South African NMLA

Answers to the First Questionnaire from the

CMI Mobile Offshore Unit International Working Group

Fall 2024

1. We refer to the the First questionnaire from the CMI Mobile Offshore Renewables Unit International Working Group for the Fall 2024 ("**CMI Mobile Offshore Questionnaire**"). This letter sets out South Africa's responses to the CMI Mobile Offshore Questionnaire.

2. For ease of reference, we repeat each question in the CMI Mobile Offshore Questionnaire in bold and italics before providing the Republic of South Africa's responses.

3. **Questions Related to Ownership and other Property Interests in MORUs**

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

3.1.1 One cannot say emphatically that a MORU would/would not always be treated as a ship under South African law.

3.1.2 The terms "*ship*" and "*vessel*" are defined differently in various South African Statutes, each of which has its own ambit of application.[1]

3.1.3 An individual enquiry must be made as to whether a MORU is considered to be a ship in terms of the applicable Statute in each unique circumstance.

3.1.4 In order to determine whether a MORU is a "*ship*", one must first determine which Statute applies to the circumstance at hand. Once the

[1] WA Joubert (2023) *The law of South Africa, Shipping* 3 ed Lexis Nexis page 76.

applicable statute has been identified, it must be determined whether the definition of a "*ship*" in that statute includes a MORU.

3.2 **Is it possible in your jurisdiction to record ownership interests in any (or all) of the categories of a 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? (b) If so, would it be registered in your jurisdiction's public register of ships, or in another public register? (c) And 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? Please explain with reference to authorities.**

(a)

3.2.1 It is possible to record ownership interests in ships in a public register in South Africa.

3.2.2 The Ship Registration Act 58 of 1996 ("**The SRA**") governs the registration of ships in South Africa, and establishes a South African Ships Register.[2]

3.2.3 Section 1 of the SRA defines a "ship" as follows:

3.2.3.1 *"any type of vessel capable of navigation by water including: a barge, lighter or other floating vessel; a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another, and a dynamically supported craft as defined in s2(1) of the Merchant Shipping Act, 1951."*

3.2.4 Section 1 of the SRA defines a "small vessel" as

3.2.4.1 *"a vessel of less than 25 gross tons and of more than three metres in length."*

3.2.5 While MORUs are non-self-propelled, they are floating units, as are the Floating Auxiliary Units, meaning they would be included in the definition above if it is interpreted broadly.

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[2] Section 33(1) of the SRA.

3.2.6 The Annex to the CMI questionnaire does not stipulate how much the MORUs weigh, though presumedly they are more than 25 gross tonnes and therefore would be classified as a ship rather than as a small vessel.

(**b**)

3.2.7 Section 1 of the SRA defines a "*Ship entitled to be registered*" as "*a ship entitled to be registered in terms of section 16*."

3.2.8 Section 16 of the Act states that the following ships are entitled to be registered:

3.2.8.1 *"(a) South African owned ships,*

3.2.8.2 *(b) small vessels, other than fishing vessels, that are wholly owned by South African residents and South African nationals, or operated solely by South African residents or South African nationals or both such residents and such nationals, and*

3.2.8.3 *(c) Ships on bareboat charter to South African nationals."*

3.2.9 Section 1(6) of the SRA sets out the meaning of "*a ship on a bareboat charter to a South African national*" and states as follows:

3.2.10 *"(6) A reference in this Act to a ship on bareboat charter to a South African national is a reference to a ship that -*

3.2.10.1 *(a) is registered in terms of the law of another state;*

3.2.10.2 *(b) is not a prescribed ship or a ship of a prescribed class or description; and*

3.2.10.3 *(c) is on bareboat charter to one or more South African nationals, and to no other person."*

3.2.11 Accordingly, a MORU would be entitled to be registered on the South African ship register as a "*ship*" if it was South African owned, or on a bareboat charter to South African nationals as defined above.

