

TULANE ADMIRALTY LAW INSTITUTE

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**The Evolution of “Vessel” Status in U.S. Domestic and
International Law**

A. Introduction; Terminology

The “vessel” or “ship” as central to admiralty jurisdiction and maritime law. Ships, Barges, watercraft, floating equipment. Cases have found craft to be vessels whether propelled by wind, tide, screw or paddles, steam, naphtha, internal combustion engines or animals or towed by another vessel.

The setting: “Ebb and flow of the tide” gives way to “navigable waters” Inland Waters, dumb barges, scows and Canal boats powered by teams of horses. Unlike matter, navigable waters can be created or destroyed – the case of canals.

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); The General Cass, 10 F. Cas. 169 (E.D. Mich. 1871); Jones v. Coal Barges, 18 F. Cas. 950 (C.C.W.D. Pa. 1855); The Hezekiah Baldwin, 12 F. Cas. 93 (E.D.N.Y. 1826) (canal boat with grain elevator added is a vessel); The Pioneer, 30 F. 206 (E.D.N.Y. 1886) (scow with steam shovel built in to enable dredging is a vessel); The Robert W. Parsons, 191 U.S. 17 (1903).

Purpose and business of the craft as an instrument of marine transportation – The Robert W. Parsons, 191 U.S. 17 (1903).

B. Effects of Technology and Applications.

Log rafts and Sack rafts to floating platforms, work barges and MODU’s

- The Annie S. Cooper, 48 F. 703 (E.D. La. 1891)

- The Mary, 123 Fed. Reg. 609 (S.D. Ala. 1903)
- U.S. v. Kennebec Log Driving Co., 491 F.2d (1st Cir. 1973)

33 U.S.C. § 460, “Exception as to floating loose timber, sack rafts, etc. The prohibition contained in section 409 of this title against floating loose timber and logs, or sack rafts, so called, of timber and logs in streams or channels actually navigated by steamboats, shall not apply to any navigable river or waterway of the United States or any part thereof whereon the floating of loose timber and logs is the principal method of navigation. . . . “

C. Boundaries of the concepts of Vessel

Several intertwined and conflicting concepts have haunted the “vessel” analysis.

“vessel under construction” – launch vs. Completion

“vessel” vs. “vessel in navigation”

“vessel” vs “permanently moored”

- 74 Fed. Reg. 2184, “Craft Routinely Operated Dockside.” (USCG 2004)

“vessel” vs “removed from navigation” “Dead Ships”

- The George W. Elder, 206 F. 268 (9th Cir. 1913)

D. Appurtenances – What is the “whole of the vessel?”

In lien and mortgage cases, it may be important to determine what constitutes the

“Vessel,” subject to arrest and foreclosure.

- Fixtures and appurtenances
- Required or useful to navigation
- Required or useful to the ship’s purpose, but not necessary or useful to navigation
- leased equipment and charterer’s equipment
 - maritime lienors
 - preferred mortgages

E. Different perspectives

Maritime torts. location and relationships to traditional maritime activity

Maritime contract. maritime nature

Marine finance. Statutory creatures, longer exposure

Vessel must be a “vessel” entitled to documentation at all times during the life of the mortgage.

Admiralty Jurisdiction. Cannot stipulate that a craft is a “vessel” and bootstrap yourself into subject matter jurisdiction.

The standard in most but not all situations is the Rules of Construction Act. The Rules of Construction Act (1 U.S.C. § 3) defines “vessel” to include:

“every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water”

F. Implications of vessel status.

Documentation is available to “vessels”

- Wholly owned by US citizen
- at least 5 net tons
- Not documented under the laws of a foreign country. 46 U.S.C. § 12103

(a)

certificate of documentation or endorsement on certificate is invalid if the vessel for which it is issued

(1) no longer meeting the requirements of Chapter 121, Title 46) or

(2) is placed under command of an individual not a citizen of the U.S. in violation of Section 12131. 46 U.S.C. § 12135

(3) until certificate is surrendered with the approval of Secretary, documented vessel is deemed to continue to be documented for purposes of Chapter 313. (preferred mortgage). 46 U.S.C. § 12136

G. Special Cases in Federal Law.

Capital Construction Funds, 46 U.S.C. § 53501(9)

The definition of “vessel” is expanded, for purposes of determining what qualifies as qualified investment under the CCF program:

“Vessel – The term “vessel” includes-

A. cargo handling equipment that the Secretary determines is intended for use primarily on the vessel; and

B. on ocean-going towing vessel, an ocean-going barge, or a comparable towing vessel or barge operated on the Great Lakes.”

Title XI Loan Guarantees Part 537

For purposes of defining property which can be financed with assistance from the Title XI Mortgage Guaranty Program, “vessel” is expressly defined in 46 U.S.C. § 53701:

“Vessel. – The term “vessel” means any type of vessel, whether in existence or under construction, including –

A. a cargo vessel;

- B. a passenger vessel;
- C. a combination cargo and passenger vessel;
- D. a tanker;
- E. a tug boat or towboat;
- F. a barge;
- G. a dredge;
- H. a floating drydock with a capacity of at least 35,000 lifting tons and a beam of at least 125 feet between the wing walls;
- I. an oceanographic research vessel;
- J. an instruction vessel;
- K. a pollution treatment, abatement, or control vessel;
- L. a fishing vessel whose ownership meets the citizenship requirements under section 50501 of this title for documenting vessels to operate in the coastwise trade; and
- M. an ocean thermal energy conversion facility or plant-ship that is or will be documented under the laws of the United States.”

- United States v. Trident Crusader, 366 F.3d 391 (5th Cir. 2004)

The Vessel was documented with the Coast Guard just prior to sea trials and a preferred mortgage in favor of MARAD was placed on it. A trade creditor who supplied services during construction challenged the Marad Title XI Mortgage as invalid as the vessel was not complete when documented or mortgaged. The Court upheld the preferred mortgage relying on the more expansive definition of vessel in the Title XI statute, including vessel “under construction.”

H. The Current litmus.

In Lozman v. City of Riviera Beach, 568 U.S. 115 (2013), the Supreme Court decided the status of a floating home by claiming to focus on the phrase “capable of being used,” relying further on its prior decision in Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005) that the phrase encompasses “‘practical’ possibilities, not ‘merely . . . theoretical’ ones.”

“Floating Home”

Split in the Circuits:

11th Circuit in Lozman (City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259 (11th Cir. 2011))

“home was ‘capable’ of movement over water and owners’ subjective intent to remain moored indefinitely at a dock could not show the contrary”

“capable of moving over water under tow, albeit to her detriment.”

5th Circuit in De La Rosa v. St. Charles Gaming Co., 474 F.3d 185, 187 (5th Cir. 2006)
“Structure not a vessel where ‘physically,’ but only theoretical[ly] capable of sailing, and owner intends to moor it indefinitely as a floating casino.”

Majority Analysis I Rules of Construction Act, 1 U.S.C. § 3

“watercraft or other artificial contrivance”

“used” or “capable of being used, as a means of transportation on water”

“practical” possibilities, not merely theoretical ones”

Stewart v. Dutra Constr. Co., 543 U.S. 481, 496(2005)

“Transportation” includes “conveyance (of things or persons) from one place to another” – *Transportation*, 18 OXFORD ENGLISH DICTIONARY 424 (2d ed. 1989)

Review of the Lozman “home”

- No rudder;
- No steering mechanism;

- Unraked hull;
- Rectangular bottom 10'' below water;
- No ability to generate or store electricity;
- “small rooms looked like ordinary nonmaritime living quarters”;
- “And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows;”

Conclusion:

“a reasonable observer, looking to [Lozman’s] home’s physical characteristics and activities, would not consider it to be *designed* to any practical degree for carrying people or things on waters” (emphasis supplied) Lozman at 116.

By introducing the word “design” into the analysis, the Court in fact departed from the “capability” test in preference for a standard based on intent, unless we are prepared to say that an object can be “unintentionally designed.” Subjective or objective?

Review of prior case law

- “watercraft need not be in motion to qualify as a vessel” – citing Stewart v. Dutra;
- Criticizes the “everything that floats” approach and calls it “inappropriate and inconsistent with our precedents”;
- Cites Washington State and California statutes defining “floating home” and urges consistency with state law as a “virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and non-lawyers alike.”
- “agree...about the need to eliminate the consideration of evidence of subjective intent” on Court suggests instead to consider “objective evidence of a waterborne transportation purpose,” objective manifestations of any relevant purpose.”

Court, refers to its analysis standard as “design-based or purpose-related criteria which should offer guidance in a significant member of borderline cases when ‘capacity’ to transport over water is in doubt.” Lozman, at 128.

Court “understand that our approach is neither perfectly precise nor always determinative.”

Court suggests that analyzing design and “purpose” is called for only when ‘capacity’ to transport over water is in doubt.

As a postscript, the Court, addressed the issue of “actual use” by noting that the fact that the floating home moved over water only by tow and only traveled “significant distances only twice in seven years,” and is far too little *actual* use to qualify it as a “vessel.” (emphasis supplied) Lozman, 568 U.S. at 130.

Questioned, if not explicitly overturned by Lozman:

Criticized by Court as embodying the “‘anything that floats’ approach”

- Miami River Boat Yard, Inc. v. 60’ Houseboat, 390 F. 2d 596, 597 (5th Cir. 1968) (so-called “houseboat” lacking self-propulsion)
- Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat, No. 09-3292, 2009 WL 3379923, at *5-*6 (D..N.J. Oct. 19, 2009)
- Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa, 469 F. Supp. 987, 989 (S.D.N.Y. 1979)
- Holmes v. Atlantic Sounding Co., 437 F.3d 441 (5th Cir. 2006) (floating dormitory)
- Summerlin v. Massman Constr. Co., 199 F. 2d 715 (4th Cir. 1952) (derrick anchored in the river engaged in building a bridge is a vessel.

Lozman Dissent (Sotomayor and Kennedy)

Criticizes introduction of “reasonable observer.”

Criticizes “importing windows, doors, room style, and other esthetic criteria into §3 analysis.”

Criticizes deference to state statutes

“The majority’s invocation of two state environmental and tax statutes as a reason to reject this well-established lower court precedent is particularly misguided. See *ante*, at ___ - ___, 184 L. Ed. 2d, at 614-615. We have repeatedly emphasized that the “regulation of maritime vessels” is a “uniquely *federal* are [a] of regulation.” Chamber of Commerce of United States of America v. Whiting, 563 U.S. 582, 604 (2011) (plurality opinion) (emphasis added); see also United States v. Locke, 529 U.S. 89, 99, (2000) (explaining that “the federal interest [in regulating interstate navigation] has been manifest since the beginning of our Republic and is now well established”). Our previous cases did not turn to state law in determining whether a given craft is a vessel. There are no good reasons to do so now.”

– Fn. 5, Lozman Dissent,

I. Cases subsequent to Lozman

Warrior Energy Servs. Corp. v. ATP Titan, 941 F. Supp 2d 699 (E.D. La. 2013). In a maritime lien *in rem* action, floating production platform that was designed to be wet-towed to the site, secured to the seabed under 4,000 feet of water, “by twelve moorings, each of which weighs over 170 tons” and “is embedded 205 feet into the seafloor” is not a “semi submersible” or a “vessel.” 941 F. Supp. at 704, 707

Mendez v. Anadarko Petroleum Corporation, 466 Fed. Appx. 316 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 979(2013). Personal injury asserted under the Jones Act by worker aboard the Anadarko spar RED HAWK, a floating gas production platform 210 miles seaward of Sabine Pass.

“Some of the spar’s features, including “tow bollards,” and the shape of its hull, could facilitate movement from one offshore

location to another, but the work and expense needed to unmoor it, prepare it for transportation, and to reattach it to a new location, make that difficult and expensive. As a result, the spar was designed to remain permanently moored to the seabed and stationary for the life of the oil and gas production field.”
46 Fed .Appx. at 317

Armstrong v. Manhattan Yacht Club, Inc., 2013 WL 1819993 (E.D.N.Y Apr, 30, 2013).

Two story floating platform moored in marina in Manhattan with two forty foot steel spuds secured to the seabed as well as a four point anchoring system, moved for six months a year to sheltered port of harbor with assistance of a crane barge. No engine, but no use of shore facilities, held not sufficiently distinguishable from Lozman’s floating home as to qualify it as a “vessel.” Therefore, Jones Act claim by employee maintenance worker failed for lack of jurisdiction.

Fireman’s Fund Ins. Co. v. Great Am. Ins. Co. of N.Y., 2013 U.S. Dist. LEXIS 11114*; (S.D.N.Y, Jan, 25, 2013).

Decided that an insurance policy on a floating drydock was not a marine policy as drydock was not a vessel. This drydock was one of the largest ever built, “consisted of eight 240’ x 101’ x 23.5 pontoons, each complete with one fixed wing wall and one removable wing wall moored together . . . “ It had been towed across the Pacific during word War II and returned by tow to Texas in 1984. Expert engineering witness testified that drydock “had ship-shaped hulls, indicating that the Drydock was built to travel long distances over the water,” and that the “pontoons also contained crews’ quarter.” 2013 U.S. DIST. LEXI 11114, at 12. District Court concluded that “this evidence, while arguably sufficient in a *pre-Lozman* landscape to prove the Drydock vessel, falls short *post-Lozman*.” *Id.* at 13.

The Drydock was “in the years leading up to its destruction, more or less permanently moored in one place.” *Id.* at 15.

Martin v. Fab-Con, Inc., 9 F. Supp. 3d 642 (2014)

Eastern District of Louisiana dismissed Jones Act and unseaworthiness claims brought by a galley hand injured on board a barge, concluding that the barge was not a vessel. The barge was located 30 feet offshore, with no mooring or utility to land, but tethered to a crane barge. It had a five ft. draft, a bilge pump and a slightly raked hull. It was spudded in place. Electricity was provided by two on board generators, but the barge had no self-propulsion, engine or rudder. Evidence was that the barge was built only as “stationary housing accommodations” and not to transport passengers, cargo or equipment across water and was never used for any of those purposes.

Plaintiff argues that the Master Charter and Service Agreement executed between CCR and Fab-Con on September 1, 2012 establishes that the UNITY is a vessel. But, as defendants correctly point out, “parties cannot contractually agree to determine vessel status . . . Vessel status is determined by the history of the contrivance, its use, purpose, and perhaps potential, not what the parties call it.” St. Paul Fire & Mar. Ins. Co. v. SSA Gulf Terminals, Inc., No. Civ. A. 01-3063, 2002 U.S. Dist. LEXIS 19138, (E.D. La. Oct 8, 2002).

Baker v. Dir., OWCP, 834 F.3d 542 (5th Cir. 2016) .

“He was allegedly injured while building a housing module designed for use on a tension leg offshore oil platform (TLP) named Big Foot.

* * *

“Big Foot, like other TLP’s, is a type of offshore oil platform used for deep water drilling; the parties concede that Big Foot was not built to regularly transport goods or people.

* * *

“Although Big Foot can float, it is not capable of self-propulsion, has no steering mechanism, does not have a raked bow, and has no thrusters for positioning once on location. Once completed, Big Foot was scheduled to be

towed to a location approximately two hundred miles off the Coast of Louisiana and anchored to the sea floor by over sixteen miles of tendons.

* * *

“Anytime it is under tow, Big Foot will be tended to by a crew that is employed to control Big Foot during the voyage. Once anchored, Big Foot will serve as a work platform for the life of the oil field, which is estimated to be twenty years. The U.S. Coast Guard classified Big Foot as a ‘Floating Outer Continental Shelf [OCS] Facility’ pursuant to 33 C.F.R. § 143.120, and stated in an email that, as a ‘non self-propelled vessel,’ it must be towed to its resting spot on the OCS.

* * *

... “Baker’s entitlement to benefits under the LHWCA turns on whether Big Foot is a vessel as contemplated by the Act. The ALJ and BRB both concluded that Big Foot is not a vessel, and we agree.

* * *

“While required to carry a captain and crew when towed, the crew will only be present to ensure Big Foot’s transport to its permanent location on the OCS. And unlike the *Super Scoop*, Big Foot will not be used to transport equipment and workers over water in the course of its regular use.

* * *

“Big Foot will not transport objects from place to place, and is intended to remain anchored to the floor of the OCS for twenty years.

* * *

“The fact that Big Foot will transport a crew and material to the OCS is likewise incidental to its purpose of serving as an oil field work platform.

Helix Energy Sols. Grp., Inc. v. Gold, 522 S.W.3d 427 (Tex. 2017).

This case more specifically applies *Lozman* to the situations where a vessel is withdrawn from navigation. It is not so much a ‘vessel’ case.

“In August 2012 Helix Energy Solutions Group purchased the HELIX 534 for \$85,000,000. Prior to the purchase, the 534 was laid up in a shipyard. And upon purchase, another vessel towed the 534 to the Jurong Shipyard in Singapore. The 534 served her previous owner as a drill ship, a ship that

drills wells. But Helix purchased the 534 with plans to convert her into a well-intervention ship, a ship that services pre-existing offshore wells. . . .

“The conversion involved, among other things, removing obsolete equipment, configuring and installing well-intervention equipment, and overhauling the engines, thrusters, generators, and in-line propulsion equipment. The work done on the propulsive components rendered the 534 unable to navigate on her own for a substantial portion of the conversion process. . . .

Though Helix initially expected the conversion to take five or six months (ending in mid 2013), unanticipated work, labor issues, and trouble procuring certain parts delayed the conversion. In September 2013, with work still to be done, Helix dry-towed the 534 from Singapore to Galveston, Texas. In April 2014, 20 months after work began, the 534 entered well-intervention service for the first time under Helix’s control. In total, the 20-month conversion cost \$115,000,000, or roughly 135% of the 524’s purchase price. . . .

“During the entire time Gold worked aboard the 534 (almost 5 months), the ship lacked the ability to navigate on her own due to the overhaul of her engines. . . .

“Helix does not contend that it is Gold’s job description that renders him outside Jones Act coverage—Helix says simply that the 534’s conversion took her out of navigation. The present dispute therefore does not hinge on Gold’s particular duties while aboard the 534. . . .

“[a] vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or dockside,’ even when she is taken to a drydock or shipyard to undergo repairs in preparation to making another trip.” Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) at 373-74 (citation and sentiment; temporary and routine repairs do not take other seaworthy vessels out of navigation. *See, e.g., Romero v. Canjun Stabilizing Boats, Inc.*, 307 Fed. Appx. 849, 851 (5th Cir. 2009) (holding that a vessel that was dry-docked for several weeks for routine repairs remained in navigation as a matter of law).”

J. Issues outside of U.S. jurisdiction.

(a) International Conventions, specialized definitions.

- International Maritime Organization (successor to IMCO) (United Nations)
- International Convention on Civil Liability for Oil Pollution Damage of 1969 (CLC Convention) Art 1.1 “Ship” – defined as “any sea-going vessel and any sea-going craft of any type whatsoever, actually carrying oil in bulk as cargo.”

MARPOL 73 “ship” – defined as “vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platform.” CLC, Art 2 (4).

- International Oil Pollution Fund

(b) Comite Maritime International (CMI – Identifying issues)

Who decides the status of a craft as a “vessel” or “ship”? Foreign State or Flag State?

