would depend upon the law of registration of a MORU.

We realize that the above answer is far from unambiguous, but the result depends on how a Polish court will interpret a term "ship" in the conflict of law norms. In Poland we have specific conflict of law norms for maritime legal relations. That is why the method of qualification of the term "ship" in a conflict of law norm (according to Polish law or law of the permanent registry of a MORU), plays a significant role.

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?

There is no provision under Polish law which would directly regulate property or sale of infrastructure in the Polish EEZ. Under Polish law EEZ is not part of the Polish territory so Polish civil law in general does not apply there. However, it can be argued that pursuant to art. 56 of UNCLOS Polish would apply under "sovereign rights" to the extent it relates to activities for the economic exploitation and exploration of the zone. It follows that if the MORU was foreign-owned but not registered, most likely Polish law would apply both to sale and passage of title unless, with regard to the passage of title, the parties would be in position to evidence a home port in different jurisdiction under art. 42 of the Polish Private International Law Act of 4 February 2011, cited above, in which case that could rely on the law of that jurisdiction with respect to passage of title. Territorial sea is part of Polish territory and Polish civil law would apply there both the with respect to sale and passage of title unless the Parties would be able to argue otherwise under 42 of the Polish Private International Law Act of 4 February 2011.

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.

III. 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)?

The Arrest Convention of 1952, to which Poland is a party, does not contain a definition of a seagoing vessel. Thus, to determine whether an object is a ship or is considered a seagoing vessel, we apply Polish domestic law, i.e., the Polish Maritime Code. According to the Maritime Code, MORU is not a seagoing vessel (Article 2, paragraph 1, by a contrario interpretation). Therefore, the provisions of the 1952 Arrest Convention do not apply to such objects.

MORU is subject to detention/seizure as an ordinary movable item based on the general provisions of civil law, i.e., the Polish Civil Code.

The question of whether a maritime claim is involved is irrelevant because the Arrest Convention does not apply in this case.

The detention/seizure of MORU is only possible in port since detaining any object on the high seas is practically unenforceable.

If so, on what grounds?

Legal basis – Polish Civil Procedure Code regulations
Article 730 § 1: In any civil case subject to examination by a court or arbitration court, it is possible to request the provision of security.
§ 2: The court may grant security before or during the proceedings.
Article 730[1] § 1: Any party or participant in the proceedings may request the provision of security if they can substantiate their claim and legal interest in the provision of such security.
§ 2: Legal interest in the provision of security exists when the lack of security would prevent or significantly hinder the execution of the judgment or otherwise make it impossible or significantly hinder achieving the purpose of the proceedings.
Article 747: Security for monetary claims is provided through:

1. *Seizure of movables.*

Note: Under Polish law, MORU is considered movable property.

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

This matter will be resolved exclusively by national law, by general pronciples of civil law that relate to securing all categories of claims. However it will not be Polish maritime law because MORU is not considered a vessel; thus, the provisions of Polish maritime law, including the 1952 Arrest Convention, do not apply.

The "flag state law" is irrelevant here. The fact that MORU might potentially be considered a "ship" under the law of the registry/flag is irrelevant because the law of the place of seizure applies — in this case, Polish law. Polish law will determine whether MORU is considered a vessel. If it is not regarded as a vessel, the Arrest Convention will not apply.

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

Yes, this applies to both non-maritime and maritime claims; this distinction is irrelevant in this case.

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?

Yes, it will be possible.

a. If so, please provide authority.

Polish Civil Procedure Code, article 742 § 1: If the obligated party deposits with the Ministry of Finance the amount of security requested by the claimant in the application for security, the security ceases.

IV. 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 does not provide a definition of a seagoing vessel. Therefore, to determine whether an object is a ship or considered a seagoing vessel, we apply Polish domestic law, i.e., the Polish Maritime Code. According to the Maritime Code, MORU is not a seagoing vessel (see Article 2, paragraph 1). Consequently, the provisions of the LLMC do not apply to such objects. As a result, the owner or salvor of MORU cannot invoke the limitation of liability provided by the LLMC.

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 response is the 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.

There are no such possibilities.

V. 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))?

See answer below.

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))?
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?
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?

There are no cases that might serve as an example for providing a definitive answer to the above questions. However, on basis of the definition of the innocent passage from UNCLOS which is also introduced in the Polish Act on Maritime Zones and Maritime Administration of 1991 we believe that it is likely that the right of innocent passage would be recognized in Poland to the situations described above. This suggestion is reinforced by the fact that UNCLOS does not include a definition of a ship and the right of innocent passage is a fundamental principle in international law. This is however only under the condition it is not prejudicial to the peace, good order or security of the coastal State. If such right of innocent passage is recognized, there are no other grounds for Polish jurisdiction except the instanced mentioned in UNCLOS.

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)?

Not applicable.

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.

VI. 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)?

Sovereign immunity of states is not regulated in the Polish civil law. It was, however, the subject of several Supreme Court judgments and has been debated in the Polish legal literature. Currently the prevailing view is that the immunity granted to a foreign state in civil proceedings is the so-called limited (functional) immunity, meaning it applies in matters related to sovereign activities (acta iure imperii), but it does not cover matters related to the state's participation in ordinary civil or commercial transactions (acta iure gestionis) – see e.g. the decision of the Polish Supreme Court of 13 March 2008 case no III CSK 293/07 and decision of the Polish Supreme Court of 29 October 2010 case no IV CSK 465/09.
It follows there is no prohibition against arrest, repossession or seizure by a creditor of property under lease or contract with an organ of the state.

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?

No applicable – there is no such immunity with respect to ordinary commercial transactions as explained under point 1 above, so it cannot be waived.
In any event, a waiver of sovereign immunity in civil proceedings is not regulated in Polish civil law (only diplomatic and consular immunity and waiver are regulated in the Polish Code of Civil Procedure) but it is generally accepted that a state may expressly waive it (decision of the Polish Supreme Court of 29 October 2010 case no IV CSK 465/09).