3.2.12 Section 15 of the Act states that for purposes of registration of a ship:

3.2.12.1 *"(a) The property in a ship is divided into 64 shares,*

3.2.12.2 *(b) The number of persons registered as owners of a ship may not at any time exceed 64,*

3.2.12.3 *(c) Any number of persons not exceeding five may be registered as joint owners of a ship or one or more shares in a ship,*

3.2.12.4 *(d) A joint owner of a ship or of one or more shares in a ship may not dispose of his or her interests separately,*

3.2.12.5 *(e) A person may not be registered as the owner of a fractional part of a share in a ship,*

3.2.12.6 *(f) A body corporate is registered as an owner by its corporate name, and*

3.2.12.7 *(g) A trust is registered as an owner in the name of the trust."*

3.2.13 For the purposes of (b) above, where a share in a ship is jointly owned on two or two or more shares in a ship are jointly owned by the same persons, the joint owners of that share or of those shares, as the case may be, must be registered as one person.

3.2.14 There are limitations on the registration of foreign ships on the South African ship register. As per section 19 of the SRA, ships registered on another register may not be registered on the South African register, subject to the following qualifications:

3.2.14.1 A ship registered on another ship register may be registered on the South African register if the ship is sold in execution by order of the South African High Court exercising its Admiralty Jurisdiction,[3] and

3.2.14.2 A ship registered on another register may be registered on the South African register if it is a bareboat chartered to a South African national, in which case evidence of the charterparty and primary register's consent to dual registration must be furnished to the registrar.[4]

[3] Section 19(1)(a) of the SRA.

[4] Section 19(1)(b) of the SRA.

3.2.15 In line with the above, if a MORU were not South African owned, it could only be registered on the South African ship register if it fell into one of the above exceptions.

(c)

3.2.16 Section 1 of the Ship Registration Act defines a "*South African Ship*" as "*a ship having South African nationality in terms of section 3*."

3.2.17 Section 3 states that the following ships are South African ships and have South African nationality:

3.2.17.1 *"(a) Registered ships, and*

3.2.17.2 *(b) Unregistered ships, being ships entitled to be registered in terms of s16(a) or (b)."*

3.2.18 As per the above, ownership and registration of ships are interrelated. For a ship to obtain the full benefits of ownership, the ship must have nationality, and nationality is conferred by the ship being entered on the South African ship register.[5]

3.2.19 Nationality conferred on ships entered on a particular country's ship register entitles those ships to fly the country's flag, and subjects the ship to a range of controls to be exercised by the flag state (primarily a range of international shipping safety standards.[6]

3.2.20 Thus, the answer is yes: if a ship is registered on the South African ship register it is deemed to be a South African ship and would be entitled to fly the South African flag.

3.3 ***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***

[5] Joubert *Supra* note 9, pages 79 – 80.

[6] Ibid.

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

3.3.1 In terms of section 31(7) read with section 2(1) of Schedule 1 of the Ship Registration Act:

3.3.1.1 *"no record of any interest in a ship or in a share in a ship, other than by way of ownership or mortgage, may be made in the register and, subject to the Act, and to any rights and powers appearing in the register to be vested in any other person, the right of an owner of a ship or of a share in a ship to dispose of the ship or share is not affected by this Act."*

3.3.2 Therefore, the only interests in ships which may be recorded in the public register are mortgages and ownership interests and neither lease interests nor charters may be recorded in the public register in South Africa.

3.4 ***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?***

3.4.1 No, as mentioned above various South African statutes define "*ship*" differently and have different ambits of application. Therefore, even if a MORU were accepted by a registrar or other governmental body as a "*ship*", "*vessel*" or equivalent term, this would not be dispositive of its legal status.

3.4.2 An individual enquiry must be made as to whether a MORU is considered to be a ship according to the relevant Statute in each unique circumstance, regardless of whether the MORU is registered or not.

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

3.5.1 As per the answer provided to question at 3.3.1 above, the only interests in ships which may be registered on the South African ship register are ownership interests and mortgages.

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

3.6.1 Section 11 of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("**AJRA**") deals with the ranking of creditor's claims.

3.6.2 A court may at any time order that any property which has been arrested or attached be sold, and the proceeds held as a fund in the court or otherwise dealt with.

3.6.3 Section 11(1)(a) states that if maritime property is sold in execution or constitutes a fund contemplated in s3(11), the relevant maritime claims shall be paid in order prescribed by subsections (5) and (11).