- Int’l Working Group Responses on Vessel Nomenclature – Questionnaire No. 1
- Categories and definitions of watercraft and related property.
- Common law jurisdictions/Code jurisdictions.
- Recognition of flag state determination of vessel status, ships and related equipment.

ATTACHMENT 1

CMI International Working Group on Vessel Nomenclature, Questionnaire #1 (March 2016).
[NOTE: when complete attach 379396]

ATTACHMENT 2

Compiled Responses to Questionnaire #1. [NOTE: when complete attach 443124]



**CMI INTERNATIONAL WORKING GROUP
ON VESSEL NOMENCLATURE**

RESPONSES TO FIRST QUESTIONNAIRE

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RESPONSES OF THE POLISH MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

Polish law provides multiple definitions of a vessel or ship – all of them adopting similar Polish term ‘statek’. Definitions’ content vary depending on the subject matter of the legal act in question (what will be developed further in answer to the question 2).

Main definition is found in the Polish Maritime Code, according to which a seagoing vessel is any floating structure appropriated for or used in, maritime shipping. Above definition indicates that it is enough for the floating structure to fulfil one of mentioned prerequisites to be qualified as a ship. Qualification therefore depends either on intention and will of the ship’s operator to exploit a ship on the sea or the fact that a ship is used in such way. By such Polish definition of a vessel contained in the Maritime Code is more closely connected with understanding of vessel than ship as indicated by the authors of questionnaire, however not the same.

The Maritime Code furthermore divides vessels into three categories, depending on their purpose: merchant seagoing vessels, seagoing vessels employed exclusively for scientific research, for sports or recreation and seagoing vessels used solely in special state service. The first category is the central object of the maritime code’s norms. A merchant seagoing vessel is defined as a vessel appropriated for or employed in economic activity, in particular: carriage of cargo or passengers, sea fisheries or exploitation of other maritime resources, towage, salvage, recovering sunk property, exploitation of the seabed mineral resources or resources of the inside of the Earth below the seabed. Above enumeration is only of the exemplary character, what means that economic activity in which a merchant seagoing vessel maybe employed is not limited to those kinds. However above examples give an interpretative clue how to understand conducting economic activity in maritime environment. Example of bunkering or dredging activities are also suggested. On the other hand seagoing vessels used exclusively in special state service are in particular: hydrographic, supervising, firefighting, telecommunication, customs, sanitary, training, pilot ships, as well as ships used only for the saving of life at sea or for ice braking. To this category of vessels the Maritime Code is applied in limited respect, i.e. with the exclusion of norms on carriage of goods, carriage of passengers, general average and maritime lines. Similarly limited applicability concerns vessels employed exclusively in sports, recreation or scientific research since norms on carriage of goods and passengers and general average are inapplicable. In this instance particular



attention should be applied to the word “exclusively”. If otherwise seagoing recreational vessel carries passengers for commercial benefit it is considered as a merchant seagoing vessel by the Maritime Code. For the purposes of hypothecation and/or mortgage a concept of a seagoing vessel under construction has been introduced to the Maritime Code, understood as a vessel which keel has been laid or similar construction work has been made in the place of launching, until the end of construction.

It ought to be underlined that ratified international agreements are universally binding law in the Republic of Poland. An international agreement ratified upon prior consent granted by statute (*ustawa*) entertains precedence over statutes in case of collision. By such, maritime conventions with their ship's and vessel's definitions, after proper promulgation, become a part of domestic legal order and are to be applied directly (unless its application depends on the enactment of a statute). Thus, definitions contained in the conventions are binding.

Worth noting is also, that the Polish Maritime code adopts a legislative method of incorporation of an international convention consisting in the regulation of certain matters by referring in the domestic legislation to rules of international treaties. Technicalities of such method include indicating the title of the convention and place of its publication in the Polish Journal of Laws, but without reproducing its text in the code. Implementing provisions are added if necessary. The incorporation method provides for optimal convergence with the international law. Such a method has been adopted in respect of the Convention on Tonnage Measurement of Ships of 1969, CLC/FUND 1992, London Protocol 2003, BOPC 2001, LLMC 1996 and Athens Convention of 1974. Thus, in those cases also definitions as adopted in the international conventions are binding.

On basis of above, it is clear that in areas regulated by the conventions vessel definition from the SALVAGE convention (art. 1b) and ship's definition from the MARPOL convention are present in the Polish legal order.

Art. 5 of Polish Maritime Safety Act defines ship as a vessel of any type operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating platforms – as long as the definition is not contrary to any found in the international conventions. Article 4.1 of the Prevention of Pollution from Ships Act defines ship as a vessel of any type operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, fixed or floating platforms.

It is also important to mention that for registry purposes, small ships up to and including 15 metres in length and all ships without mechanical drive are not legally considered to be ships. Also, leisure boats/yachts up to and including 24 metres in length are registered in the Polish Yachts Register. Consequently, only yachts longer than 24 metres can be registered in the Polish National Register, which is known as the ‘Rejestr Okretowy’ in Polish. Small vessels, up to and including 5 metres in length and not operating abroad, are not obligated to register in any Polish ship register.

Lastly, worth mentioning is the fact that Polish Codification Commission for Maritime Law is in the course of preparing proposal for new maritime code. In respect of the vessel's definition it proposed a definition allowing for clearer differentiation between vessels and floating structures, since on basis of the current definition such differentiation was not straightforward, especially

when considering f.ex. floating crane actually used in maritime shipping, even if not predominantly intended for. The proposed definition defines a seagoing vessel as a floating structure intended for *and* used in maritime shipping. New definition differs from current code's regulation as both prerequisites, intention for and usage in maritime shipping, have to be fulfilled. Floating structures that do not fulfil both conditions are treated under the proposal as maritime floating facilities, for which a separate definition is intended. It is envisaged in the proposal that code's norms will be applicable also to maritime floating facilities, unless otherwise prescribed. A separate book of ship's registry is intended for maritime floating facilities.

Question 2:

In your system, does the definition of 'vessel' (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

As indicated above, the definition of vessel in the Polish legal system depends on the subject of particular law. The meaning of a 'vessel' is varied in the Polish Maritime Code, Safety Law, Marine Protection Law and Labour Law. Different understanding of 'vessel' is driven by different aims of the regulation at stake. Some of the definitions have been presented above, nonetheless they will also be recalled in this part. The Maritime Code defines ship as: "any type of vessel intended to use (designed for) or be used in shipping." This basically presumes, that the Maritime Code is written for commercial shipping.

For safety standards and the purposes of environmental protection, Polish legislators, as mentioned above, gave wider definitions according to whether the ship is a vessel of any type operating in the marine environment and including hydrofoil boats, air-cushion vehicles, submersibles, floating platforms. The legal implications and obligations connected with labour at sea are regulated by the Maritime Labour Act. They are only relevant to commercial ships, although the aforementioned act does not contain the definition of either a ship or a vessel.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

The process of seizure, forced sale, ranking and priority of claims against vessel is different from such a process for other types of property under the Polish law. There are special rules in the Civil Procedural Code (CPC) on the seizure and forced sales of ships. It is necessary to note that Poland is a party to the International Convention Relating to the Arrest of Sea-Going Ships, signed in Brussels in 1952. The Polish Maritime Code does not contain specific provisions on the arrest of vessels. As regards the arrest of vessels, the judicial procedures securing claims as laid out in the provisions of the CPC are used, including pecuniary claims on sea vessels or sea vessels under construction (Article 747⁴ of the CPC).



Polish legislation allows for two different ways of carrying out a levy of execution against ships. It can be carried out in accordance with the rules governing the execution of movables, or in accordance with Article 1014 of the CPC, according to the rules on execution against real estate. The implementation of an appropriate method of a levy of execution depends entirely on whether the ship is already registered in the register of ships. The entry of a vessel into the aforementioned Register entails the application of the rules on execution against real estate, taking into account some specific amendments to Articles 1015-1022⁴ of the CPC. Vessels not registered in the register of ships, in accordance with Article 1021 of the CPC, are subject to execution in line with the rules of execution against movables. In the scope of a levy of execution involving foreign ships, the indications are that the method of execution depends on whether the vessel has been entered into the respective foreign register of ships. If this is the case, the CPC provisions concerning execution against real estate with the amendments in Articles 1022-1022⁴ of the CPC will be appropriate for use; if this is not the case, the rules governing the execution of movables are used (Article 1021 of the CPC).

As mentioned earlier the current regulation leaves judicial enforcement proceedings outside the Maritime Code. The execution proceedings against ships are governed specifically by a separate Section VII of the Part III of the CPC on Executory Proceedings in general. Section VII is of rather modest size, consisting of only a dozen or so Articles that define some of the specific elements of a levy of execution against ships. Unlike other provisions of execution, the following issues relating to the levy of execution from ships have been regulated specifically in Section VII of the CPC: property of bailiff (Article 1015); manner of seizing entities (Article 1017, 1018); and manner of the carrying out of the notice of auction (Article 1020). Additional amendments have been made on the levy of execution against foreign vessels within Poland's territory (Articles 1022-1022⁴). The other elements of the regulatory scheme are the general provisions on execution from immovable property or movables in case of ships entered into the register of ships and those not entered, respectively. Both procedures also apply the provisions of the Maritime Code in the scope of provisions governing the issue, as *lex specialis*.

In relation to ranking priority, generally claims secured with maritime hypothecation burdening ships registered under the Polish law, entertain priority before other personal creditors of the shipowner. However, there are some privileged claims, that ought to be satisfied in the first place from the sums obtained within enforcement proceedings. Among those privileged claims chronologically are: cost of enforcement proceedings, alimonies, claims for wages (limited to 3 months period). Fourth place in ranking is prescribed for maritime liens, which supersede maritime hypothecation.¹ They take priority before claims satisfied by other limited proprietary rights burdening other types of property: hypothecation, pledge and registered pledge.

¹ Currently CPC provides in art. 1025 that claims secured with maritime liens and maritime hypothecation entertain the same place in ranking priority.~~That mistake will be amended in order to provide maritime liens with higher place in the ranking priority.



Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

MLM 93 has not been ratified by Poland, neither followed in Polish law. Poland has ratified and adopted the Brussels 1926 convention.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Under the Polish law the acceptance of property as a ship by registered body (Izba Morska) is dispositive of fulfillment the requirements prescribed by the Maritime Code and other legal acts relating to maritime safety (f. ex. measurement, tonnage, construction, composition of crew). It is possible to appeal against such a decision to the higher instance court. In relation to levy of execution proceeding, as it was describe in answers to question 3 and 6, the situation is different. For the levy of execution purposes, according the Polish Civil Procedure Code, Polish Court recognizes property as a ship if the vessel has been entered into the respective foreign register of ships.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

We are not aware of any court judgement or reported decision considering the treatment of vessels categorized as ships according to any other jurisdiction, which would be treated as a ship or vessels by Polish courts for the purposes of arrest and foreclosure. Such a decision however would be possible according to the Polish Civil Procedural Code in reference to the international convention, which has been ratified by Poland.

The matter of a ship’s arrest is not regulated in the Polish Maritime Code. Yet we still we have relevant regulation in the Polish Civil Procedural Code, which corresponds with the International Convention Relating to the Arrest of Sea-Going Ships, signed in Brussels, on 10th May, 1952. This convention offers the legal guidelines, according to which the Polish civil procedure is applied.

According to Polish Civil Procedural Law, the foreclosing procedure can be applied to ships registered in the Register of Ships, kept by the Maritime Chamber, which is responsible for the vessel’s home port. For such a procedure the regulations of foreclosing from real estate are applied correspondingly (according to Article 1014 of Polish Civil Procedure Law). For the ships not registered in the Register of Ships, kept by the Maritime Chamber, regulations of foreclosing from movable are applied (according to 1021 of Polish Civil Procedural Code). However, according to

Article 1022, execution proceedings can be applied to a foreign vessel located in Poland. This can be reduced to the following simple formula: if the foreign ship is registered in a foreign Vessel/Ship Register and according to foreign law can be categorized as a vessel or ship, it is possible that such a vessel will be treated as a ship for mortgage claims procedures, ship arrest and foreclosure, during the time it is located in Poland.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

There are not many court judgements or reported decisions which address the legal classification of vessels. Those relevant are listed below, categorise according your proposition:

- 1) ***non-self propelled barges*** – there are no such a reported decisions;
- 2) ***self-propelled barges*** – there are no such a reported decisions;
- 3) ***accommodation barges*** – there are no such a reported decisions but according to Polish Maritime Code definition of ship, if they are moored to the shore, they would not be assumed as a ship;
- 4) ***mobile offshore drilling units*** – there are no such a reported decisions;
- 5) ***wind turbine towers (floating or permanently fixed)*** – there are no such a reported decisions;
- 6) ***jack up drill rigs*** – there are no such a reported decisions;
- 7) ***construction barges*** – there are no such a reported decisions;
- 8) ***submarines*** – there are no such a reported decisions;
- 9) ***seaplanes*** – there are no such a reported decisions;
- 10) ***hydroplanes (air cushion)*** – there are no such a reported decisions;
- 11) ***vessels under construction*** – the relevant case concerned the hull of a motorway yacht, which was towed by a tug. The Polish Court set up for resolving maritime accidents, found that the hull of yacht under tow was *not* a ship. The proceedings went through three instances. The court of first instance ('Izba Morska') found the yacht's hull under tow was a ship. 'That was also a decision on the part of the second instance court ('Odwoławcza Izba Morska). The third instance court ('Sąd Apelacyjny') decided that the said hull was not a ship, and consequently closed the case. Analyses carried out by the Polish court were done so for the purposes of recognising the responsibility for damaging the towed hull and were based on the Polish definition of a shipping accident. If such a yacht's hull under tow was

accepted to be a ship, the Polish court would be justified in the ruling (investigating) of an accident of a yacht's hull. If it was not recognised as a ship, therefore the Polish court would not have jurisdiction over the above the accident. This presumption is a consequence of the Polish legal definition of a maritime accident contained in The State Commission on Maritime Accident Investigation Act. According to the aforementioned act, we can divide maritime accidents into: very serious casualties, serious casualties and maritime incidents. These definitions are based on the International Maritime Organisation's definitions contained in the document MSC-MEPC.3/Circ.3 dated 18th December 2008.² To establish the hull's status the court had to refer to the vessel's definition contained in art. 2 of the Polish Maritime Code (any floating structure indented appropriated to or used in shipping). The Polish Appeal Court decided that a hull under tow could be considered as a "ship under construction" but not a ship under the Polish Maritime Code's definition. According to the Court, such a hull could not be considered a ship until the construction work was finished, sea trials were passed and the safety certificate was issued by the flag state administration. Consequently, such an accident – in the Court's view – could not be considered as a maritime casualty, because the harm had been done to the towed hull, not to a ship;

- 12) *unmanned vessels* – there are no such a reported decisions;
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities* – there are no such a reported decisions;
- 14) *vessels in "cold layup"* – there are no such a reported decisions
- 15) *derelict Vessels or "dead ship"* – the case concerns the 'dead ship', which sank while under tow on 31st May, 2013, near the Gulf of Gdańsk, on the Baltic Sea. The Georg Büchner was a 'dead ship', when being towed by the Polish tug "Ajaks" from the Port of Rostock, in Germany, to the breaking yard in Lithuania when it sank. The wreck was located in Polish Territorial Seas. Also, in this case, the Polish State Commission on Maritime Accident Investigation, based on the Polish definition 'maritime accident', rejected possibility of recognising it as a ship. After this case, the scope of competences of The State Commission on Maritime Accident Investigation Act has been change. At the moment, mentioned Commission has

² Very serious casualties **are casualties to ships** which involve total loss of the ship, loss of life, or severe pollution.~~Serious casualties **are casualties to ships** which do not qualify as very serious casualties and which involve a fire, explosion, collision, grounding, contact, heavy weather damage, ice damage, hull cracking, or suspected hull defect, etc., resulting in: – immobilization of main engines, extensive accommodation damage, severe structural damage, such as penetration of the hull under water, etc., rendering the ship unfit to proceed*, or

– pollution (regardless of quantity); and/or

– a breakdown necessitating towage or shore assistance.

Less serious casualties are casualties to ships which do not qualify as very serious casualties or serious casualties and for the purpose of recording useful information also include marine incidents which themselves include hazardous incidents and near misses.



the competence to investigate also very serious casualties involving ships and any other structures during the towage operation. Mentioned legal changes concerns only the competences of The State Commission on Maritime Accident Investigation, not Polish courts. That is why it is difficult to consider if maritime accident during the tow operation and involving structure not being a ship, would be consider as a ship casualty by Polish court (Izba Morska). Georg Büchner's accident is under investigation by the Polish Izba Morska at the moment;

- 16) *vessels under conversion or renovation* – there are no such a reported decision.

Furthermore, a subject of the Polish judgments were also the banana boats. In three judgments, the court stated that banana boat was not a ship according to the Maritime Code's definition.³ Similar decision was made by Polish second Instance Odwoławcza Izba Morska in reference to water scooter/personal water craft in 1994, which found water scooter not designed or used for shipping.⁴

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court's views.

The above descriptions of Polish regulations finally brings us to the following conclusion: the Authors are not aware of any reported decisions which would have recognised the property mentioned in a question No. 7, as a ship.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

As indicated in answer to question 1, ratified international agreements are universally binding law of the Republic of Poland. Moreover, an international agreement ratified upon prior consent granted by statute (ustawa) entertains precedence over statutes in case of collision. By such, maritime conventions with their ship's definitions, after proper promulgation, become a part of domestic legal order and are to be applied directly (unless its application depends on the enactment of a statute).

Thus, what could be compared only are definitions as adopted by the international conventions with definitions under national law, which concern areas not regulated by ratified conventions. In that respect a comparison may be drawn between definition of a vessel in art. 1b of the SALVAGE convention and definition of seagoing vessel as states in the Polish Maritime Code, art. 2. According to SALVAGE, 'vessel' means "any ship or craft, or any structure capable of

³ The Banana boat' cases however were resolved in the "old", wider legal definitions of maritime accidents.

Judgment dated 26th of August 2009, WMG 23/09.~~The banana boat accident was also investigate earlier, and found as not a ship.~~Judgment dated 21st of February 1996, WMG 57/95 and judgment dated 13 of May 1997, WMG 16/97.

⁴ Judgment dated 24th of October 1994, WMG 63/94.



navigation”, where the latter is understood as capacity to move or to be moved. On the other hand art. 2 of the Polish Maritime Code defines a vessel as any type of floating structure indented to use (designed for) or used in shipping. It is understood that a cargo vessel used as a warehouse or a passenger ship used as a hotel (examples provided by Prof. B. Sözer in comments to the CMI questionnaire) would not satisfy vessels definition under the Maritime Code.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

We are not aware of such a legal proceedings.

* * *

The responses were contributed by: Ms Justyna Nawrot (Dr) and Mrs Zuzanna Pełowska-Dąbrowska (Dr) – Members of the Polish MLA.

In case of any doubts or questions, please feel free to ask anytime.



RESPONSES OF THE IRISH MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

There is no basic general definition of the word “vessel”, “ship” or related terms in Irish law.

However, there is a *definitions* section in the Merchant Shipping Act 1894 (which remains the principle Act in Ireland relating to Merchant Shipping) and this provides as follows:

“In this Act, unless the context otherwise requires, the following expressions have the meanings assigned to them, that is to say – *vessel* includes any ship or boat, or any other description of vessel used in navigation; *ship* includes every description of vessel used in navigation not propelled by oars; ...”

Many later Acts enacted by the Irish legislature (usually with the words Merchant Shipping in the title) are expressly to be construed as one with the 1894 Act and, therefore, will have the same meaning applied to the words *vessel*, *ship* and related terms unless the context requires otherwise. Apart from such express provision, the Irish courts will not import definitions from one Act into another Act except in a case where the court can be persuaded that the two Acts concerned are *pari materia*.

Where the legislature does not give a term a technical meaning the court itself will determine the ordinary meaning to be given to the term by reference to dictionaries or by itself taking judicial notice of the way English was spoken at the time the Act was enacted (per Kenny J. of the Supreme Court in *Re South Coast Boatyard (in voluntary liquidation) Barber v. Burke and ors*, unreported judgment delivered 31st July 1980). A copy of that judgment relating to the meaning of the term *ship* in the Companies Act is attached hereto.



Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

In general, the registration and flagging of ships, the registration of marine mortgages, the regulation of safety and seagoing labour and dealing with casualties, are regulated in Ireland by the Merchant Shipping Acts with a common definition for vessel and ship and related terms as mentioned above. Some divergence has been introduced by the Registration of Ships Act, 2014 which provides a definition for “ship” as including; “includes every description of vessel used in navigation not propelled exclusively by oars and includes personal watercraft and small fast powered craft. In turn “small fast powered craft” is defined as a ship (other than a recreational craft or a fishing boat) of less than 7 metres length overall with a total propulsion engine power of equal to or greater than 150 kW, or as prescribed under section 11(5) while personal watercraft is defined as ““personal watercraft” means a ship (other than a recreational craft) of less than 7 metres in length overall which uses an internal combustion engine having a water jet pump as its primary source of propulsion, and which is designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of a hull, or as prescribed under section 11(5).”

A distinction is drawn in Ireland between ships below 24 metres load line length and those above the former being exempted from having to be registered when operating domestically for pleasure.

Environmental, insurance and taxation law will not follow suit. International conventions ratified by Ireland do not take effect in Irish law unless and until they are enacted in domestic legislation; however, in modern times the Irish parliament, An Oireachtas, has adopted the legislative technique of incorporating international conventions as a “Schedule” to the relevant domestic Act so that each such convention takes effect in Ireland complete with its own internal definitions.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Yes, the Irish legal system provides for the arrest of ships for *maritime claims* as defined by the Convention on the Arrest of Sea-going Ships, 1952, which is a Schedule to the Jurisdiction of the Courts (Maritime Conventions) Act, 1989. Mortgages on Irish ships are registered under the Mercantile Marine Act, 1955, and take priority *inter se* according to the date of registration. Foreign mortgages (whether registered in their own country or not) are treated as unregistered mortgages and rank in priority immediately after registered Irish mortgages (per Walsh J., Griffin J. concurring, Henchy J. dissenting, in the *Fritz Raabe* unreported judgment of the Supreme Court delivered 1st August, 1974). There has been some litigation in Ireland in respect of whether an unregistered vessel, enjoying the exemption accorded to pleasure craft under 24m in length as to whether, being a vessel not registered under any flag, such a vessel was susceptible to an arrest under the 1952 Convention or otherwise. The reference to “flying the flag” in the 1952 Convention



has been interpreted by the Irish Courts, in this context, to denote the nationality of the Vessel rather than a requirement for the same to be registered in order for the same to be susceptible to arrest under the Convention.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

No, neither adopted nor followed.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

No, though the courts tend to defer to the competent authority. A refusal by the Irish Registrar of Shipping to register a vessel for a number of reasons, *inter alia* due to it allegedly not satisfying the qualifying characteristics of a ship, is susceptible to an appeal to the District Court with a further appeal to the Circuit Court (section 22 of the Registration of Ships Act, 2014).

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

Having regard to the answers to questions 3 and 5 above, the Irish courts would categorize the property in accordance with Irish law and would treat the property accordingly. No decision has been yet furnished by the Irish Courts on the matters determined by the *Halcyon Isle* [1981] A.C. 221 as to whether, in respect of priorities, maritime liens, mortgage rights etc., it would be the *lex fori* or the *lex causus* which would determine this issue.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) ***non-self propelled barges*** – Yes, the *Von Rocks* [1998] 2 Lloyd’s Rep. 199, (backhoe dredger having been towed across the North Sea should be regarded as a ship within the meaning of the Arrest Convention, per Keane J. Barrington J. and Lynch J. concurring).
- 2) ***self-propelled barges*** –



- 3) *accommodation barges –*
- 4) *mobile offshore drilling units –*
- 5) *wind turbine towers (floating or permanently fixed) –*
- 6) *jack up drill rigs –*
- 7) *construction barges –*
- 8) *submarines –*
- 9) *seaplanes –*
- 10) *hydroplanes (air cushion) –*
- 11) *vessels under construction* – See case referred to above – unreported decision of McGovern J. in M/V Crownline 270CR 23rd June, 2011 where (new) Vessel was not registered but nevertheless found susceptible to arrest.
- 12) *unmanned vessels –*
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities –*
- 14) *vessels in “cold layup” –*
- 15) *derelict Vessels or “dead ship” –*
- 16) *vessels under conversion or renovation –*

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

See the *Von Rocks* [1998] 3 IR 41 and [1998] 2 Lloyd’s Rep. 199,

And what about floating nuclear power stations currently under construction in Russia and China?



Question 8:

We attach a most excellent summary by Professor Bulent Sözer of Istanbul regarding the variations in definitions, usages and limitations on application of terms in many international conventions. Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Owing to the legislative technique referred to above, there are no apparent variations in Irish law from the International definitions.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

Yes, *Re South Coast Boatyard (in voluntary liquidation) Barber v. Burke and ors*, unreported judgment delivered 31st July 1980 (referred to above). A copy of the judgment relating to the meaning of the term *ship* in the Companies Act is attached hereto.



[1980]
WJSC-SC

THE SUPREME COURT

(259/1979)

No. 280 Sp./1979

Walsh J.
Kenny J.
Parke J.

**In the matter of SOUTH COAST BOATYEARD (IN VOLUNTARY
LIQUIDATION)**

Between/

JAMES BARBER

Plaintiff

and

BARRY BURKE, PATRICK HICKEY AND MALLINSON WOOD PRODUCTS

LIMITED

Defendants

JUDGMENT delivered on the 31st day of July 1980 by Walsh J.

The facts in this case in so far as they are relevant are fully set out in the judgment Mr Justice Kenny is about to deliver and there is no need for me to recite them.

The essential point in the case is whether or not the yachts in question were ships within the meaning of section 99 of the Companies Act 1963. Unlike the Bills of Sale (Ireland) Acts 1879 and 1883, the Companies Act did not speak of both ships and vessels.

I think it is valid to assume that all ships are vessels but that not all vessels are ships. For the purpose of the present case it is necessary to arrive at some definition of a ship within the meaning of the Companies Act to decide whether or not the yachts in question can be so classified.

A ship, technically speaking, designates a particular species of a sea-going vessel. Originally it referred to three-masted vessels, square rigged throughout, with tops and yards to each of the



masts. In the generic sense a ship is a vessel of burden, irrespective of the rig, and without regard to the particular means of locomotion. There are at least one dozen statutes in each of which the words “ship” or “vessel” are given a statutory definition for the purposes of that particular statute and none of which are of any particular help in the present case. For example, in the Fisheries (Ireland) Acts a vessel includes “any ship, boat, cot, coble or curragh”. The most recent definition of “ship” in Irish legislation is contained in the definition section of the Statute of Limitations 1957 which describes a ship as including “every description of vessel used in navigation not propelled by oars”. Yet in the generic sense one could scarcely regard the very large vessels which carried hundreds of troops and were propelled by galleys of oarsmen as being other than ships. The term “vessel” does not include everything that floats. For example, it would not include a raft but it would certainly include everything which would be called a boat or a ship. For my own part I derive no assistance whatever from the various statutory definitions of ships or vessels and I think the only sensible approach is to deal with the term “ship” in its generic sense. In my view, that means a vessel of burden, irrespective of rig and without regard to the particular form of locomotion. I note that Blackburn J. in *In Re Ferguson* 40 L.J.Q.B. 110, in dealing with section 2 of the Merchant Shipping Act 1854, concluded that “every vessel that substantially goes to sea is a ship”. The vessels in question in the present case are ocean racing yachts the primary purpose of whose design would appear to be to make them as fast as possible, carrying as much sail as possible and as little weight as possible. The fact that they contain berths for six persons is in my view of no consequence as it is assumed that provision is made only for the crew. There is no suggestion whatsoever that these vessels were designed as vessels of burden and in fact all the evidence indicates the contrary. For that reason I am of opinion that they are not to be regarded as ships within the meaning of section 99 of the Companies Act 1963.

Judgment delivered 31st July 1980 KENNY J.:

South Coast Boatyard Limited (“the company”) carried on the business of building ocean-going yachts at Cork Harbour and, by, 1978, had succeeded in establishing a considerable international trade in its products. The Governor and Company of the Bank of Ireland (“the bank”) were its bankers. By a mortgage debenture of the 4th October 1974 the company charged all its assets with repayment to the bank of all moneys advanced by it. This was stamped to cover £155,000. The bank had imposed a limit of £80,000 on its advances to the company but this, together with the paid up share capital of £70,000, was not enough to make it possible to carry on the business of the company. The directors of the company began negotiations first with Foir Teoranta and then with the Bank of Ireland Finance Limited (a merchant bank associated with the bank) to secure more working capital and while these were going on, the bank allowed the company to overdraw its account with them up to £220,000.

Management accounts for the three months from April to June 1978 became available in August and showed a considerable loss during that period. On 4th September 1978 the bank required immediate payment of the amount of the overdraft in excess of £80,000 and warned the directors of the company that they would not honour its cheques until this amount was paid. Barry Burke and Patrick Hickey (“the lenders”), who are the first and second named defendants, were directors and shareholders of the company and believed it would prosper if it could survive. They agreed to lend the company £140,000 out of their own moneys if they got as security a transfer of the



yachts some of which were in course of construction and were in the company's yard and others of which were at sea or in ports in and outside Ireland. The company's directors agreed to accept this offer.

On 8th September a written agreement was made the material parts of which read:

“AGREEMENT made 8th September 1978 BETWEEN The South Coast Boat Yard Limited ... (hereinafter called “the company”) of the one part Barry Burke and Patrick Hickey (hereinafter together called “the lenders”) of the other part whereby it is agreed as follows:

1. The lenders agree to lend the company on the security of the boats set out in the Schedule hereto the sum of £140,000 (hereinafter called “the loan”) and the company hereby transfers to the lenders all of the said boats (hereinafter called “the boats”) as security for repayment of the loan.
2. Such transfers are in each case subject to the provisions hereinafter set out
3. If within 6 months from the date of this agreement the company proffers to the lenders in cash or by bank draft the portion (hereinafter called “the appropriate sum”) of the loan secured by one or more of the boats together with interest on the appropriate sum at the overdraft rates charged from time to time by the Irish Clearing Banks on accounts with a single A rating for the period during which the appropriate sum was outstanding, the lenders shall forthwith transfer such boats back to the company”.

There were 13 yachts mentioned in the Schedule. 7 of these were being constructed in the shipyard, one was at sea, two were in Holland, one in Hamburg, one in Sydney and one in Cork Harbour. All of them were described as Shamrock racers and had a specification which read:

“General Classification, I.O.R. rating 21.5 approx. 3 Ton Mask Head Sloop. Length 30 feet. Beam 10 feet 2 inches. Draft 4 feet 6 inches. Weight: 3 tons. Keel lead. Inboard Engine. Diesel 15 H.P. 6 berth cabin with galley, W.C. and chart table”

The agreement was not registered as a charge with the registrar of companies under s. 99 of the Companies Act, 1963 because the lenders' solicitors advised, them that this was not necessary.

When the agreement of 8th September had been signed, the lenders paid £140,000 to the bank to the credit of the company.



When the management accounts for the period July/August 1978 were produced, they showed a further substantial loss. The directors of the company decided that this further loss together with the continuing international depression in the boat market made it necessary to liquidate the company which was then insolvent. The plaintiff was appointed liquidator of the company at a meeting of its creditors on 28th September 1978 and was advised that the agreement of 8th September was invalid because it had not been registered under s. 99 of the Companies Act, 1963. He has now brought these proceedings seeking a determination by the High Court of the question whether the agreement of 8th September 1978 was void. The third named defendants were joined to represent the unsecured creditors. In the High Court, Mr. Justice McWilliam held that the yachts were not ships and that the agreement did not require registration. The unsecured creditors have now appealed to this Court.

Before dealing with the legal issues I think I must say something about the meaning of the terms used in the specification, "I.O.R" means "International Offshore Rules". All yachts which are keel boats and which engage in long distance offshore racing have to be measured and allocated an I.O.R rating for handicap purposes. The measuring authority for the Republic of Ireland and the United Kingdom is the Royal Ocean Racing Club. The purpose of the rating is to enable "a corrected time" for races to be worked out. This is done by taking the actual time taken and then taking account of the rating, the corrected time is calculated. Thus boats of substantially different design and dimension can race notionally on level terms. "Weight 3 tons" means the displacement of the yacht i.e. the weight of water displaced which is the weight of the boat itself. In design the specified displacement should be the weight of the complete boat in seagoing state with fuel stores and crew but, in pamphlets and advertisements the weight given is often the weight of the boat only. The weight is not the same as "the registered tonnage". The Matter is, speaking broadly, measured on the cubic capacity of the ship. Section 91 of the Mercantile Marine Act, 1955 provides that the tonnage of every ship to be registered under that Act was to be ascertained in accordance with regulations made by the Minister for Industry and Commerce: the relevant regulations now are the Merchant Shipping (Tonnage) Regulations 1967 (S.I. No. 213 of 1967).

The relevant parts of s. 99 of the Companies Act, 1963 read:

"99 (1) ... every charge ... being a charge to which this section applies, ... shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, ... are delivered to or received by the registrar of companies for registration ... within 21 days after the date of its creation.

(2) This section applies to the following charges:

(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

(h) a charge on a ship or any share in a ship".



There is therefore a reference in the section which we have to construe to the Bills of Sale (Ireland) Acts 1879 and 1883. “Bill of Sale” is defined in s. 4 of the Act of 1879 and the relevant parts of the definition read:

“The expression “bill of sale” shall include bills of sale, assignments, transfers ... and other assurances of personal chattels ... and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred but shall not include the following documents; ... transfers or assignments of any ship or vessel (emphasis added) or any share therefor”

The yachts are certainly vessels so that the agreement of 8th September 1978 did not require registration under sub-s. 2(c) of s. 99 of the Act of 1963. The definition of bill of sale has however particular significance for the instant case. The exception relates to ships or vessels and shows that there may be vessels which are not ships and that a wider class of vessel is contemplated by the Act of 1879 than that in s. 99(2) (h) of the Companies Act, 1963.

There are numerous definitions of “ship” in Acts dealing with various aspects of shipping but little help is to be got from them. In the Merchant Shipping Act, 1894 and in the Mercantile Marine Act, 1955 ship is defined as “including every description of vessel used in navigation not propelled by oars” while in the Merchant Shipping (International Labour Conventions) Act, 1933 ship is defined as meaning “any seagoing ship or boat of any description which is registered in Saorstát Eireann and includes any fishing boat entered in the fishing boat register in Saorstát Eireann but does not include any tug, dredger, sludge vessel barge or other craft whose ordinary course of navigation does not extend beyond the seaward limits of the jurisdiction of the harbour authority of the port at which such vessel is regularly employed if and so long as such vessel is engaged in her ordinary occupation”. The dictionaries do not help. In the most recent, Collins Dictionary of the English Language (1979 Edition) which has a most diverse and learned board of consultants, ship is defined as:

“1. a vessel propelled by engines or sails for navigating on the water esp. a large vessel that cannot be carried aboard another as distinguished from a boat. 2. Nautical a large sailing vessel with three or more square-rigged masts. 3. the crew of a ship.”

While the Shorter Oxford English Dictionary (1933 Edition) has this entry for ship:

“A large seagoing vessel (opp. to a boat); spec, (in modern times) a vessel having a bowsprit and three masts, each of which consists of a lower, top and topgallant mast”.

The Court is, in my opinion, entitled to have regard to the way in which English was spoken and used in 1963. If, in that year, any Irishman or, indeed, Englishman went to Dun Laoghaire during the sailing season and saw the many yachts in the harbour and was asked by a linguistic philosopher how he would describe the vessels in the harbour, he would say that the British Rail vessel was a ship, that the yachts were yachts and the rowing boats were boats. If he were pressed



on what he called yachts, he would say that they were vessels. He would never dream of calling any of the yachts there, irrespective of their size, ships.

This last mentioned matter and the contrast between the language of the Companies Act, 1963 and the Bills of Sale (Ireland) Act, 1879 persuade me that none of the 13 vessels mentioned in the agreement of 8th September were ships.

In my opinion the judgment of Mr. Justice McWilliam was correct, the first question posed by the liquidator should be answered 'No' and the appeal should be dismissed.



RESPONSES OF THE ITALIAN MARITIME LAW ASSOCIATION

General Comments

We have considered the Questionnaire which is believed to be very helpful to seek uniformity on the subject matter.

The Maritime Conventions do not seem to be helpful for the purposes of the interesting enquiry that the Questionnaire intends to make.

In fact from the list of terms used in Conventions attached to the Questionnaire it seems that almost all such terms have merely the purpose of indicating the scope of application of the Conventions, such as the term “ship” in the 1973 Convention for the prevention of pollution from ships. Therefore, they are not definitions in a strict sense. As a consequence are not of assistance for a general definition of the terms “ship” and “vessel”.

A distinction between sea going vessels and vessels of inland navigation appears instead to be worthy of an investigation. There may be three basic alternatives: the first is that it is based on the characteristics of the ship, secondly that it is based on the register in which they are registered, thirdly, that it is based on the waters in which the occurrence in respect of which the Convention is applied takes place at sea.

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

There is a general definition of “ship” in article 136 of the Italian Code of Navigation (CN). It is the following:

Navi e galleggianti. Per nave s’ intende qualsiasi costruzione destinata al trasporto per acqua, anche a scopo di rimorchio, di pesca, di diporto o ad altro scopo.

(“Ships and barges. By ship it is meant any construction destined to carriage on water, also for the purpose of towage, fishing, recreation, or other purpose.”)

That definition is followed by a distinction between *navi maggiori* and *navi minori* (major and minor ships) and by the statement that are “major” the ships intended for navigation on the high

seas and are “minor” the ships intended for coastwise navigation, those intended for port services and those intended for inland navigation.

Art. 136 then says that the provisions applicable to ships apply, unless otherwise stated, to floating crafts intended for any service whatsoever relating to navigation and trade in marine and inland waters.