3.6.4 S11(4) read with s11(5) of prescribes the ranking of creditor's claims in respect of maritime property sold in execution as follows:

3.6.4.1 First listed are claims in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale. These claims rank before any other kind of claim.

3.6.4.2 Second listed are claims to a preference based on possession of the property in question, whether by way of a right of retention or otherwise. These claims rank after the claims listed at 31.1 above but before any claim arising after it.

3.6.4.3 Third is an extensive list of maritime claims with the last one being a catchall provision "*any other maritime claims*". Claims mentioned in this subsection rank equally, irrespective of when such claims arose, subject to the following exception:

3.6.4.3.1 Claims in respect of the salvage of a ship, removal of any wreck of a ship, and any contribution in respect of a general average act or sacrifice in connection with the ship, rank before any other claims.

3.6.4.4 Fourth listed are claims in respect of any mortgage, hypothecation or right of retention of, any other charge on, the ship, effected or

valid in accordance with the law of the flag of a ship and in respect of any lien to which any person mentioned in paragraph (o) of the definition of a maritime claim is entitled. Claims mentioned in this paragraph rank according to the law of the ship.

3.6.4.5 Fifth are claims in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs. Claims in this paragraph shall, among themselves rank in their priority according to law.

3.6.4.6 Lastly, any other maritime claims will rank in their order of preference according to the laws of insolvency.

3.6.5 Furthermore, section 11(11) of AJRA provides the following in respect of the ranking of creditors' claims:

3.6.5.1 Direct claims against the ship sold rank first,

3.6.5.2 Claims arising in respect of sister ships (owned by the same party) rank second, and

3.6.5.3 Claims in respect of associated ships rank last.

4. **Questions Related to the Treatment of Foreign MORUs as Property**

4.1 **Does your Jurisdiction recognise ownership of any such property (i.e., any category of MORU) as evidenced by an entry in a public register of another jurisdiction.**

4.1.1 The SRA does not directly deal with the question of whether ownership of a ship may be evidenced by entry in a public register of another jurisdiction.

4.2 **If a MORU (or any type thereof) is categorised as a "vessel" or "ship" or other "marine equipment" or other such special property in another jurisdiction, BUT 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: purposes of arrest of the MORU, purposes of foreclosure on a mortgage / hypothecation of the MORU,**

purposes of enforcement of maritime liens on the MORU, and/or any or all other purposes?

4.2.1 No- if the MORU does not fall within the definition of a "*ship*" in the applicable domestic legislation of South Africa, it will not be treated as such by the Court even if it is categorised as a "*ship*" or "*vessel*" or other "*maritime equipment*" in another jurisdiction.

4.2.2 Section 2 of AJRA delineates the Admiralty Jurisdiction of the High Court of South Africa and states as follows:

4.2.3 "*(1) Subject to the provisions of this Act, each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine* ***any maritime claim*** *(including, in the case of salvage, claims in respect of ships, cargo or goods found on land)* ***irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.***

4.2.4 *(2) For the purposes of this Act the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction*" (Own emphasis).

4.2.5 In terms of the above section, the High Court of South Africa may exercise its Admiralty Jurisdiction in respect of "*maritime claims.*" Section 1 of AJRA defines a "*maritime claim*" and sets out an extensive list of claims which are categorised as such, each of which pertain in some manner to ships, as defined in AJRA..

4.2.6 Therefore, if a MORU did not fall within the definition of a "*ship*" as per the AJRA, the High Court of South Africa would not be able to exercise its Admiralty Jurisdiction or associated powers in respect of the MORU, which powers would include ordering the arrest of a MORU or enforcing a maritime lien, regardless of whether the MORU fell within the definition of a "*ship*" in another jurisdiction.

4.2.7 As discussed above, however, MORUs do fall within the definition of a "*ship*" for the purposes of AJRA. Therefore, our courts would be able to enforce maritime claims in respect of MORUs.