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

The terms above indicated are generally used for all purposes, except that for pleasure crafts, that in the code regulating pleasure navigation are called “*unità da diporto*” (pleasure units). There is a distinction based on length and the terms used are “*nave da diporto*” (pleasure ship) for units with an overall length of more than 24 meters, “*imbarcazione da diporto*” (pleasure boat) for units with a length between 24 and 10 meters and “*natante da diporto*” (pleasure craft) for units with a length of less than 10 meters and for rowing boats. A variety of names is used in respect of special types of pleasure crafts.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

There are special rules in the code of navigation on the seizure and forced sale of ships (articles 643-685). The proceedings commence with the seizure of the ship and rules are dictated on the sale and the distribution of the proceeds of the sale.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

Italy has acceded to the MLM Convention of 1926 and its provisions have the force of law.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

The registration of a ship in the ships register is not dispositive of its status, nor is it dispositive of the title to or right on a ship. It is possible to challenge a registration and apply for its amendment

and if such application is rejected proceedings may be brought in order to have the registration amended or cancelled.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

This question is very theoretical and describes a situation very unlikely to occur. In any event we believe that the Italian Courts (there are no precedents), if the property is registered in a foreign register as a ship and flies the flag of a foreign State, would treat such property as a ship unless that would be in conflict with Italian public order. The basic rule on choice of law is in fact that the law of the flag would apply.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

To our knowledge there are very few reported decisions which address some of the types of craft enumerated under nos. 1 to 13. They will be mentioned below.

Introduction

The statutory provisions that may be relevant in connection with the properties reference to which is made in this Question are the following:

Art. 136 CN which provides the definition of ship and floating barges as reported in the answer to Question 1 and art. 140 CN which provides that “major” ships are distinguished by a name whilst art. 141 CN says that “minor” ships and barges are distinguished by a number.

- 1) ***non-self propelled barges*** – By judgment of 19 July 2006, *Mutuelles du Mans Assurances v. SAIPEM*, 2007 Dir. Mar. 1249, the Tribunal de Commerce of Marseilles held that a dredger without autonomous means of propulsion is not a ship for the purposes of the limitation of liability.

By judgment of 22 February 2005, *Willard Steward v. Dutra Construction Co*, 2007 Dir. Mar. 1272 the U.S. Supreme Court held that pursuant to the definition of “vessel” under s. 3 of the 1873 Statutes according to which is such “every description of water craft used, or capable of being used, as a means of transportation on water”, a dredger, even if deprived of autonomous propulsion, must be deemed to be a vessel in as much as during its operation it carries on water machinery, instruments and a crew.

- 2) *self-propelled barges* – There are in Italy no reported decisions.
- 3) *accommodation barges* – There are in Italy no reported decisions.
- 4) *mobile offshore drilling units* – There are in Italy no reported decisions.
- 5) *wind turbine towers (floating or permanently fixed)* – There are in Italy no reported decisions.
- 6) *jack up drill rigs* – By judgment of 25 February 2010, *Rossi Costruzioni v. Navale Assicurazioni*, 2012 Dir. Mar. 1138, the Court of Appeal of Venice held that a jack-up platform must be qualified as a mobile floating construction that as such is subject to their administrative rules.
- 7) *construction barges* – By judgment of 16 June 2010, *Toro Assicurazioni v. Impresa Costruzioni Mentucci*, 2011 Dir. Mar. 1277, the Court of Appeal of Turin held that a huge caisson, employed for construction purposes, that sank during towage, could not be considered a ship.
- 8) *submarines* – There are in Italy no reported decisions.
- 9) *seaplanes* – There are in Italy no reported decisions.
- 10) *hydroplanes (air cushion)* – There in Italy no reported decisions.
- 11) *vessels under construction* – Pursuant to art. 244 CN after launching a ship under construction may be registered on the ships register and, therefore, is entitled to fly the Italian flag during the essays.
- 12) *unmanned vessels* – There are in Italy no reported decisions.
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities* – There are in Italy no reported decisions.
- 14) *vessels in “cold layup”* – There are in Italy no reported decisions.
- 15) *derelict Vessels or “dead ship”* – By judgment of 24 August 1959 No. 2546, *Rottamindustrie v. S.p.a. Messina*, (1959) Dir. Mar 545, the Supreme Court held that the sale of a ship intended for breaking up may consist of the sale of a specified quantity of materials or of the sale of a ship and in this latter case the quantity and quality of materials, unless specified, is irrelevant.

By judgment of 1 June 1995, No. 429, *Fortunato Fattorini v. Guernica Shipping, Inc*, (1997) Dir. Mar. 429, the Supreme Court held that the destination of ships to the carriage, that is essential for the qualification of a construction as a ship is not lost in case of temporary loss of seaworthiness, whilst the ship is not such anymore

and becomes a wreck, in case of substantive and definitive alteration of its constituent elements.

- 16) *vessels under conversion or renovation* – There are in Italy no reported decisions.
- 17) *Floating dry-docks* – This item is added to the list because the Italian Supreme Court with judgment of 15 November 1994, no. 9589, (1996) Dir. Mar. 1008 held that a floating dry-dock, even if it is mobile and may be moved on the sea (in the relevant case it had been imported in Italy from the United Kingdom) cannot be qualified as “ship” under art. 136 C.N.

Question 8:

We attach a most excellent summary by Professor Bulent Sözer of Istanbul regarding the variations in definitions, usages and limitations on application of terms in many international conventions. Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

It is not clear what is meant by “usages and limitations”. The term “usages” seems inappropriate. In fact the conventions set out rules of law that States parties undertake to include in their national legislation.

As said in the General Comments, definitions in the Conventions may have often the purpose of indicating which is the scope of application of a given Convention. As regards “limitations”, we understand that what is meant is the limits in the scope of application of a Convention. If the understanding is correct, it is quite possible that a definition of “ship” given in a Convention differs from the equivalent definition in Italian law. But if Italy ratifies or accedes to that Convention, its rules become part of Italian law and whatever is the notion of “ship” under Italian law, for the purpose of the implementation of any given Convention, what is relevant is the notion of “ship” adopted in such Convention, and its provisions apply within its scope.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

If Italy becomes part of a Convention, its provisions become part of the Italian legal system and where the definition of “ship” is at variance with its definition under Italian law, in order to establish the scope of application of that Convention the relevant definition is that included in that Convention. But that does not affect the Italian definition of “ship” for other purposes.

It is suggested that the purpose of this enquiry is to compare the notion of “ship” or “vessel” existing in the various legal systems, and that it would not assist to consider the definitions contained in the Maritime Conventions when, as previously stated, almost always they have merely the purpose of indicating the scope of application of the relevant Convention.



Genoa, 18 April 2016



RESPONSES OF THE CROATIAN MARITIME LAW ASSOCIATION

Question 1:

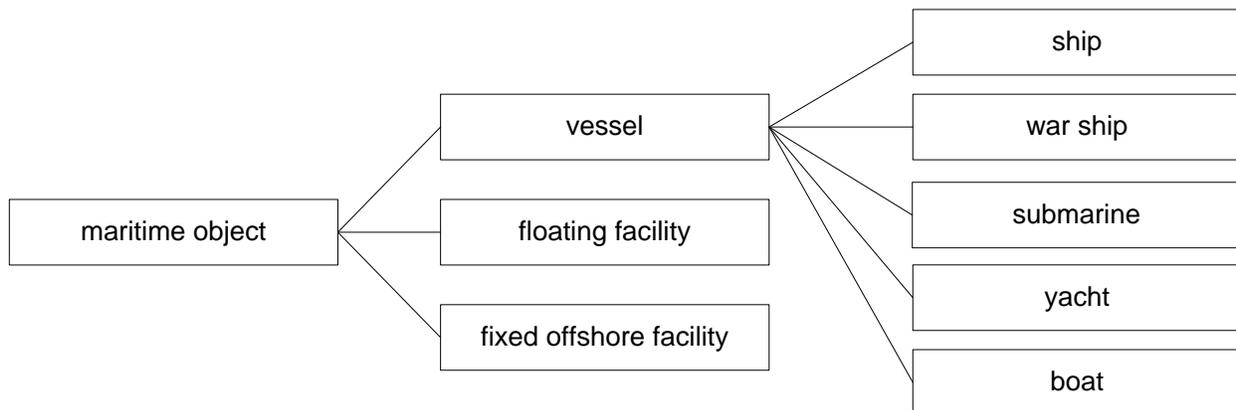
Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either 'vessel' or 'ship'? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

The matter of maritime law is in Croatian legal system comprehensively regulated by the Maritime Code (MC or Code).¹ Definitions and/or meanings of the terms used in the Code are prescribed by the Art. 5 of the MC, unless otherwise stipulated by the very same Code for the purpose of provisions in its specified section. It is important to point out that provisions pertaining to ships shall also apply to yachts, unless otherwise prescribed. On contrary, the application of regulations provided for ships on other maritime objects is possible solely when explicitly stipulated by the Code (Art. 2 of the MC).

The widest term is the **maritime object**. The MC does not actually define the term, but only provides the list of maritime objects encompassed by this term. According to the Art. 5/1/2 of the MC maritime object (*cro. pomorski objekt*) is an object intended for navigation at sea (vessel) or an object permanently moored or anchored at sea (floating facility) or an object entirely or partially embedded into the seabed or positioned onto the seabed (fixed offshore facility).

¹ Maritime Code, Official Gazette of the Republic of Croatia, no. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013 and 26/2015.



This basic classification is followed by the definition of the vessel and its further division. **Vessel** (*cro. plovni objekt*) is a maritime object intended for navigation at sea. A vessel may be a ship, warship, submarine, yacht or boat. (Art. 5/1/3 of the MC).

Second type of the maritime objects, floating facility, is defined in the Art. 5/1/13 of the MC. **Floating facility** (*cro. plutajući objekt*) is a maritime object permanently moored or anchored at sea, and not intended for navigation (e.g., floating dock, floating workshop, floating restaurant, floating powerhouse, pontoon bridge, pontoon marina and the like). The list of floating facility types is exemplary. Even though it is not intended for navigation it is clear that it may be towed.

Third type of the maritime objects is fixed offshore facility. According to the Art. 5/1/14 of the MC **fixed offshore facility** (*cro. nepomični odbalni objekt*) is a maritime object entirely or partially embedded into the seafloor or positioned on the seafloor and not intended for navigation (ex. a fixed offshore facility for the research and exploitation of the seabed, a submarine pipeline and the like) with the exception of a submarine cable and traffic infrastructure objects (ex. a submarine tunnel, a bridge supported by the seafloor, etc.)

Each of the named categories of the vessel, except submarine, is also defined by the MC. According to the Art. 5/1/4 of the MC **ship** (*cro. brod*), with the exception of warship, is any vessel intended for navigation at sea, exceeding 12 m in length and a gross tonnage of 15 tons, or one authorised to carry more than 12 passengers. Pursuant to the cited Article a ship may be a passenger ship, cargo ship, technical vessel, fishing vessel, public (government) ship or a scientific research ship. There are statutory definitions for all stated types of ship. Special attention should be devoted to the technical vessel.

Technical vessel (*cro. tehnički plovni objekt*) is, according to the Art. 5/1/12 of the MC, a ship with or without a mechanical propulsion intended to carry out technical operations (dredger, floating crane, floating dock, rigs for the research and exploitation of the seabed, and the like). By embracing the technical vessel under the term ship Croatian legislator has accepted expansive definition of ship. This contention goes into two directions. Firstly, the main purpose of the ship does not have to be navigation and transportation of people and cargo, nor it has to be designed and constructed in that sense. It is explicitly prescribed that the purpose of technical vessel is carrying out technical operations. However, it is to be noted that in fact technical vessel also has



the transportation function by transporting equipment (and crew) over the water. Furthermore, under the statutory definition technical vessel is required to be capable of navigation, but regardless of the means by which is navigated. Namely, it may have its own (full or limited) self-propulsion, but it is expressly prescribed that the mechanical propulsion is not determinative of its status as a technical vessel. The navigation may be conducted by towage as well. The distinction between technical vessel and floating object is in the purpose of the maritime object.

MC distinguishes and defines Croatian warship and foreign warship. **Croatian warship** (*cro. hrvatski ratni brod*) is a vessel, including submarines, which is under the command of the armed forces of the Republic of Croatia, and the crew of which is military, i.e. under the authority of military discipline, which must furthermore display external recognition signs of Croatian national warships whenever it is necessary to identify this feature of the craft. (Art. 5/1/6 of the MC).

Yacht (*cro. jahta*) is a vessel for sports and recreation, regardless of whether it is used for personal needs or business, exceeding 12 m in length and intended for a longer stay at sea, which is furthermore authorised to carry no more than 12 passengers in addition to the crew (Art. 5/1/20 of the MC). Contrary to the ship's definition, the tonnage is not determinative of its status.

Boat (*cro. brodica*) is a vessel intended for navigation at sea, which is not a ship or a yacht, and the length of which is more than 2.5 metres or the total power of its propulsion engines is greater than 5 kW. The term boat does not encompass: – vessels belonging to another maritime craft for the purpose of collecting, salvaging or conducting work, – vessels intended exclusively for competitions, – canoes: kayaks, gondolas and pedal boats, – windsurfing boards and surfboards. (Art. 5/1/15 of the MC). The question of the status of vessels belonging to another maritime craft for the purpose of collecting, salvaging or conducting work could (and should) be raised.

Furthermore, MC differs existing ship, i.e. a ship that is not under construction from the ship under construction which encompasses shipbuilding from the moment of laying the keel or a similar activity in shipbuilding up to the time of its entering into the register of ships (Art. 5/1/29 and 30 of the MC).

It is to be emphasised that the ship's status is not inevitably permanent. Ship might lose its status as a ship, for example when is withdrawn from service and permanently moored in order to be used as a restaurant or a hotel, in which case it becomes floating facility. In case of withdrawal of a ship from navigation a ship should be deleted from the register of ships and in case of its repurposing it is to be registered in the register of floating facilities.



Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

MC provides the default definition of ‘ship’ throughout the MC unless otherwise prescribed for the purpose of the specific part. The statutory definition of a ship is intended and expected to apply broadly, not only throughout the maritime law, but also for the purpose of other branches of law.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Process of seizure, foreclosure, forced sale, ranking and priority claims against vessels is according to Croatian law different from such processes for other types of property. Regulations on distraintment and security on ships (and cargo) are provided by the Part IX of the MC, by the Art. 841-965. It is explicitly provided that those rules shall apply to all maritime objects except boats. Distraintment and security on boats is carried out in accordance with the Execution Act (Art. 841/3 of the MC). In connection with the stated difference are the jurisdictions provisions. In the subject matter of distraintment and security on all maritime objects except boats the competent courts to conduct are commercial courts competent for the settlement of maritime disputes. In relation to boats (as well as other types of property) jurisdiction have municipal courts and notaries public.

When MC applies provisions of the Execution Act shall apply accordingly regarding security proceedings as well as on distraintment proceedings and security measures on ship, unless postulated otherwise by the Code. The exception is provided as regards to security by the transfer of ownership or another right, in which case the application of the Execution Act is excluded. However it is to be stressed that the procedure is in the MC regulated very comprehensively.

The priority ranking of claims covered from the distribution money is proscribed by the Art. 912 of the MC. The expenses which arose in the course of the ship sale proceeding shall be settled before the distribution of the purchase money. First claims to be covered are those of Republic of Croatia for wreck removal, second ones are those of creditors whose claims are secured by maritime lien, third are claims of shipbuilder and ship repairer, whose claims are secured by the right of retention. Fourth in the priority ranking are creditors whose claims have been secured by a mortgage on the ship, and the last ones are claims of all the other creditors.



Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

“MLM-93” has not been adopted by the Republic of Croatia. However, its provisions have been used as a standard in respect of maritime liens.

Provisions on maritime liens prescribed for ships, shall apply to yachts and boats, as well as ships and yacht under construction when afloat (Art. 252 of the MC). Since the provisions of the MC are applicable to other maritime objects solely when explicitly stipulated by this Code, provisions on maritime liens cannot apply to floating facilities and fixed offshore facilities (Art. 2/2 of the MC). It is explicitly prescribed that provisions on maritime liens shall not apply to ships entered into the register of public ships (Art. 251 of the MC).

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Yes, the acceptance by registrar of property as a “ship” or “vessel” is dispositive of its status under Maritime Code. The certain property will be considered as a “ship” only if it meets the requirements prescribed by the Art. 5/1/4 (is intended for navigation at sea, exceeding 12 m in length with gross tonnage of 15 tons, or one authorised to convey more than 12 passengers). When the property is considered as a ship it may be entered into the appropriate register of ships under conditions prescribed by the Art. 187 of the MC. Requirements for registry of yachts are prescribed by the Art. 188 of the MC.

It should be noted that the MC provides three kinds of ship’s registers – register of merchant ships, register of fishing ships and register of public (government) ships (Art. 196/1 of the MC), register of yachts, register of floating facilities and register of fixed offshore facilities. Separate registers are provided for each of those maritime objects when under construction. Boats may be registered in different types of boat ledgers (there are ledger of boats for personal use, ledger of boats for commercial purposes and ledger of public boats).²

² See: Pravilnik o brodicama i jahtama (Rule Book on Boats and Yachts), Official Gazzete, no. 27/2005, 57/2006, 80/2007, 3/2008, 18/2009, 56/2010, 97/2012, 137/2013, 18/2016.



Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

The property considered as a “vessel” in another jurisdiction and so registered and flagged will be accepted a “vessel” by Croatian courts and other relevant authorities and that categorization will be accepted for all purposes, including arrest and foreclosure.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) *non-self propelled barges –*
- 2) *self-propelled barges –*
- 3) *accommodation barges –*
- 4) *mobile offshore drilling units –*
- 5) *wind turbine towers (floating or permanently fixed) –*
- 6) *jack up drill rigs –*
- 7) *construction barges –*
- 8) *submarines –*
- 9) *seaplanes –*
- 10) *hydroplanes (air cushion) –*
- 11) *vessels under construction –*
- 12) *unmanned vessels –*
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities –*
- 14) *vessels in “cold layup” –*
- 15) *derelict Vessels or “dead ship” –*
- 16) *vessels under conversion or renovation –*



If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court's views.

There are not such decisions.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Definitions and/or meanings of the terms used in the Code are prescribed by the Art. 5, unless otherwise stipulated by the very same Code for the purpose of provisions in its specified section. In all parts or sections of the MC where the Conventions rules apply the definition of the *ship* has the same meaning as in the relevant Convention regardless the meanings of the term used in the Code. For example definition of the *ship* in the MARPOL means a *vessel of any type whatsoever operating in the marine environment and includes fixed or floating platforms*. The fixed or floating platforms are not included in the definition of the ship prescribed by the Art. 5/1 of the MC. (see no. 1.). However, for the purpose of the prevention of pollution Maritime Code uses the MARPOL definition of ship and applies MARPOL standards to all maritime objects.

Another example of different comprehension of the term 'ship' is within the chapter on non-contractual liability for pollution damage from ships (section regarding Liability for Pollution Damage Caused by Discharge of Oil Carried as Cargo). In Art. 813/1/1 of the MC the definition of ship has the same meaning as in Article I of the 1992 CLC – "**ship**" means any ship or vessel of any kind constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship is capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

The same meaning of ship as in the Bunker Convention may be found in Art.823.a/1, which states: For the purpose of this Chapter of the Maritime Code (Liability for Bunker Oil Pollution Damage) "**ship**" means any seagoing vessel of any type whatsoever.

Finally, the MC contains the same meaning as in the Salvage Convention in its Art. 761/I stating: The terms used in this Chapter of the Maritime Code (Salvage) shall have the following meanings: "**ship**" is any ship, boat, yacht or structure capable for navigation. The applicability of this section on warship is explicitly prescribed (Art. 762/1 of the MC).

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of "vessel", "ship" or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

We are not aware of any such legal proceeding.



RESPONSES OF THE HONG KONG MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

1. Yes, there is a number of Ordinances and Regulations containing definitions of “Ship” or “Vessel” that convey a meaning similar to the definitions in your questionnaire, with various modifications. The number is quite large. Some definitions are definitive, some are inclusive, and some are exclusive. We provide some of the definitions by way of example in the following:
 - (a) Section 12E of the High Court Ordinance (Chapter 4)

“(1) ...Ship includes any description of vessel used in navigation and (except in subsection 2c of this section) includes, subject to any regulations made by the Governor, a hovercraft;”
 - (b) Section 2 of the Merchant Shipping (Registration) Ordinance (Chapter 415)

“...Ship means, subject to section 3, every description of vessel capable of navigation in water not propelled by oars, and includes any ship, boat or craft and an air-cushion vehicle or similar craft used wholly or partly in navigation in water.”

Section 3 provides “The Director may by notice published in the Gazette provide that a thing designed or adapted for use at sea and described in the notice is or is not to be treated as a ship for the purpose of the Ordinance...”
 - (c) Section 2 of the Merchant Shipping (Seafarers) Ordinance (Chapter 478)

“...Ship means every description of vessel used in navigation in water not propelled by oars, and includes any ship, boat or craft used wholly or partly for navigation in water any craft so used the weight of which is partly supported by forces other than hydrostatic forces, but excludes any junk or lorcha howsoever propelled;”



- (d) Section 2 of the Merchant Shipping (Safety) Ordinance (Chapter 369)
- “... Ship includes any vessel used in navigation other than a vessel propelled by oars or a junk;”
- (e) Section 11C of the United Nation (Anti-Terrorism Measures) Ordinance (Chapter 575)
- “... Ship means a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles, or any other floating craft;”
- (f) Section 2 of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Chapter 413)
- “...Ship means a vessel of any type whatsoever operating in the marine environment and includes a hydrofoil, hovercraft, submersible or floating craft and a fixed or floating platform;”
- (g) Section 3 of the Merchant Shipping (Security of Ship and Port Facilities) Ordinance (Chapter 582)
- “...Ship means
- (a) A ship (including a high-speed craft) of 500 gross tonnage or upwards that is engaged on international voyages; or
- (b) A cargo ship (including a high speed craft) of 500 gross tonnage or upwards that is engaged on voyages,
- and includes a mechanically propelled vessel capable of engaging in drilling operations for the exploration for or exploitation of resource beneath the sea-bed such as liquid or gaseous hydrocarbons, sulphur or salt, not on location;”
- (h) Section 2 of the Merchant Shipping Ordinance (Chapter 281)
- “...vessel includes
- (a) any ship or boat or junk or any other description of vessel used in navigation; and
- (b) any floating dry dock, floating workshop or floating restaurant;”



- (i) Section 2 of the Import and Export Ordinance (Chapter 60)
- “...vessel includes every description of vessel used in navigation for the carriage of persons or articles, whether or not the vessel is mechanically propelled and whether or not the vessel is towed or pushed by another vessel;”
- (j) Section 2 of the Fisheries Protection Ordinance (Chapter 171)
- “...vessel means any ship, junk, boat, dynamically supported craft, or any other description of vessel used in navigation;”
- (k) Section 2 of the Port Control (Cargo Working Areas) Ordinance (Chapter 81)
- “...vessel includes any ship, boat, junk or lorcha and any other description of vessel used in navigation and includes also any floating wharf, ramp, pontoon or landing place;”
- (l) Section 2 of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Chapter 508)
- “...vessel includes any ship or boat, or any other description of vessel used in navigation;”

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

The definition of “vessel” varies depending on the subject of the particular law. For details, please see the above answer to question 1.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Yes. In brief, there are procedures under Order 75 of the High Court Rules specifically for admiralty proceedings in relation to ships. Under Order 75 rule 5 of the High Court Rules, a warrant of arrest can be issued against a ship within the jurisdictional waters of Hong Kong for its arrest for enforcement of certain specific maritime claims.

The shipowner may put up a bail bond or cash or other agreed security for the release of the ship. If the ship is not released, the bailiff or any party having a maritime claim within the recognized categories against the ship may make an application to the court for the appraisal and sale of



the ship *pendente lite* in due course in accordance with Order 75 rule 12, rule 22 and rule 23. Otherwise, it is possible for a ship to remain under arrest for the during of the proceedings.

The order of priority of claims is not set out in the statute. Under Order 75 rule 22, the court has the power to determine the priority of claims against the proceeds of sale of a ship. There is a well-settled order of priorities which is regularly applied by the court, although this order is only a prima facie ranking, subject to the court's equitable jurisdiction. The usual order in general terms can be summarised as follows: (a) the court's bailiff fees for the arrest, preservation and sale of the vessel; (b) the expenses of arrest, preservation and sale *pendente lite*; (c) the costs of the arresting party; (d) maritime liens attached to the ship, not the sister ship, to which the claim arose; (e) secured maritime claims; and (f) unsecured maritime claims. The application of this principle was illustrated in a decision in the case of

The Ruby Star (HCAJ 129/2013, 30 April 2015), a copy of which is here: www.hklii.hk/eng/hk/cases/hkcfi/2015/842.htm

The above procedures under Order 75 are not applicable to enforcement of claims against other property.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

No, the 1993 Convention on Maritime Liens and Mortgages has not been adopted in Hong Kong.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

“Ship” and “Vessel” are legal terms to be determined by the Hong Kong courts in case of dispute. Though the Hong Kong courts may receive foreign law evidence as to their definitions if their meanings are governed by foreign law for a particular dispute.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

It depends on the purpose of the interpretation. Only the High Court has admiralty jurisdiction over ships. The exercise of the admiralty jurisdiction of the High Court and the arrest of ships are governed by section 12 to section 12E of the High Court Ordinance and Order 75 of the High



Court Rules. They are matters of local law. Therefore, for determining whether an object falls within the admiralty jurisdiction of the High Court and subject to arrest under Order 75, the general view is that the High Court should determine whether the object is a ship or not in accordance with the Hong Kong law, and the High Court is not bound by categorization by a foreign registry or authority. Please see the definition of “ship” in section 12E of the High Court Ordinance in the above answer 1(a).

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

We have located only one decision relating to whether an object should be classified as a “Dead Ship”. This is the judgment in *R v Kwong Lung Co Ltd*. The judgment is here: www.hklii.hk/eng/hk/cases/hkcfi/1986/13.html

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

The definitions of “ship” or “vessel” used in the Hong Kong laws in respect of the conventions are as follows, referring to the table “TERMS USED in CONVENTIONS” attached to Professor Bulent Sözer’s summary:

- (a) The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 was implemented by the CARRIAGE OF GOODS BY SEA ORDINANCE (Chapter 462). In section 1:

“ship” (船隻) means any vessel used for carriage of goods by sea, other than a vessel which is regularly employed in trading to or from Hong Kong and which is required to be certificated under the Merchant Shipping (Local Vessels) Ordinance (Cap 548). (Amended 43 of 1999 s. 91) (the underlined are absent from the convention).

- (b) Hong Kong has not adopted the UN Convention on Conditions for Registration of Ships. Under the MERCHANT SHIPPING (REGISTRATION) ORDINANCE (Chapter 415), in section 1:

“ship” (船隻) means, subject to section 3, every description of vessel capable of navigating in water not propelled by oars, and includes any ship, boat or craft and an air-cushion vehicle or similar craft used wholly or partly in navigation in water.”

- (c) The International Convention on Salvage 1989 was implemented by the MERCHANT SHIPPING (COLLISION DAMAGE LIABILITY AND SALVAGE) ORDINANCE (Chapter 508). There is no separate definition of “vessel” in the Ordinance in relation to the Convention and therefore the definition in the Convention should directly apply.



- (d) The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (as amended in 1976) was implemented by the MERCHANT SHIPPING (LIMITATION OF SHIPOWNERS LIABILITY) ORDINANCE (Chapter 434). In section 4:
- “(a) notwithstanding paragraph 3 of Article 1 of the Convention, “ship” (船、船舶) in the Convention means any seagoing vessel, and includes any air-cushion vehicle designed to operate in or over water while so operating;” (emphasis added, the Ordinance expressly includes, rather than as in the convention excludes air-cushion vehicle)
- (e) Hong Kong has not adopted the Rules for the Assessment of Damages in Maritime Collisions, Lisbon, 29 February 1998.
- (f) Hong Kong is a party to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 29 November 1969. There is no separate definition for “ship” for this Convention under Hong Kong law.
- (g) The Convention on Limitation of Liability for Maritime Claims, 1976 was implemented by the MERCHANT SHIPPING (LIMITATION OF SHIPOWNERS LIABILITY) ORDINANCE (Chapter 434). In section 13:
- ‘(a) “ship” (船、船舶) in the Convention includes-
- (i) any air-cushion vehicle designed to operate in or over water while so operating; and
 - (ii) any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship;’
- (h) Hong Kong is a party to the International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, Protocol 1978. Under the MERCHANT SHIPPING (PREVENTION AND CONTROL OF POLLUTION) ORDINANCE (Chapter 413). In section 2:
- “ship” (船) (船舶) means a vessel of any type whatsoever operating in the marine environment and includes a hydrofoil, hovercraft, submersible or floating craft and a fixed or floating platform.’ (the definition is very close to that in the convention though it expressly includes hovercraft).
- (i) The Convention on the International Regulations for Preventing Collisions at Seas, London, 20 October 1972 was implemented by the MERCHANT SHIPPING (SAFETY) (SIGNALS OF DISTRESS AND PREVENTION OF COLLISIONS) REGULATIONS (Chapter 369N). There is no separate definition of “vessel” in the regulations and therefore the definition in the convention should apply directly.



- (j) The International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 were implemented by the MERCHANT SHIPPING (LIABILITY AND COMPENSATION FOR OIL POLLUTION) ORDINANCE (Chapter 414).

Section 2 provides:

“‘ship’ (船) (船舶) means any sea-going vessel or seaborne craft of any type whatsoever;”

Section 6 provides:

“(3A) Subject to subsection (3B), this section applies to any ship constructed or adapted for carrying oil in bulk as cargo. (Added 46 of 1997 s. 4)

(3B) Where a ship referred to in subsection (3A) is capable of carrying other cargoes besides oil, this section shall apply to such a ship-

- (a) while it is carrying oil in bulk as cargo; and
- (b) subject to the owner proving that no residues from the carriage of any such oil remain in the ship, while it is on any voyage following the carriage of any such oil. (Added 46 of 1997 s. 4)”

- (k) The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 was implemented by the BUNKER OIL POLLUTION (LIABILITY AND COMPENSATION) ORDINANCE (Chapter 605). Section 2 provides:

“‘ship’ (船舶) means a sea-going vessel or seaborne craft of any type;”

- (l) Hong Kong is not a party to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substance by Sea, 1996.
- (m) Hong Kong is a party to the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990. Certain provisions of the convention have been implemented by the MERCHANT SHIPPING (PREVENTION AND CONTROL OF POLLUTION) ORDINANCE (Chapter 413) and its sub-legislations. The definition of “ship” used in the Ordinance is given in the above.
- (n) The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 1988 was implemented by the FUGITIVE OFFENDERS (MARITIME SAFETY) ORDER (Chapter 503AD). There is no separate definition of “ship” in the Order and therefore the definition in the Convention should apply directly.



Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

We have located two judgments where inconsistent or conflicting definitions of “vessels” or “ships” have impacted on the result of a proceeding. They are:

- (a) The *LIAN SHUN* a copy of which is here:
www.hklii.hk/eng/hk/cases/hkcfi/2004/933.html
- (b) *R v Keung Siu Wah* a copy of which is here:
www.hklii.hk/eng/hk/cases/hkca/1984/122.html

Yours faithfully

Edward Alder

HKMLA Secretary

RESPONSES OF THE NEDERLANDSE VERENIGING VOOR VERVOERRECHT
(NVV) (DUTCH TRANSPORT LAW ASSOCIATION)

Introduction

The Kingdom of the Netherlands is made up of four separate countries:

- the Netherlands
- Aruba
- Curaçao
- Sint Maarten.

Each of the countries has its own government that is responsible for the legislation applying in the particular country. However, within the country of the Netherlands there are two separate legal systems: the one applying in the Netherlands in Europe and the other in the Caribbean Netherlands on the islands of Bonaire, Sint Eustatius and Saba (the government of the Netherlands being responsible for the legislation applying in both jurisdictions). Consequently there are five different legal systems existing within the entire Kingdom. These are all civil law systems, and much of the main statute law applying in the different jurisdictions is identical. Article 39 of the *Statuut voor het Koninkrijk der Nederlanden* (Charter for the Kingdom of the Netherlands) contains the so-called ‘principle of concordance’. It provides:

1. Civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, industrial property, the notarial profession, and provisions concerning weights and measures shall be regulated as far as possible in a similar manner in the Netherlands, Aruba, Curaçao and Sint Maarten.
2. Any proposal for drastic amendment of the existing legislation in regard to these matters shall not be submitted to or considered by a representative assembly until the Governments in the other countries have had the opportunity to express their views on the matter.

With this principle in mind the courts of the different countries within the Kingdom tend to interpret the law in a manner that unifies the law of the countries as much as possible (harmonious or concordant interpretation).

With regard to the topic of this CMI questionnaire the differences between the separate jurisdictions is not very relevant. The differences mainly arise from the fact that there are inconsistencies in respect of ratification of international conventions: some of the conventions or their latest protocols may not be ratified for each and every jurisdiction, and may therefore have not been incorporated in national law. Furthermore, as there is no inland navigation of note in the Dutch Caribbean (i.e. the Caribbean Netherlands, Aruba, Curaçao and Sint Maarten), provisions

of inland navigation enacted in the law of the Netherlands in Europe have not been enacted in the Dutch Caribbean.

This reply is based on the law applying in the Netherlands in Europe. Where relevant we will make some comments about the position in the Dutch Caribbean.

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

Netherlands: The equivalents in the Dutch language of the generic terms ‘vessel’ or ‘ship’ are *schip* (with the same etymology as ‘ship’), *vaartuig* (from *varen* = moving on water (same etymology as ‘to fare’) + *tuig* = device (same etymology as ‘tug’)), and, usually for smaller vessels, *boot* (same etymology as ‘boat’). These terms are used without too much consistency in a number of statutes. Sometimes the terms are defined to some extent. These definitions very often look rather alike.

The basic definition for *schip* in the context of private law is the one contained in Article 8:1 of the Dutch Civil Code (in force in the Netherlands in Europe since 1 April 1991, in the Caribbean Netherlands, Curaçao and Sint Maarten since 1 January 2001, and in Aruba since 1 January 2002):

1. In this Code ‘ships’ are all objects, other than aircraft, which, according to their construction, are destined to float and which float or have done so.
2. By Regulation objects which are not ships may be designated as such for the purposes of the provisions of this Code; equally, provisions of this Code may be declared inapplicable to objects which are ships.
3. Propulsion equipment and other machineries become component parts of the ship at the time when, after their installation, their attachment to the ship is such as it will also be after the completion of the ship.
4. The ‘ship’s appurtenances’ are those things which, not being component parts of the ship, are destined to serve the ship durably and which are recognizable as such by their form, as well as the means of navigation and communication connected to the ship in such a manner that they cannot be separated therefrom without significant damage to them or to the ship.
5. Save as otherwise stipulated, the ship’s appurtenances are also considered as belonging to the ship. A term containing a derogation can be entered in the public registers referred to in Section 2 of Title 1 of Book 3.

6. For the purposes of paragraphs 3, 4 and 5 of this article, a ship also includes a ship under construction.

The use of the words ‘In this Code’ makes it clear that the definition in principle applies throughout the entire Dutch Civil Code. The definition is therefore relevant for issues relating to the law of obligations (contracts of carriage of goods or passengers and related contracts; collision; salvage; general average; third-party liability for dangerous or hazardous goods) and relating to property law (ship registration; rights attaching to the ship such as hypothec, pledge, usufruct, privileges (maritime or statutory liens), the right of detention (possessory lien) and limitation of liability).

However, in other parts of the Dutch Civil Code the basic definition is enlarged, limited or otherwise changed for specific purposes, particularly where the text of the Dutch Civil Code is based on international conventions. We will deal with those in more detail under question 2.

It is noted that ‘construction’ and ‘floating’ are the main criteria for an object to be characterized as a ship. ‘Navigation’ (which is part of the notion of *vaartuig*) was explicitly rejected as a criterion by the legislator, as it would imply an undesirable narrowing of the class of objects. It follows a fortiori that ‘transportation’ or ‘propulsion’ or other criteria (length, tonnage, intended trade or usage) than design (construction) and buoyancy (floating) are not considered relevant for the basic definition.

The legislative history of the article indicates that ‘to float’ was used instead of ‘to float on water’ in order to include submarine craft. It also notes that ‘to float’ (*drijven*) was preferred over ‘to fare’ (*varen*) as the latter would indicate (in Dutch of course) some movement in a certain direction through human interference. The intention, however, was to include objects without means of propulsion and objects towed by other ships. The legislative history also makes it clear that living beings, whales, tree trunks (unless joined into a raft), flotsam, and refuse are not to be considered a ship. A seaplane (float plane, flying boat) is not considered a ship. A hydroplane and a floating offshore installation are considered ships. But when a floating offshore installation becomes permanently fixed to the sea floor it loses its purpose to float, and is no longer a ship. The same applies to floating box caissons which are sunk to become part of some permanent water works. A wreck remains a ship (‘which float or have done so’) unless (or until) it loses its purpose to float. The *Hoge Raad* (the Dutch Court of Cassation) has ruled that a jack-up is a (sea going) ship (HR 28 May 2004, [ECLI:NL:HR:2004:AP0226](#), S&S 2015/13, ‘G’). A ship under construction which has not yet floated is not a ship (yet). In a case of damage caused by a ship under construction while being launched from a slipway, the *Rechtbank Rotterdam* (Rotterdam District Court) ruled that floating means that the weight of the object must predominantly be carried by water. The mere touching of the water by a small part of the object cannot be considered floating, but it would be possible for an object to float although some part of it rests on land (Rb. Rotterdam [ECLI:NL:RBROT:2013:BZ6053](#), S&S 2013/138, ‘Oleg Strashnov’). The most notable example of a ship under Dutch law is a rubber duck, provided it was made to float in someone’s bathtub and has done so.

Article 8:2 of the Dutch Civil Code (the Civil Codes applying in the Dutch Caribbean differ on certain points) provides the definition of sea-going ship:

1. In this Code ‘sea-going ships’ are ships which are entered as sea-going ships in public registers referred to in Section 2 of Title 1 of Book 3, as well as the ships which are not entered in those registers, and which, according to their construction, are exclusively or principally destined to float at sea.
2. By Regulation ships which are not sea-going ships may be designated as such for the purposes of the provisions of this Code; equally, provisions of this Code may be declared inapplicable to ships which are sea-going ships.
3. In this Code ‘sea-going fishing ships’ are sea-going ships which, according to their construction, are exclusively or principally destined for commercial fishing.