4.3 **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 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 recognise a MORU as a "vessel' or a "see-going vessel" for purposes of that Convention?**

4.3.1 South Africa is not a party to either 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.

4.4 ***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: foreign owned but not registered, or operated in the territorial sea of your jurisdiction?***

4.4.1 Section 6 of AJRA will determine which law applies to a sale or change of ownership which is operated in the EEZ of South Africa.

4.4.2 See reference to section 6 of AJRA at paragraph 5.1.13 below.

4.5 **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: MORUs of any type, Offshore wind turbines (fixed or floating), Mobile Offshore Drilling Units (MODUs), and/or FSUs and FSPOs?**

4.5.1 There are currently no reported South African decisions which directly address the legal classification of MORUs, Offshore wind turbines, Mobile Offshore Drilling Units, FSUs or FPSOs.

4.5.2 However, the case of *De Beers Marine (Pty) Ltd v Harry Dilley (Pty) ltd*[7] dealt with a claim arising in respect of the salvage of a piece of marine equipment that is not a ship. Specifically, the claim was in respect of a

[7] (413/22) [2023] ZASCA 110.

robotic submarine used to map the seabed in mining operations, which ran aground and was then recovered by the respondent.

4.5.3 The Supreme Court of Appeal ordered that the respondent be paid salvage reward in terms of the Salvage Convention.

5. **Questions Related to Arrest**

5.1 ***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?***

(a)

5.1.1 The Admiralty Jurisdiction Regulation Act 105 of 1983 ("**AJRA**") governs arrest of ships in South Africa.

5.1.2 For purposes of AJRA, section 1(1) defines a ship as:

5.1.2.1 *"any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig. floating mooring installation, whether self-propelled or not."*

5.1.3 The above definition is very broad as it encompasses "any vessel used or capable of being used on the sea or internal waters."

5.1.4 This would certainly include a MORU, as a MORU is defined as "*any non-self-propelled, floating offshore unit or facility*" which is designed for being "*used on the sea*" in that it is a unit designed to generate renewable electrical energy (amongst other functions) while being positioned at sea.

5.1.5 Therefore, MORUs fall within the ambit of the AJRA and may be arrested if the requirements for arrest outlined in the Act are met.

5.1.6 Section 3(4) of the AJRA governs actions *in rem* and states as follows:

5.1.6.1 *"Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action**, a maritime claim**, may be enforced by an action in rem:*

5.1.6.2 *(a) if the Claimant has a maritime lien over the property to be arrested, or*

5.1.6.3 *(b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned" (own emphasis)."*

5.1.7 The above is not exhaustive of the circumstances in which the action in rem is available. A maritime claimant may also arrest such property in rem and therefore being an action in rem if the claim is in respect of ownership of a ship[8]

5.1.8 Property which may be arrested *in rem* is restricted to property falling into one of the categories set out in s3(5) of the Act. Furthermore, such maritime property must be the property in respect of which the claim arose (Joubert).

5.1.9 Any maritime claim may be enforced by an associated ship arrest, save for claims relating to mortgages.

5.1.10 Section 3(5) of the Act states as follows:

5.1.10.1 *"An action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:*

5.1.10.1.1 *(a) The ship, with or without its equipment, furniture, stores or bunkers;*

5.1.10.1.2 *(b) The whole or any part of the equipment, furniture, stores or bunkers;*

5.1.10.1.3 *(c) The whole or any part of the cargo;*

5.1.10.1.4 *(d) The freight;*

5.1.10.1.5 *(e) Any container, if the claim arises out of or relates to the use of that conainer in or on a ship of the carriage of goods by sea or by water otherwise in that container;*

5.1.10.1.6 *(f) a fund."*

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[8] *Duas Compania Naviera SA v MV Al Kaziemah*

5.1.11 Furthermore, s3(6) of AJRA states that an *action in rem* in respect of a maritime claim may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose. With the exception that a claim in respect of any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, or any bottomry or respondentia bond may not be enforced by way of arrest of an associated ship.