Article 8:3 of the Dutch Civil Code (there is no equivalent provision in the Civil Codes applying in the Dutch Caribbean) provides the definition of inland navigation ship:

1. In this Code ‘inland navigation ships’ are ships which are entered as inland navigation ships in the public registers referred to in Section 2 of Title 1 of Book 3, as well as the ships which are not entered in those registers and which, according to their construction are neither exclusively nor principally destined to float at sea.
2. By Regulation ships which are not inland navigation ships may be designated as such for the purposes of the provisions of this Code; equally, provisions of this Code may be declared inapplicable to ships which are inland navigation ships.

Article 8:3a of the Dutch Civil Code provides the definition of aircraft:

1. In this Code ‘aircraft’ are all machines which can be kept in the atmosphere as a result of forces that the air exerts thereon, with the exception of machines which, according to their construction, are destined to move on an air cushion that is being kept between the machine and the surface of the earth.
2. (...)

Reading Article 8:1 sub (1) and Article 8:3a sub (1) of the Dutch Civil Code together makes it clear that hovercraft/air-cushion vehicles fall under the general definition of ship of Article 8:1 sub (1) of the Dutch Civil Code. But as will be shown below question 2, hovercraft are explicitly excluded from the more specific definitions.

Although in principle only applying within the ambit of the Dutch Civil Code (‘In this Code’) the definition(s) provided in the Dutch Civil Code are directly relevant for other legislation which is based on or directly connected to the subject matter dealt with in the Dutch Civil Code. Some relevant examples would be the Dutch Code of Civil Procedure and the Cadastre Act (the Cadastre being the organization responsible for the public registers and therefore for the registration of ships).

As indicated earlier, the term *vaartuig* is used in other legislation, particularly legislation predating the entry into force of Article 8:1 of the Dutch Civil Code, for instance the Dutch Criminal Code and the Dutch Code of Criminal Procedure. A true definition of *vaartuig* is lacking, and the interpretation may in fact vary for each statute. However, it is clear that motion or navigation (whether or not by its own means of propulsion) is an essential element which, as said, is absent in the definition of *schip* of Article 8:1 of the Dutch Civil Code.

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

Netherlands: Yes. See the following particular examples.

Ship registration; rights attaching to a ship; and rights attaching to objects on board.

With regard to Sections 2 to 5 of Title 3 of Book 8 of the Dutch Civil Code Article 8:190 of the Dutch Civil Code provides:

1. In Sections 2 to 5, inclusive, of Title 3 ‘ships’ include ships under construction. (...).

Sections 2 to 5 of Title 3 deal with registration of sea-going ships; rights attaching to a sea-going ship such as hypothec, pledge, usufruct; privileges (maritime or statutory liens) and the right of detention (possessory lien); and rights attaching to objects on board. As a consequence an object which in under construction to become a (sea-going) ship, but which has not yet floated, may be registered as a (sea-going) ship, and may be subject to a hypothec (and other rights). This ensures that the construction of the ship may be financed by loans secured by hypothec.

With regard to Sections 2 to 6 of Title 8 of Book 8 of the Dutch Civil Code Article 8:780 of the Dutch Civil Code provides:

1. In Sections 2 to 6, inclusive, of Title 8 ‘ships’ include ships under construction. (...).
2. In Sections 2 to 6, inclusive, of Title 8 ‘inland navigation ships’ also include hydrofoils, ferryboats, as well as dredgers, floating cranes, elevators and all floating equipment, pontoons or equipment of similar nature satisfying the requirements, mentioned in Articles 1 and 3, with respect to inland navigation vessels.

Sections 2 to 6 of Title 8 deal with the same subject matter regarding inland navigation ships as Sections 2 to 5 of Title 3 do regarding sea-going ships, with the addition of hire-purchase of inland navigation ships. (There are no equivalent provisions for sea-going ships on this point.) Article 8:780 sub (2) of the Dutch Civil Code is derived from the Convention on the Registration of Inland

Navigation Vessels, Geneva, 25 January 1965, which also shows there is an international basis for including floating objects without their own means of propulsion.

In the absence of inland navigation of note in the Dutch Caribbean Article 8:780 and (Sections 2 to 6 of) Title 8 have no equivalent in Book 8 of the Civil Codes applying in the Dutch Caribbean.

Enforcement/Judicial Sale

With regard to effecting an attachment for the enforcement of claims against ships and the judicial sale of ships Article 562a Dutch Code of Civil Procedure provides:

In this Title ‘ships’ include ships under construction.

This provision was introduced in the Dutch Code of Civil Procedure at the same time as the entry into force of the Book 8 of the Dutch Civil Code with the new provisions relating to ships.

Contracts for the carriage of passengers

With regard to contracts for the carriage of passengers by sea Article 8:500 heading and sub (j) of the Dutch Civil Code provides:

In this Section the following terms mean:

(...)

(j) ‘Ship’: a seagoing vessel, excluding an air-cushion vehicle; (...)

This definition is directly derived from Article 1 sub (3) of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 (left unamended by the 2002 Protocol). Although in the Dutch text the word *schip* is used twice (*schip: een zeegaand schip*) the interpretation should follow the convention text, using vessel. This Article 8:500 heading and sub (j) of the Dutch Civil Code was introduced on 31 December 2012 in connection with the ratification of the Athens Convention. Before that time the provisions regarding carriage of passengers by sea did not have a particular definition for ship, and the general definition of ship was applied. As only the Netherlands in Europe is party to the Athens Convention, the Civil Codes applying in the Dutch Caribbean have not been amended, and therefore do not have a particular definition for ship.

The provisions regarding carriage of passengers by inland waterway (which only exist in the Netherlands in Europe) do not have a particular definition for ship. The general definition of ship is applied.

Salvage

With regard to salvage Article 8:551 heading and sub (b) of the Dutch Civil Code provides:

In this Section the following terms mean:

(...)

(b) ‘vessel’: any ship or craft, or any construction capable of navigation;

(...)

This definition is directly derived from Article 1 heading and sub (b) of the International Convention on Salvage 1989, London 28 April 1989.

The same definition applies for salvage on inland waterways.

Third party liability for incidents with dangerous goods

With regard to third party liability for incidents with dangerous goods on board a sea-going ship Article 8:620 heading and sub (b) of the Dutch Civil Code (only applying in the Netherlands in Europe) provides:

In this Section the following terms mean:

(...)

(b) ‘ship’: a seagoing ship, not being an air-cushion vehicle

(...)

Although the contents of the Section are based on the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), Geneva, 10 October 1989. This convention was not intended to apply to sea-going ships. It has the following definition of ship:

“Ship” means any vessel or craft, not being a sea-going ship or sea-borne craft, of any type whatsoever.

Therefore the Dutch legislator was free to adopt its own definition for sea-going ships. (Air-cushion vehicles are excluded here and treated as road vehicles elsewhere in the Dutch Civil Code in respect.)

Similarly with regard to third party liability for incidents with dangerous goods on board an inland navigation ship Article 8:1030 heading and sub (b) of the Dutch Civil Code (only applying in the Netherlands in Europe) provides:

In this Section the following terms mean:

(...)

(b) ‘ship’: an inland navigation ship, not being an air-cushion vehicle

(...)

Liability for incidents of bunker oil pollution

With regard to liability for incidents of bunker oil pollution Article 8:639 heading and sub (d) of the Dutch Civil Code (only applying in the Netherlands in Europe) simply provides:

In this Section the following terms mean:

- (a) ‘Convention’: the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, adopted in London on 23 March 2001 (...);
- (b) (...)
- (d) ‘Ship’, ‘person’, ‘bunker oil’, ‘preventive measures’, ‘incident’, ‘pollution damage’, ‘State of the ship’s registry’, ‘gross tonnage’, ‘organization’ and ‘Secretary-General’: the meaning defined in Article 1 of the Convention;

There are no similar inland navigation provisions

Wreck removal

With regard to wreck removal Article 8:655 of the Dutch Civil Code provides:

In this Section the following terms mean:

- (a) ‘Convention’: the International Convention on the Removal of Wrecks adopted in Nairobi on 18 May 2007 (...);
- (b) ‘Wreck’, ‘ship’, ‘maritime casualty’, ‘hazard’, ‘registered owner’, ‘State of the ship’s registry’: the meaning defined in Article 1 of the Convention;

At this moment the Nairobi Convention only applies in the Netherlands in Europe, so the Civil Codes applying in the Dutch Caribbean contain no equivalent provision.

Global limitation of liability

With regard to global limitation of liability for sea-going ships Article 8:750 sub (4) of the Dutch Civil Code provides:

In this Title a ‘ship’ means a sea-going ship. A ship under construction is also considered a ship for the purposes of this Title from the time its launching commences. An air-cushion vehicle is not considered a ship for the purposes of this Title. A platform constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof and that can float is not considered a ship for the purposes of this Title during the period that it rests on the seabed.

This definition seems to be a combination of Article 2 (seagoing ship) and Article 15 sub (5) (air-cushion vehicles and platforms) of the Convention on Limitation of Liability for Maritime Claims, London 19 November 1976, with the addition of ships under construction.

With regard to global limitation of liability for inland navigation ships Article 8:1060 sub (4) and (5) of the Dutch Civil Code (only applying in the Netherlands in Europe) provides:

4. In this Title ‘inland navigation ships’ include hydrofoils, ferries and small craft, dredgers, floating cranes, elevators and all other floating and movable equipment, pontoons or equipment of a similar nature satisfying the requirements of Articles 1 and 3 of this Book with regard to inland waterway vessels.
5. A ship under construction is also considered a ship for the purposes of this Title from the time its launching commences. An air-cushion vehicle is not considered a ship for the purposes of this Title.

This definition seems to be a peculiar combination of Article 1 sub (2)(b) of the Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels (CLNI), Strasbourg, 4 November 1988 and Article 1 sub 1 (b) of the Convention on the Registration of Inland Navigation Vessels, Geneva, 25 January 1965

Other

Where other conventions as listed by Professor Sözer were ratified for the Netherlands in Europe and implemented by more specific legislation, the definition of ship generally follows the convention text closely:

- International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels 29 November 1969 (as amended) – *Wet bestrijding maritieme ongevallen* (Act on the Combatting of Maritime Casualties);
- Convention on the International Regulations for Preventing Collisions at Sea, London 20 October 1972 – *Scheepvaartverkeerswet* (Ships Traffic Act);
- International Convention for the Prevention of Pollution from Ships, London 2 November 1973 (as amended) and the International Convention on Oil Pollution Preparedness, Response and Co-operation, London 30 November 1990 - – *Wet voorkoming verontreiniging door schepen* (Act on the Preventing of Pollution from Ships);
- International Convention on Civil Liability for Oil Pollution Damage, London 27 November 1992 – *Wet aansprakelijkheid olietankschepen* (Oil Tanker Liability Act)(We note the existence of the IOPCF document: Guidance for Member States 2016 Edition Consideration of the definition of ‘ship’);

- International Convention of the Establishment of an International Fund for Compensation of Oil Pollution Damage, London 27 November 1992 – *Wet schadefonds olietankschepen* (Oil Tanker Liability Fund Act).

There is other legislation applying in the Netherlands or the Dutch Caribbean using some variation of the notion of ship. We thought it would be unnecessary to provide a truly comprehensive list. There is a clear general picture: the Civil Code contains a general definition which is very wide; in other places within the Civil Code the definition may be even wider or rather more limited depending on the particular purpose or the origin of the provision (convention). Other legislation may also contain a somewhat different notion of ship, which may or may not be very well defined.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Netherlands: Distinct statutory provisions will indeed apply, but the procedure is largely similar to the seizure, foreclosure, and forced sale of registered property (real estate) or moveables, depending on whether the ship is a registered ship or not. The one thing that perhaps stands out is that ‘judicial’ sales normally take place before a civil law notary, but that the person enforcing a claim against a foreign ship has the option to have the ship judicially sold by the court. The option was created to increase the chance of recognition of the judicial sale in countries unfamiliar with the civil law or latin notarial system (particularly common law countries).

With regard to the ranking and priority of claims against ships there is a distinct system. The Netherlands is not a party to any of the maritime liens and mortgages conventions (1926, 1967, 1993 – see also question 4). Instead it has based its national system of (ranking of) liens on ships on Protocol Nr 1 to the Convention on the Registration of Inland Navigation Vessels, Geneva, 25 January 1965, regardless of whether the ship is a sea-going ship or an inland navigation ship (the latter of course not recognized as a separate category in the Dutch Caribbean).

With regard to recognizing (foreign) liens on (foreign) ships the Netherlands in Europe has its own distinct conflict of law rule. Article 10:160 of the Dutch Civil Code provides:

1. If, in the event of a bankruptcy or judicial sale, the proceeds of a registered ship are to be distributed in the Netherlands by the court, the question whether a claim submitted in such proceedings exists and, if so, in what amount, shall be governed by the law which is applicable to that claim.
2. Whether a claim as referred to in the preceding paragraph is privileged and, if so, the scope, rank and consequences of such privilege, are to be decided by the law of State where the ship was registered upon commencement of the bankruptcy or sale. In determining the ranking of claims, however, priority over claims secured by hypothec shall only be attributed to those claims which have such priority under Dutch law.

3. No priority shall be attributed to a claim which, under the law applicable thereto, is not privileged on the ship.
4. Subparagraphs 2 and 3 apply mutatis mutandis to the recoverability of a claim against the ship.

Summarizing, there is a two tier system of the *lex causae* and the *lex registrationis* (which may not be the law of the flag) for allowing a claim to be recovered from the ship and enjoy the priority ranking of the *lex registrationis*. For the claim to be ranked above mortgage/hypothec a third test of the *lex fori* has to be passed.

Article 10:160 replaced a two tier system of the *lex causae* and the *lex fori* which was developed in court judgments. The question therefore is whether this system still applies in the Dutch Caribbean, or whether the courts in the Caribbean Netherlands, Aruba, Curaçao or Sint Maarten will – on the basis of the principle of concordance – shift to applying similar rules as laid down in Article 10:160 of the Dutch Civil Code as it applies in the Netherlands in Europe.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

Netherlands: No.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Netherlands: No. It may be relevant for its status as either a seagoing ship or inland navigation ship under Articles 8:2 and 8:3 of the Dutch Civil Code.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

Netherlands: There are conflict of law rules regarding the recognition of proprietary interests in ships (Article 10:127 of the Dutch Civil Code) or rights attaching to ships (Article 10:160 of the Dutch Civil Code), but these rules presuppose the classification of the object as a ship. This question of classification as a ship is to be regarded as an incidental question in the conflict of laws. Article 10:4 of the Dutch Civil Code provides in this respect:

If, by way of an incidental question, a question arises as to the legal effect to be given to a fact in connection with any other question subject to foreign law, the incidental question shall be considered as an independent question.

But there is no Dutch (written) conflict of law rule to the question of recognition of foreign registered ships as ships or as registered objects as such. The *lex registrationis* or the *lex fori* (Dutch law) would seem to be the most likely to be applied. One would assume that an object registered as a ship in a certain country would in most cases be regarded a ship under the laws of that country (*lex registrationis*). If, however, Dutch law was to be applied as the *lex fori* it would be difficult to imagine an object registered as a vessel in another jurisdiction not be treated as a ship in the Netherlands in view of the very wide definition of ‘ship’ in the Dutch Civil Code.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) ***non-self propelled barges – Netherlands:*** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.
- 2) ***self-propelled barges – Netherlands:*** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.
- 3) ***accommodation barges – Netherlands:*** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.
- 4) ***mobile offshore drilling units – Netherlands:*** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.
- 5) ***wind turbine towers (floating or permanently fixed) – Netherlands:*** No known decision, but if the tower is floating it seems to be well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code. When it is permanently fixed it would have lost its purpose to float, and would no longer be a ship. (See above on p. 3 with regard to floating offshore installations and floating box caissons.)
- 6) ***jack up drill rigs – Netherlands:*** The *Hoge Raad* (the Dutch Court of Cassation) has ruled that a jack-up is a (sea going) ship (HR 28 May 2004, [ECLI:NL:HR:2004:AP0226](#), S&S 2015/13, ‘G’)
- 7) ***construction barges – Netherlands:*** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.
- 8) ***submarines – Netherlands:*** No recent decision, but specifically mentioned in the legislative history of Article 8:1 of the Dutch Civil Code as falling within the class of objects considered ships.

- 9) **seaplanes – Netherlands:** A seaplane (float plane, flying boat) is not considered a ship. (See above on p. 3.)
- 10) **hydroplanes (air cushion) – Netherlands:** As far as we know a hydroplane is not to be confused with an air-cushion vehicle. A hydroplane is a type of powerboat which floats but, when sailing at speed, also uses lift (air) to reduce drag. In that sense a hydroplane is similar to a hydrofoil. There is no known decision on the issue whether a hydroplane is a ship, but as hydrofoils fall within the class of objects considered ships, hydroplanes likely will too. There is no known decision on the issue of air-cushion vehicles being a ship, but it is specifically mentioned in the legislative history of Article 8:1 of the Dutch Civil Code as falling within the class of objects considered ships. As indicated on p. 4 air-cushion vehicles are sometimes explicitly excluded from the more specific definitions of ship.
- 11) **vessels under construction – Netherlands:** Following the general definition of Article 8:1 of the Dutch Civil Code an object which has not yet floated (which could be a ship under construction) is not a ship. However, some specific definitions of ships include ships under construction, more particularly Article 8:190 and 8:780 of the Dutch Civil Code (Article 8:780 not applying in the Dutch Caribbean as it concerns inland navigation ships). But the *Gerechtshof 's-Gravenhage* (Court of Appeal of the Hague) ruled that on the other hand a ship which is in the water may still remain a ship under construction if the construction of the ship still needs to be completed ([ECLI:NL:GHSGR:2011:BQ9513](#); S&S 2011/122 – confirmed by the Dutch Court of Cassation in HR 28 February 2014, [ECLI:NL:HR:2014:440](#); S&S 2015/29). In that case 26 hulls of inland navigation vessels were constructed in China, launched into Chinese waters, registered in the Dutch ship's register, encumbered with Dutch registered ship hypothecs, and loaded onto a sea-going pontoon which was then towed to the Netherlands. A creditor of the owner of the hulls attached the hulls on arrival in the Netherlands and contested the ship hypothecs on the basis of the argument that ships under construction may only be registered in the Netherlands if they are under construction in the Netherlands, that the hulls – although launched into water, and therefore ships – still remained ships under construction, making the registration (of a ship under construction in China) and the hypothecs void at the time. The Court of Appeal agreed.
- 12) **unmanned vessels – Netherlands:** No known decision, manning is not a criterion in deciding whether an object is a ship under Article 8:1 of the Dutch Civil Code.
- 13) **vessels devoted temporarily or permanently to storage of bulk commodities – Netherlands:** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.
- 14) **vessels in “cold layup” – Netherlands:** No recent decision, but is well within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.

- 15) *derelict Vessels or “dead ship” – Netherlands:* No recent decision, but just like floating structures becoming permanently fixed to the seafloor derelict vessels or dead ships may have lost their purpose to float, and would therefore no longer be classed as ships.
- 16) *vessels under conversion or renovation – Netherlands:* No recent decision, but is well to remain within the class of objects considered ships under Article 8:1 of the Dutch Civil Code.

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

Netherlands: Links to the relevant judgments (in Dutch) were included above.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Netherlands: See above.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

Netherlands: See under question 7 sub 11 Vessels under construction.

1 December 2016

Committee Ad Hoc

Reinier P. van Campen
Maarten H. Claringbould
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RESPONSES OF THE ROMANIAN MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

Romania: According to art. 23(a) from the Government Ordinance no. 42/1997 the definition of vessel is as follows: “*maritime and inland waterway vessel of any type, powered or non-propelled, sailing on the surface or immersion, designed to carry goods and / or people, fishing, towage or pushing and other water activities. The following are part of vessel: installations, machines and engines powering the vessel or cause other mechanical action, together with the mechanisms and means of transmission of this action, all necessary equipment navigation, various maneuvers, safety of the ship, saving life, pollution prevention, communications, hygiene and the intended operation of the vessel and supplies*”.

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

Romania: No.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Romania: No. According to the recent legal developments (the entry into force of the New Civil Procedural Code), the process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels is the same for other types of similar property (moveable property). Nevertheless, Romania is a party to the 1926 Liens and Mortgages Convention and thus the ranking and priority of claims mentioned in the Convention applies.

**Question 4:**

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

Romania: No. Romania is a party to the 1926 Liens and Mortgages Convention.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Romania: No.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

Romania: There is no case law of the Romanian Courts that can determine their position on this issue. However, we believe that if such an issue may arise, the Court would consider the ship to be categorized as moveable property and if sufficient evidence that this vessel is owned by the debtor is provided by the claimant, than the arrest/foreclosure would be granted by the Court.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) *non-self propelled barges*
- 2) *self-propelled barges*
- 3) *accommodation barges*
- 4) *mobile offshore drilling units*
- 5) *wind turbine towers (floating or permanently fixed)*
- 6) *jack up drill rigs*
- 7) *construction barges*
- 8) *submarines*
- 9) *seaplanes*
- 10) *hydroplanes (air cushion)*
- 11) *vessels under construction*
- 12) *unmanned vessels*
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities*
- 14) *vessels in “cold layup”*
- 15) *derelict Vessels or “dead ship”*
- 16) *vessels under conversion or renovation*



If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court's views.

Romania: There aren't any Romanian Court decisions which address the legal classification of any of the above mentioned property.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Romania: There are no variations between the Conventions mentioned by Professor Bulent Sözer and the equivalent terms in the Romanian national law system.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of "vessel", "ship" or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

Romania: No.



RESPONSES OF THE BRAZILIAN MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

- 1.1. Yes, pursuant to maritime legislation (Law No. 9537 of December 11, 1997), the concept of “vessel” (“*embarcação*”) is expressly defined as any construction including floating platforms and, when towed, the fixed-type platforms, subject to enrolment with the maritime authorities and susceptible to locomotion through the water, under their own steam or otherwise, transporting persons or cargo (article 2, item V thereof).
- 1.2. Particularly with respect to environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship (“*navio*”) is expressly defined as a vessel of any type which operates in water, including hydrofoils, air-cushion vehicles, submersibles and other floating crafts. Please note that the applicability of such concept shall be restricted to said law, which regulates the prevention, control and inspection of pollution caused by oil spillage and other harmful and dangerous substances in waters under Brazilian jurisdiction
- 1.3. The Port and Coastal Authority (*Capitania dos Portos*), under the authority of the Navy Command, of the Ministry of Defense, established under Brazilian Maritime Rule No. 1 approved by Ordinance No. 45 of May 11, 2005 as amended, the following types of vessels:
 - (A) Classified Vessel - any vessel bearing a Class Certificate or under a classification process before a recognized Classification Society acting on behalf of the Brazilian Government;
 - (B) Certified Vessels (EC) – all non-SOLAS vessels, which may be subdivided in:
 - (I) Class 1 (EC1) – vessels which may be characterized under one of the followings situations:
 - (i) intended for the transportation of passengers, with or without propulsion, and with a Gross Tonnage higher than 50;
 - (ii) floating operating with more than 12 people on board, with a Gross Tonnage higher than 50;

- (iii) not intended for the transportation of passengers, with or without propulsion, and with a Gross Tonnage higher than 50; or
 - (iv) floating with a Gross Tonnage higher than 100.
- (II) Class 2 (EC2) - all other non-SOLAS vessels.
- (C) “SOLAS” vessels - means all merchant vessels used for international maritime voyages or employed in the merchant maritime traffic among Brazilian ports, oceanic islands, port terminals and offshore platforms, with exception to:
 - (I) cargo vessels with Gross Tonnage lower than 500;
 - (II) passenger vessels with Gross Tonnage lower than 500 and not used for international voyages;
 - (III) vessels without mechanical propulsion;
 - (IV) wooden vessels of primitive construction;
 - (V) fishing vessels; and
 - (VI) vessels with a ruled length lower than twenty-four (24) meters.
- (D) Prototype - first vessel of a “Vessel Series” for which a Construction License has already been issued;
- (E) Vessel Series (“sister ships”) – characterized due to a unit group with same characteristics, built at the same place and based on the same project;
- (F) Passenger Vessel - all vessels transporting over 12 passengers;
- (G) Fishing Vessel – all vessels intended exclusively and permanently for capturing live beings, which have the water as their main or more frequent natural habitat;
- (H) Tanker Vessel - vessel built or adapted for the transportation in bulk of liquid loads of flammable nature. All other vessels which carry liquid bulk loads are considered as cargo ships;
- (I) Flotel - vessel which renders support services to the activities of the offshore platforms (such as electric power generation, hotel services, maintenance utilities, among others);
- (J) Floating - all floating structures without propulsion which operate at a fixed and determined place;
- (K) Tugboat and/or Pusher - all vessels designed or adapted to perform the operations of towing and/or pushing;

- (L) New Vessel:
 - (I) SOLAS - vessels which are defined as such under the applicable International Conventions and Codes ratified by the Brazilian Government; and
 - (II) Non-SOLAS – under a process of Construction, Alteration or Reclassification Licenses or request enrollment (in case of vessel that is not required to obtain the such License) after June 30, 2004;
- (M) Existing Vessel - the one which is not a new vessel;
- (N) Platform – fixed or floating structure or facility intended for activities directly or indirectly related to the research, exploration and exploitation of resources originated from the bed of inland waters and their subsoil or from the seabed, including the continental shelf and its subsoil.
 - (I) Mobile Platform - means the generic designation of vessels used directly in the activities of prospection, extraction, production and/or storage of oil and gas. It includes the Semi-Submersible and Self-Elevating units, Drill Ships, Tension Leg units, Deep Draft (Spar) units, Stationary units of Production, Storage and Transfer (FPSO) and Stationary units of Storage and Transfer (FSO). Vessels intended for the execution of other works or services, even when presenting construction characteristics similar to the units fitting the above definition, must not be considered as “Platforms” for the purpose of application of the requirements established in these Standards and in other codes associated with oil-related activities.
 - (II) Fixed Platform - means a construction placed in a permanent way at the seabed or inland waters, intended for the use in activities related to the prospection and extraction of oil and natural gas. It is not considered as a vessel when attached to the bed of inland waters or seabed.

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

- 2.1. Although the concept of vessel is not otherwise specifically defined under the applicable tax legislation, Brazilian Federal Tax Authorities have a particular interpretation according to which an asset to be deemed as a vessel should be able to move on the water performing transportation of people or cargo. Based on such interpretation adopted in specific administrative decisions, Brazilian Tax Authorities do not apply the applicable vessel tax exemption (as further detailed below) to platforms and, as we understand it, such matter has still not been decided by Brazilian Superior Courts.

- 2.2. Pursuant to article 1, item “I” of Law No. 9481, of August 13, 1997, as consolidated in article 691 of the Income Tax Regulations (Decree No. 3000, of March 26, 1999), the Brazilian Withholding Income Tax is assessed at a zero rate in the case of payments remitted abroad as remuneration for the charter of vessels.
- 2.3. There are lower court decisions with the understanding that, for the purposes of such vessel tax exemption, an asset shall only be deemed as a vessel if its purpose is the transportation of people or cargo. Pursuant to such decisions although platforms would be able to move on the water, the purpose of such assets would be research, exploitation and prospecting of oil. Therefore, platforms would not be contemplated by such tax exemption.
- 2.4. Please note, however, that the legal concept of vessel established under Law No. 9537 of December 11, 1997 expressly contemplates platforms in such definitions characterizing the possibility of locomotion through the water as an essential element to such type of asset (rather than the transportation of people and goods).
- 2.5. As regards maritime insurance, please note that pursuant to article 685 of the Brazilian Commercial Code (Law No. 556 of June 25, 1850, as amended) any and all things, any and all interests with monetary value, which has been or shall be put at sea, may be object of maritime insurance, with due regard to any prohibition on the contrary. Additionally, Law No. 8374 of December 30, 1991, which regulates the mandatory insurance for personal damages caused by vessels or their cargo, defines vessel as vehicles destined to maritime or inland traffic, equipped with self-propulsion or not.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

- 3.1. Please find below our comments on the protective measures to creditors against vessels under Brazilian Law:

Arrest and Privileged Claims over Vessels in Brazil

- 3.2. Law No. 13105 of March 16, 2015 (also known as the New Brazilian Code of Civil Procedure) establishes precautionary measures for urgent matters (as it would be the case of seizure and arrest, among others), to avoid a party to suffer serious damages hard to be recovered in a situation of dispute against another party. The requirements established by law in order to authorize the filing of a precautionary measure (and also the granting of the injunction) are:
 - (a) risk of damage or risk to the useful result of the proceeding (*periculum in mora*) --
- meaning that the party cannot wait the dispute to be finally appreciated and decided, under the risk of suffering damages hard to be recovered in the meantime;
and

- (b) probability of right (*Fumus boni iuris*) --- consisting of the plausibility (existence of pre-established proof) that the plaintiff's claims are grounded.
- 3.3. The New Brazilian Code of Civil Procedure indicates the arrest (“*arresto*”) as one of the precautionary measures, which is a protective measure to creditors consisting in the judicial seizure of the debtor's assets for purpose of securing a future execution action. Please note, however, that such new legislation does not provide for specific requirements for the arrest as otherwise expressly regulated under the previous legislation on the matter. Therefore, there are jurists that understands that such previous requirements would still apply as standards.
- 3.4. The right of arrest does not come ahead of the owner's right in a vessel. According to the Brazilian Commercial Code (Law No. 556 of June 25, 1850, as amended), the requirement for granting the arrest of a vessel is that the outstanding credit must fall under any of the legal payments set forth in articles 470, 471 and 474 of the Brazilian Commercial Code (known as “privileged claims”). Privileged claims under the Brazilian Commercial Code, which shall create a statutory mortgage over the vessel, are as follows: (i) salaries owed for onboard services; (ii) all maritime fees and taxes (that is, fees due to the ports administrators and tax obligations); (iii) expenses for surveillance and maintenance of a ship; (iv) crew payment; (v) overdue payment of a ship's purchase price; (vi) debts arising from the ship construction agreement; and (vii) repair expenses involving a ship and its equipment.

Enforcement of Foreign Mortgages in Brazil

- 3.5. In Brazil, rights over vessels shall be governed by the laws of the country of the flag that the vessel is flying. In case of a dispute in Brazil, Brazilian courts shall apply a foreign law, to the extent that such foreign law does not contravene Brazilian national sovereignty, public policy or good morals.
- 3.6. In this regard, please note that Brazilian courts shall have jurisdiction whenever the defendant is domiciled in Brazil, the obligation has to be performed in Brazil or the fact under dispute has been originated in Brazil. Brazilian courts, however, shall have exclusive jurisdiction in actions relating to real property situated in Brazil. Brazilian courts would also have jurisdiction in case of any action seeking repossession of a vessel or in case of arrest, provided that the vessel is located within Brazilian territorial waters, the exclusive economic zone or the continental shelf of Brazil. Please also note that, in accordance with the rules on conflicts of law established by Decree-Law No. 4657 of September 4th, 1942 as amended by Law No. 12376 dated December 30th, 2010, whenever a foreign law shall be applied, the provisions of such foreign law shall be observed, regardless of any reference that may be made by such foreign law to other laws.
- 3.7. With respect to a foreign mortgage over the vessel, therefore, we understand that Brazilian courts would have jurisdiction to decide on the mortgage in relation to provisional remedies, i.e. protection measures related to the status of the mortgagee's rights over the vessel and to the protection of the vessel from depreciation or destruction.

- 3.8. Under Brazilian law, the enforcement of a mortgage can only be made through a judicial proceeding, in which case the judge shall determine that the mortgaged property be attached and appraised by an appraiser appointed by the judge. Upon the appraisal of the mortgaged property, such property shall be sold at a public auction, the proceeds of which will be applied to the payment of the principal and interest of the debt, judicial expenses and legal fees. The balance amount, if any, shall be returned to the debtor. Alternatively, the property may also be adjudicated to the mortgagee, with the leave of the court, or sold by the creditor, either directly or through a broker accredited with the court, in which case the judge shall determine the term for the sale to be effective, the mechanism for its publicity, the minimum price, the payment conditions and collateral requirements, as well as the brokerage, if applicable.
- 3.9. As a general rule, the registration of a mortgage under Civil law will be valid for the term of 30 (thirty) years. Upon expiration of such term, the relevant mortgage may be renewed only with a new deed and new registration. On the other hand, the specialization of the mortgage shall be renewed after 20 (twenty) years.
- 3.10. Please also note however that, according to the Brazilian Civil Code, mortgage over vessels shall be governed by specific law.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

- 4.1. No, Brazil is not a signatory of the Convention on Maritime Liens and Mortgage 1993 (“MLM-93”).
- 4.2. On the other hand, Brazil is a party to the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1926/Maritime Liens and Mortgages Convention of 1926 (“Brussels Convention”), which was ratified by the Decree No. 351 of October 1, 1935.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

- 5.1. No, registration of maritime property (*Registro de Propriedade Marítima* – “RMP”) shall grant the nationality, validity, assurance and publicity of the vessel’s ownership in Brazil. In order to be valid against third parties, the ownership rights and security interests over Brazilian vessels shall be registered with the Maritime Court.
- 5.2. Maritime property is presently regulated in Brazil by Law No. 7652 of February 3, 1988 as amended by Law No. 9774 of December 21, 1988 (“Law No. 7652/88”). Brazilian vessels are those entitled to fly a Brazilian flag. The following requirements must be observed for a vessel to fly a Brazilian flag: (i) the owner of the vessel shall be either an individual with Brazilian nationality or a Brazilian company; (ii) the vessel’s captain shall

- be an individual with Brazilian nationality; (iii) the chief engineer of the vessel shall be an individual with Brazilian nationality; and (iv) at least two thirds of the vessel's crew shall be individuals with Brazilian nationality.
- 5.3. Brazilian vessels (other than marine war vessels) shall be enrolled with the Port and Coastal Authority (*Capitania dos Portos*) of the place either where the ship owner or ship carrier is located or where the vessel is to operate. Vessels with a gross tonnage over 100 tons must also be registered with the Maritime Court, regardless of the modality of navigation they perform.
 - 5.4. On the other hand, foreign vessel may be provisionally registered with the Brazilian Maritime Court to fly a Brazilian flag (the so-called *Registro Especial Brasileiro* - "REB") during the relevant period for utilisation of the vessel in Brazil by a Brazilian shipping company (*Empresa Brasileira de Navegação*, also known as "EBN"), even though such vessel is owned by a foreign company, subject to compliance with certain specific requirements. Brazilian vessels are also eligible for registration with REB.
 - 5.5. Please note that REB is not a register of title and merely supplements the RMP and cannot replace said document. Such registration is subject to the suspension of the right to fly the flag of the country where the vessel is originally registered for the period of its operation in Brazil.
 - 5.6. The REB contains administrative and tax benefits given to Brazilian ship-owners, with a view to increasing the competitiveness of the Brazilian shipping market in relation to the foreign ship-owners, which operate their ships at a reduced cost by flying convenience flags.

Question 6:

If property is categorized as a 'vessel' in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

- 6.1. Considering that REB (the so-called *Registro Especial Brasileiro* - "REB") is merely a supplementary registry, not being a register of title, it shall not reflect any annotation on mortgages over foreign vessel.
- 6.2. Only Brazilian vessels are eligible for registration as property by the Maritime Court, while foreign vessels are subject to specific authorizations and enrolments (not related to property registration).

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) *non-self propelled barges*
- 2) *self-propelled barges*
- 3) *accommodation barges*
- 4) *mobile offshore drilling units*
- 5) *wind turbine towers (floating or permanently fixed)*
- 6) *jack up drill rigs*
- 7) *construction barges*
- 8) *submarines*
- 9) *seaplanes*
- 10) *hydroplanes (air cushion)*
- 11) *vessels under construction*
- 12) *unmanned vessels*
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities*
- 14) *vessels in “cold layup”*
- 15) *derelict Vessels or “dead ship”*
- 16) *vessels under conversion or renovation*

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

7.1. To come.

[7.2. We have located judicial decisions with respect to (i) non-self-propelled barges (appellate court, 2011), (ii) vessels under renovation (appellate court, 2011) and (iii) vessels under construction (appellate court, 2011), as per the attached documents.]

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

8.1. Please refer to item 1 above. Brazilian maritime legislation expressly defines the concept of vessel characterizing as its core element the capability of navigation, including, when towed, fixed-type crafts, and subject to enrolment with Brazilian Maritime authorities.

8.2. Accordingly, we understand that the following definitions of ships and vessels would be compatible to and/or included in the Brazilian law concepts of vessel and ships, as applicable and subject to the specific comments made in each item:

I - Concept of vessel for Maritime Operations in general (item 1.1. above)

- (a) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 1924 - “Ship” means any vessel used for the carriage of goods by sea. Brazil has not ratified such Convention;

- (b) United Nations Convention on Conditions for Registration of Ships, Geneva, 1986 - “Ship” means any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of less than 500 gross registered tons. Brazil has not ratified such Convention;
- (c) International Convention on Salvage, London, 1989 – “Vessel” means any ship or craft or any structure capable of navigation. This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of seabed minerals resources. Brazil has ratified such Convention by the Legislative Decree No. 263 of June 12, 2009. Pursuant to Brazilian maritime legislation, the concept of vessel shall apply to platforms, except in case such crafts are attached to the seabed;
- (d) Rules for the Assessment of Damages in Maritime Collisions, Lisbon, 1998 - “Vessel” means any ship, craft, machine, rig or platform whether capable of navigation or not, which is involved in a collision. Brazil has not ratified such Convention. Pursuant to Brazilian maritime legislation (Law No. 2180 of February 5, 1954) aircrafts, either floating or flying, shall be deemed as merchant vessels, in case of collision or any type of damaged caused to merchant vessels;
- (e) International Convention on Limitation of Liability for Maritime Claims, London, 1976 - This Convention shall not apply to: (i) air-cushion vehicles; (ii) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof. Brazil has not ratified such Convention;
- (f) Convention on the International Regulations for Preventing Collisions at Sea, London, 1972 - The word “vessel” includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transport on water. Brazil has ratified such Convention by the Decree No. 80.068 of August 2, 1977;

II - Concept of ship for environmental law purposes (item 1.2. above)

- (a) Athens Convention Relating to the Carriage of Passenger and their Luggage By Sea, Athens, 1974 - “Ship” means only sea-going vessel, excluding an air-cushion vehicle. Brazil has not ratified such Convention. Pursuant to Brazilian environmental legislation, the concept of ship also applies to air-cushion vehicles;
- (b) Athens Convention Relating to the Carriage of Passenger and their Luggage By Sea, 1974 and the Protocol of 2002 to the Convention vehicle - “Ship” means only a sea-going vessel, excluding an air-cushion. Brazil has not ratified such Convention. Pursuant to Brazilian environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship also applies to air-cushion vehicles;
- (c) International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 1969 – “Ship” means (i) any sea-going vessel of

any type whatsoever, and (ii) any floating craft with the exception of an installation or device engaged in the exploration and exploitation of the sea-bed and the ocean floor and the subsoil thereof. Brazil has ratified such Convention by the Decree No. 6.478, of June 9, 2008. Pursuant to environmental legislation (Law No. 9966 of April 28, 2000), platforms and support installations to platforms or to port installations are expressly defined thereto and subject to the legal provisions established thereunder;

- (d) International Convention for the Prevention of Pollution from Ships, London, 1973 and Protocol, London, 1978 – “Ship” means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms. Brazil has ratified such Convention and Protocol by the Decree 2.508, of March 4, 1998. Pursuant to environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship encompasses any type of vessel that operates in water (rather than only in marine environment) and the concept of platforms is expressly defined thereunder;
- (e) International Convention on Civil Liability for Oil Pollution Damage, London, 1992 – “Ship” means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard. Brazil has not ratified such Convention. Pursuant to Brazilian environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship shall apply to any type of vessel operating in water;
- (f) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 1992 – “Ship” has the same meaning as in Article I of the 1992 Liability Convention. Brazil has not ratified such Convention;
- (g) International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 2001 – “Ship” means any seagoing vessel and seaborne craft, of any type whatsoever. Brazil has not ratified such Convention;
- (h) International Convention on Liability and Compensation for Damage in Connection With the Carriage of Hazardous and Noxious Substance by Sea, London, 1996 – “Ship” means any seagoing vessel and seaborne craft, of any type whatsoever. Brazil has not ratified such Convention;
- (i) International Convention on Oil Pollution Preparedness, Response and Co-Operation, London, 1990 – “Ship” means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, and floating craft of any type. Brazil has ratified such Convention by

the Decree No. 2.870 of December 10, 1998. Please refer to our comments in item 8.2.II.(d); and

- (j) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 1988 – “ship” means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any floating craft.