5.1.12 Section 3(7) of AJRA defines the term "*associated ship*" and states as follows:

5.1.13 *"(b) For the purpose of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose-*

5.1.13.1 *(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or*

5.1.13.2 *(ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or*

5.1.13.3 *(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.*

5.1.13.4 *(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.*

5.1.14 *(b) For the purposes of paragraph (a)-*

5.1.14.1 *(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;*

5.1.14.2 *(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;*

5.1.14.3 *(iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.*

5.1.15 *(c) If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable."*

5.1.16 In summary:

5.1.16.1 A MORU falls within the ambit of application of the AJRA,

5.1.16.2 A MORU may therefore be arrested for purposes of instituting an action *in rem,* if it is the "*ship*" in respect of which the action *in rem* arose, provided that:

5.1.16.2.1 The claimant has a maritime lien over the MORU,

5.1.16.2.2 The owner of the MORU is liable to the claimant for an action *in personam,* or

5.1.16.2.3 There is some other legally recognised ground for the arrest of the MORU including that the claim is in respect of the ownership of the MORU.

5.1.16.3 A MORU may also be arrested if it qualifies as an associated ship of the ship concerned in respect of which an action in rem arose.

(b)

5.1.17 Section 6 of the AJRA governs which law should be applied by the High Court exercising its Admiralty Jurisdiction in respect of a Maritime claim, and it states as follows:

5.1.18 *"(1) Notwithstanding anything to the contrary in any law or the common law contained, a court in the exercise of it's admiralty jurisdiction shall-*

5.1.18.1 *(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court*

of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

5.1.18.2 *(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.*

5.1.19 *(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.*

5.1.20 *(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.*

5.1.21 *(4) The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court.*

5.1.22 *(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute."*

5.1.23 Therefore, in determining which law is applicable, the High Court exercising its admiralty jurisdiction will proceed as follows:

5.1.23.1 If there is an applicable South African Statute, the Statute will prevail and is to apply,

5.1.23.2 If there is no applicable South African Statute, a choice of law term in an agreement between the parties to the dispute will be upheld and the chosen law applied,

5.1.23.3 If there is no applicable Statute and no choice of law term in the agreement between the parties, the court will apply the common law (either English common law or Roman Dutch common law depending on the basis for the claim).

5.1.24 In the case of an arrest or potential arrest of a MORU, the AJRA is applicable (as demonstrated above), meaning the Court will apply the AJRA.

5.1.25 Therefore, the question of whether a MORU may be arrested will be determined with reference to domestic law.

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

5.2.1 Section 3(4) of the Act specifically states that "***a maritime claim*** *may be enforced by an action in rem*" (own emphasis) and then sets out the circumstances in which a maritime claim may be so enforced.

5.2.2 Furthermore, the maritime property which may be arrested to enforce a claim in rem must be the property in respect of which the claim arose, in accordance with section 3(5) of the AJRA.

5.2.3 Furthermore, the High Court may only exercise its Admiralty Jurisdiction (and thereby order the arrest of a ship) in respect of maritime claims.[9]

5.2.4 Therefore, a MORU could not be arrested for non-maritime claims in South Africa.

5.2.5 Section 3 of AJRA also makes provision for ships to be attached in order to found or confirm jurisdiction, for purposes of instituting a claim *in personam*. Section 3(2)(b) states that an action in personam may be instituted against a person "*whose property within the court's area of jurisdiction has been attached by the plaintiff or the applicant to found or confirm jurisdiction*."

5.2.6 However, the attachment of a ship for purposes of instituting a claim in personam is also limited to maritime claims as section 3(1) of AJRA states that: "*Subject to the provisions of this Act* ***any maritime claim*** *may be enforced by an action in personam*" (own emphasis).

5.2.7 Therefore, a MORU could not be attached in order to institute an action in personam which is not in respect of a maritime claim in terms of AJRA.

5.2.8 Furthermore, in terms of South Africa's parochial laws of jurisdiction, an *incola* Plaintiff may establish jurisdiction against a foreign *peregrinus* defendant in a particular division of the High Court either by attachment of property to found or confirm jurisdiction where the foreign *peregrinus* defendant has attachable property within the borders of South Africa.[10]

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[9] s2 of the Admiralty Jurisdiction Regulation Act 105 of 1983.

[10] C Theophilopoulos et al (2020) *Fundamental Principles of Civil Procedure* 4 ed Lexis Nexis page 80.

5.2.9 The right of an *incola* Plaintiff to attach property is limited, in the case of moveable property, to actions *in rem*.[11]

5.2.10 Therefore, if there is a MORU which is foreign owned (i.e., not owned by a South African resident), in respect of which a South African resident has a claim *in rem,* the MORU may be attached to found or confirm jurisdiction.

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? If so, please provide authority.

5.2.11 In terms of s3(1)(a)(i) of AJRA, an owner of property may prevent attachment or arrest of that property by the provision of security, or may secure the release of any property attached or arrested by provision of security.

6. **Questions related to limitations of liability**

6.1 ***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?")?***

6.1.1 South Africa has not acceded to the Convention on Limitation of Liability for Maritime Claims, 1976 however the Merchant Shipping Act 57 of 1951 (the "**MSA**") provides scope for the limitation of liability for a variety of damage claims against a shipowner.

6.1.2 While the LLMC expressly excludes the application of the convention from floating platforms which are constructed for the purpose of exploring or exploiting natural resources, the MSA extends the definition of a ship to include " *a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another"* without excluding vessels that are constructed for the exploring or exploitation of natural resources.

[11] Ibid.

6.1.3 The implication is that if a MORU falls under the definition of a ship as provided for by the MSA, its owner or salvor may potentially benefit from the limitation of liability provisions in the MSA.

6.2 ***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?***

6.2.1 As provided in response to 6.1~~3.1~~ above, if a MORU falls under the definition of a ship as provided by the MSA, its owner or salvor may potentially benefit from the limitation of liability provisions in the MSA.

6.3 ***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.***

6.3.1 Yes, a ship owner has a right under South African law to limit liability in an action for damage to property or loss of life or personal injury to any person that is caused without the shipowner's actual fault or privity on the basis of the tonnage of its ship which is encapsulated in section 261(1) of the Merchant Shipping Act 57 of 1951 ("**MSA**").

6.3.2 The right to limit extends to any defendant shipowner (local or foreign, in respect of a local or foreign flagged ship) and includes a charterer (whether by demise, a time charterparty or a voyage charterparty) against whom proceedings are brought in South Africa.[12] By implication, therefore, extends to all "ships" defined as such by the Act, wherever registered or even if unregistered.[13]

6.3.3 The liability is assessed according to the tonnage of the ship, damaged or undamaged and will apply to vessels that are within the Republic or the territorial waters thereof.[14] However, the MSA will not apply to the ships belonging to the defence forces of the Republic or of any other country. [15]

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[12] J Hare (2009) *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed Juta & Company page 519.

[13] Section 2 of the MSA.

[14] Section 4(5) of the MSA.

[15] Section 4(6) of the MSA.

6.3.4 A MORU would fall within the definition of "ship" in section 2 of the MSA. Therefore, the owner of the MORU will be able to limit its liability in terms of section 216(1) of the MSA if the damage to property or loss of life or personal injury to any person was not caused by the owner's actual fault or privity.

7. **Questions related to innocent passage and transit**

7.1 ***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))?***

7.1.1 Section 3(3) of the Maritime Zones Act 15 of 1994 ("**Maritime Zones Act**") provides that:

> *"the right of innocent passage shall not exist in the internal waters, except if the internal waters concerned were territorial waters before the commencement of the Act."*

7.1.2 By implication, a foreign-registered MORU would not be allowed to be towed through South Africa's internal waters unless those internal waters were territorial waters before the commencement of the Act (11 November 1994).

7.1.3 The internal waters in South Africa comprises of all waters landward of the baselines and all harbours.[16]

7.1.4 ***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))?***

7.1.4.1 Section 4(3) of the Maritime Zones Act provides that:

> *"The right of innocent passage shall exist in the territorial waters."*

7.1.4.2 This means that a right to innocent passage will be recognised for a foreign-registered MORU being towed through South Africa's territorial sea.

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[16] Section 3(2) of the Maritime Zones Act.

7.1.5 We note that the territorial sea in South Africa constitutes "*the sea within a distance of twelve nautical miles from the baselines*".[17]

7.1.5.1 ***(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?***

7.1.5.1.1 Yes, section 4(2) of the Maritime Zones Act provides that:

> *"Any law in force in the Republic, including the common law, shall also apply in its territorial waters and the airspace above its territorial waters."*

7.1.5.1.2 In terms of this provision, South Africa would recognise its own criminal jurisdiction on board a foreign-registered MORU passing through its territorial sea other than in accordance with UNCLOS Art.27.

7.1.5.2 ***(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?***

7.1.5.2.1 Yes, section 4(2) of the Maritime Zones Act provides that:

> *"Any law in force in the Republic, including the common law, shall also apply in its territorial waters and the airspace above its territorial waters."*

7.1.5.2.2 South Africa would recognise its own civil jurisdiction on board a foreign-registered MORU passing through its territorial sea other than in accordance with UNCLOS Art.28.

7.1.6 ***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)?***

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[17] Section 4(1) of the Maritime Zones Act.

7.1.6.1 South Africa does not have straits used for international navigation in its waters.

7.1.7 ***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))?***

7.1.7.1 South Africa is not an archipelagic State as within the meaning of UNCLOS Art. 46.

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

8.1 ***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)?***

8.1.1.1 In South Africa, the State Liability Act 20 of 1957 ("**State Liability Act**") provides that a creditor of property under lease or contract with an Organ of State cannot as a first resort, arrest, repossess or seize such property unless the procedure outlined in section 3 has been followed.

8.1.1.2 Section 3 of the State Liability Act provides that no execution, attachment, or similar process may be issued against the State or its property to satisfy final court orders for monetary payments. Instead, the payments must be made from the relevant department's budget.

8.1.1.3 Accordingly, within 7 days of a final court order being issued against a department, the State Attorney or the department's attorney must notify the executive authority, accounting officer, and relevant treasury in writing.

8.1.1.4 If the State does not satisfy the court order within thirty (30) days, the judgment creditor can serve the court order on the relevant State Officials, who must ensure payment or make alternative arrangements within fourteen (14) days.

8.1.1.5 If the Treasury fails to ensure payment or make arrangements, the judgment creditor may request a writ of execution. This can be issued by the registrar or clerk of the court against movable property owned by the State and used by the department. The Sheriff can attach movable property but cannot remove it initially unless an agreement is made with the department about the relevant property being essential for public service.

8.1.1.6 After 30 days from attachment, if no stay or alternative arrangements are made, the Sheriff may sell the property to satisfy the debt. However, if the attached property's sale would disrupt service delivery or endanger public safety, the department may apply to the court for a stay of execution. The application must include a list of movable property that can be sold to satisfy the debt.

8.1.1.7 We note that this is the legal position, as property owned by the State is used for public service. Therefore, arresting, repossessing, or seizing such property should be considered a last resort, to ensure that the State is not impeded in fulfilling its public duties. Therefore, arresting, repossessing, or seizing the property is only permissible as a last resort once the creditor has obtained a final judgment from the court stating that the State, under a lease or contract with the creditor, owes the creditor money.

8.2 ***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?***

8.2.1.1 Contracts with the state are subject to a number of key legislation including the Public Finance Management Act 1 of 1999 (PFMA), the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) as well as the Constitution.

8.2.1.2 We are not aware of any legislation that provides explicitly for the waiver of the State's immunity through a contract.

8.2.1.3 As we understand it, the State may provide a waiver under a contract with a creditor provided that this does not contradict the provisions of the Constitution, the PFMA, the PAJA or the PPPFA.

8.2.1.4 However, in certain instances, the property may be protected if it's attachment will severely disrupt service delivery, threaten life or put the security of the public at risk.[18]

8.2.1.5 In addition, a term in a contract which entitles a creditor to arrest, repossess or seize a property of the debtor without having to go to court for an attachment and execution order against the defaulting debtor is regarded in South Africa as a ***parate executie*** clause.

8.2.1.6 A *parate executie* clause in a mortgage bond permits the creditor (bondholder) to execute without recourse to the debtor (mortgagor) or the court by taking possession of the immovable property and selling it, which is illegal and thus void.

[18] S7(b) of the State Liability Amendment Act 14 of 2011