Brazil has ratified such convention by the decree n° 6136, of June 26, 2007. Pursuant to environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship applies to any type of vessel which operates in water and fixed type platforms are included under the concept of platform expressly defined thereunder.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

- 9.1. Yes, as discussed in item 2 above, Brazilian Tax Authorities have a particular interpretation as regards the concept of vessel which adversely impacted transactions involving platforms.



RESPONSES OF THE DANISH BRANCH OF CMI

The purpose of this questionnaire is to identify variations and conflicts in the definitions of “vessel,” “ship” and related terms, both internally in the Danish legal system and externally between the laws of the member States, and then to assess the impact of those variations and conflicts.

For this exercise it is assumed that the basic general definition of “vessel” in common understanding might be that contained in Article 11b of the International Convention on Salvage, London 28 April 1989:

Vessel means any ship or craft or any structure capable of navigation.

It is also assumed that the common understanding of the term “ship” is reflected in the International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, and Protocol, London, 17 February 1978:

Art. 2/4: Ship means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air cushion vehicles, submersibles, floating craft and fixed or floating platforms.

From this starting point we have responded as fully and completely as possible to the questions which follow.

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

No – Danish law does not provide a unified definition of either “ship” or “vessel” or any other such terms. However, there are several varying definitions depending on the area of law where the terms are used, cf. the answer to question 2 below.



Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

Yes – Danish legislation contains a number of different definitions of the terms “vessel” and “ship”. The below described definitions are not exhaustive, but provide the most prominent of these definitions.

The Danish Merchant Shipping Act (the “**DMSA**”) is the main body of law governing Danish maritime law. The DMSA contains varying definitions of both “ship” and “vessel”, depending on the specific part of the DMSA. These different definitions derive from both Danish legislation and incorporation of international conventions.

Section 11 of the DMSA provides a definition of ships that require registration in the Danish Ship Register. This definition is based on Danish legislation alone, and it is therefore not derived from any international convention. However, section 11 of the DMSA does not provide a general or extensive definition of the term “ship”. Section 11(2) of the DMSA merely nominates types of vessels, which in no case should be considered as a ship, while section 11(3) contains a list of certain vessels that will be considered ships, if these are equipped with machinery for propulsion:

11(2) Floating docks, cable drums, floating containers and other similar equipment shall not be considered ships when applying the regulations of this part.

11(3) Barges, lighters, dredgers, floating cranes and similar shall be considered ships but shall be exempted from the duty of registration pursuant to section 10(1) if they are not equipped with machinery for propulsion.

It follows from section 11 of DMSA that machinery for propulsion seems to be decisive when assessing whether or not a ship is exempted from the duty of registration in the Danish Ship Register. Nevertheless, as can be seen, section 11 of the DMSA does not provide for a general definition of neither the term “ship” nor “vessel”.

Moreover, Denmark has adopted the 2007 Nairobi International Convention on the Removal of Wrecks. The definition of “ship” contained in the convention was incorporated into section 165 of the DMSA with the exact wording of the convention:

165(2) “Ship” in this chapter means a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.

With respect to Danish legislation on salvage, the definition of a ship follows from the 1989 International Convention on Salvage, cf. section 441 of the DMSA. The incorporation of the 1989 International Convention on Salvage also incorporated the wording of the convention:



441 (1) *In this part:*

[...]

- b) *Vessel shall mean any ship or craft or any structure capable of navigation.*
- c) *Property shall mean any physical asset not permanently or intentionally attached to the shoreline and shall include freight at risk.*

A fourth definition was incorporated into the DMSA when Denmark adopted the 1992 Convention on Civil Liability for Oil Pollution Damage. The ship definition of this convention was incorporated into section 191 of the DMSA, without amendment:

In this part, cf. however section 206(2), ship shall mean any floating unit constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

It is expressly stated in the DMSA that the different definitions of “ship” and “vessel” only apply to the relevant part of the DMSA. However, it is not unlikely that a Danish court would use a definition outside of its respective area of application in the DMSA when determining if an object is a vessel or a ship (U.2013.713H – see section 7).

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Danish law provides several instruments and processes in relation to enforcement of creditor’s monetary claims. These are generally contained in the Danish Administration of Justice Act (the “AJA”). For the sake of clarity, please note that foreclosure and forced sale as legal instruments in Denmark differ from other jurisdictions.

We have outlined below the main principles available under Danish law.

3.1 Arrest (seizure)

With respect to arrest (seizure) of ships, Denmark has ratified the 1952 International Convention on Arrest of Sea-Going Ships (the “1952 Arrest Convention”) which has been incorporated into part 4 of the DMSA without amendments. Danish rules on arrest (seizure) are similar to those contained in the 1952 Arrest Convention.

3.2 Forced administration

Pursuant to Section 520(2) of the AJA, the Danish Bailiff’s Court can make a decision on the forced administration of property, if this is required due to risk of the property losing capital value as a consequence of debtor’s neglect.



Generally, the decision of forced administration is made following the Bailiff's Court's receipt of a request from the creditor in possession of the foundation of enforcement, cf. section 520(1) of the AJA. A foundation of enforcement exists when a creditor has levied execution against the debtor's property. The court will then appoint a manager to administrate the property.

Profits following the manager's administration of the property do not belong to the creditor requesting the forced administration. The requesting creditor can only use potential profit to cover expenses imposed as a consequence of the forced administration. This is contrary to the rules on taking possession in relation to real estate (see below). Real estate, registered ships and aircrafts can be subject to the AJA's rules on forced administration. Conclusively, Danish rules on forced administration of property are the same, whether the assets are real estate or a ship.

3.3 Taking possession of a mortgaged asset

In Denmark the rules on taking possession of a mortgaged asset are limited to real estate, cf. section 588 of the AJA. However, Danish literature suggests that the rules should be extended to cover ships as well, since commercial ships have several similarities to real estate. Thus, both real estate and ships are operational assets and mortgage can include revenue generated by such assets. Nevertheless, Danish law does not currently provide the possibility of taking possession of a mortgaged ship.

3.4 Public auction

The AJA does not contain rules on forced sale, as this is not a legal instrument under Danish law. However, the AJA contains rules on public auction of property, which is a similar legal instrument that requires the courts' intervention. Public auction is a way for a creditor to force the sale of an asset in order for the proceeds of the auction to be used to fulfil outstanding debt.

Public auction of property is governed by the general rules in part 49 and 50 of the AJA. Hence, the DMSA does not contain any specific rules on public auction of vessels or ships. However, article 544(2) of the AJA states that a public auction of a vessel or ship must be announced six weeks in advance – two weeks for other assets. Nevertheless, this is merely a rule on the formal procedure and has no material effect.

3.5 Ranking and priority of claims against vessels

Denmark has ratified the 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (the “**MLM-67**”) by incorporating the convention into the DMSA. The rules on liens and mortgages deriving from the MLM-67 are the only unique rules in Danish legislation regarding ranking and priority of claims against vessels.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

Denmark has signed, but not yet ratified, the MLM-93. However, Denmark has ratified the MLM-67 which is incorporated in the DMSA.



Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

The fact that a registrar accepts a vessel as a ship is not dispositive of a vessel’s status. However, the fact that a registrar accepts a vessel as a ship or similar would be given weight in the court’s evaluation of the vessel definition.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

In general, Danish courts have an open and pragmatic approach towards finding durable solutions to legal disputes. Hence, if a craft is categorized as a “vessel” in another jurisdiction and is so registered and flagged, such circumstances could constitute aid to interpretation of the vessel definition.

Apart from situations where Denmark has an obligation to recognise a specific categorisation of a craft etc. under the various conventions, Danish courts will generally categorize a craft in accordance with Danish law and treat the craft accordingly.

However, in one case (U.2013.713H) the Danish Supreme Court emphasised the fact that a barge was registered as a ship with the Swedish Ship Register and ruled that the vessel therefore also should be considered as a ship according to the DMSA. However, the fact that the barge was registered as a ship with the Swedish Ship Register was not the only fact supporting the ruling. Hence, at best the case can only be used as an unclear *Obiter Dictum*.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) ***non-self propelled barges***
- 2) ***self-propelled barges***
- 3) ***accommodation barges***
- 4) ***mobile offshore drilling units***
- 5) ***wind turbine towers (floating or permanently fixed)***
- 6) ***jack up drill rigs***
- 7) ***construction barges***
- 8) ***submarines***
- 9) ***seaplanes***
- 10) ***hydroplanes (air cushion)***



- 11) *vessels under construction*
- 12) *unmanned vessels*
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities*
- 14) *vessels in “cold layup”*
- 15) *derelict Vessels or “dead ship”*
- 16) *vessels under conversion or renovation*

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

A recent judgment rendered by the Danish Supreme Court considered the issue of a *non-self-propelled barge*. The Danish Supreme Court delivered its judgment on 4 December 2012 in case 37/2011 (“**U.2013.713H**”). The court found that the barge – Carrier 5 – was considered a ship in the sense of section 151 of the DMSA regarding owner’s liability. The court applied the definition in section 11 of the DMSA, even though the provision does not apply to this specific chapter in the DMSA. The court stated that it is not a requirement for a ship to be self-propelled in order to be considered as a ship according to section 11 of the DMSA, and in fact also emphasised that the barge was actually registered as a ship with the Swedish Ship Registry.

There are no other printed Danish cases considering the legal classification of the above listed property.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Since Denmark does not have any definitive definitions other than those derived from conventions, the Danish national system is generally not at variance with the conventions.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

In a case from the Danish Western High Court delivered on 14 September 1999 (“**U.1999.2074V**”), the court had to determine whether four small rubber dinghies could be considered as ships within the meaning of the DMSA and the Act on Safety at Sea. The rubber dinghies in question were bought in a toy store, at a price of DKK 220 apiece and they each held one or two persons. According to the public prosecutor, the definition of a ship included all kinds of floating arrangements, among others rubber dinghies, that are used or can be used as a vehicle on water. The defendant argued that the rubber dinghies could not be considered as ships since they did not have the required size. The court found in its judgement that the Act on Safety at Sea did not contain a definition of a ship. Further, the court stated that a clear legal authority was required to reach a verdict of criminal liability. On that basis - and due to the characteristics and the limited



size of the rubber dinghies – it was not proven beyond reasonable doubt that the rubber dinghies should be considered as ships in the meaning of the Act on Safety at Sea.

In a Supreme Court case delivered on 14 March 1975 (“**U.1975.415H**”), the court considered whether the Danish State could oppose the permanent placing of a houseboat in territorial waters. The houseboat was registered with the Danish Ship Register as a ship, but was permanently placed close to land with four anchors, a bridge to shore, and had no means of navigation available. The Danish State therefore argued that the houseboat could not be considered as a ship anymore. The Danish Maritime Authority had allowed the houseboat to remain registered as a ship with the ship register and pointed out that a transformation of a registered ship into a houseboat or a residential ship does not automatically result in a deletion from the register. Moreover, the Danish Maritime Authority stated that Danish legislation does not contain a basis for the assessment of whether a ship or vessel that has been transformed into stationary use must be deleted from the register. In respect of ship registration, it is a fundamental principle that ships are only deleted from the Danish Ship Register, if i) the ship is sold to a foreign country, ii) the ship is lost, or iii) the ship becomes decommissioned or condemned. The court did not consider whether the houseboat was a ship or not, but ruled that it had to be removed from territorial waters since a permanent placing required a permit from the relevant authority.

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Copenhagen 28 March 2017

Gorrissen Federspiel

For and behalf of the Danish branch of CMI



RESPONSES OF THE MALTA MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

Art 2 of the Merchant Shipping Act (Chapter 234 of the Laws of Malta) (the “MSA”) includes the definition of both Ship and Vessel, with the former being a sub-category of the latter:

1. **Ship** means “every description of vessel used in navigation, whether self-propelled or not, and it includes barges, pontoons, floating establishments, installations or structures, oil rigs and other similar vessels, and for those parts of the Act wherever applicable it shall also include a ship under construction”.

In addition to the above, **Art 37A of the MSA** states that a ship “shall include together with the hull, all equipment, machinery and other appurtenances as accessories belonging to the ship, which are on board or which have been temporarily removed therefrom”.

2. **Vessel** includes “any ship or boat, or any other description of vessel used in navigation”;

Moreover, the MSA defines Cargo Ship and Passenger Ship as per below:

3. **Cargo Ship** as “every ship which is not a passenger ship, a fishing vessel or a pleasure yacht”;
4. **Passenger Ship** as “every ship which carries more than twelve passengers”.

Section 3 of the MSA further refers to the requirements to be fulfilled for purposes of ship registration.

Omissis

*(2) Ships registered under the Authority for Transport in Malta Act **not exceeding twenty-four metres in length** shall be exempted from registry, and such ships, if not registered elsewhere and if owned wholly by persons habitually resident in Malta or by bodies corporate established under*

and subject to the laws of Malta and having their principal place of business in Malta, shall also be deemed to be Maltese ships:

*Provided that ships of a **length of six metres or over** not employed solely in navigation on the coasts of Malta shall not be exempted from registry.*

(3) It shall be lawful to register any ship which is being built or equipped and that when built or equipped will be a ship registrable under this Act.

Omissis

*(7) Notwithstanding any other provision of this Act, ships **under six metres in length** shall not be registrable under this Act.*

*(8) No ship shall be registered otherwise than by or with the express permission of the Registrar-General if the completion of her first construction occurred **more than twenty-five years** before the commencement of the year in which application for registration is first made under this Act, and the Registrar-General may allow the registration, or refuse to allow the registration of, any such ship:*

Provided that the Minister may, in any case, direct the Registrar-General, not to register any ship irrespective of its age in respect of which an application for registration has been made, if in the Minister's opinion it would be detrimental to the national interest of Malta or the interest of Maltese shipping for the ship to be registered.

No Further definition of Vessel and Ship may be found in the MSA.

Question 2:

In your system, does the definition of 'vessel' (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

For purposes of documentation, ship registration, flagging and mortgaging definitions the meaning of vessel and ship is the one defined under the MSA as per question 1.

As to the subsidiary legislation implementing international conventions although these refer to the definition of ships under the MSA they also cross refer to the definition of ships under the respective conventions.

- i. Subsidiary legislations implementing:
 - a) the Load Line Convention¹,

¹ Subsidiary Legislation 234.29

- b) the Marpol Convention²,
- c) the STCW³,
- d) the Maritime Labour Convention⁴,
- e) the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea⁵,
- f) the Nairobi International Convention on the Removal of Wrecks⁶,
- g) the International Convention on Civil Liability For Bunker Oil Pollution Damage signed in the London on 23rd March, 2001⁷, including any amendment or protocol, and
- h) the Convention on the International Regulations For Preventing Collisions at Sea signed in London on the 20th October, 1972

refer to the definition of ship or vessel included in the original convention unless otherwise defined in the MSA.

- ii. **Subsidiary Legislation 234.16 “Limitation of Liability for Maritime Claims Regulations”** defines “ship” by as to any structure, whether completed or in the course of completion, launched or intended for use in navigation as a ship or part of a ship, and shall apply to any barge or like vessel however propelled, and the expression “ship” shall be construed accordingly.
- iii. **Subsidiary Legislation 234.34 Merchant Shipping (Fishing Vessels) (Minimum Safety And Health Requirements) Regulations** defines “Vessel” as any vessel equipped or used commercially for catching fish or other living resources of the sea;
- iv. **Subsidiary Legislation 234.36 Merchant Shipping (Fishing Vessel Safety) Rules** defines a “Maltese Fishing Vessel” as a fishing vessel registered under the MSA;

² Subsidiary Legislation 234.32

³ Subsidiary Legislation 234.17. It is worth to note that this S.L. while referring to the definition of ship under the relevant convention includes also the definition of major ship and minor ship. The distinction is based only on the basis of the gross tonnage and whether this is a motor or a sailing ship.

⁴ Subsidiary Legislation 234.51

⁵ Subsidiary Legislation 234.52

⁶ Subsidiary Legislation 234.53

⁷ Subsidiary Legislation 234.46

- v. **Merchant Shipping (Port State Control) Regulations S.L. 234.38** defines “ship” as any sea going vessel to which one or more of the Conventions apply, flying a flag other than that of Malta.
- vi. **Subsidiary Legislation 234.34 Merchant Shipping (Fishing Vessels) (Minimum Safety And Health Requirements) Regulations** defines a vessel as any new or existing fishing vessel.
- vii. **Subsidiary Legislation 234.40 Merchant Shipping (Marine Equipment) Regulations** defines a “Maltese Ship” as a ship for which safety certificates are issued by or on behalf of the Government of Malta under international conventions except where such certificates are issued by the Government of Malta at the request of the Administration of a third country;

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Yes, ships and other vessels constitute a particular class of movables whereby they form separate and distinct assets within the estate of their owners for the security of actions and claims to which the vessel is subject. In case of bankruptcy of the owner of a ship, all actions and claims, to which the ship may be subject, shall have preference, on the said ship, over all other debts of the estate⁸.

Seizure

Section 77 of the MSA states that where any ship has either wholly or as to any share therein become subject to forfeiture under the MSA, any officer authorised in that behalf by the Minister and any Maltese consular officer may seize and detain the ship and may bring her for adjudication before the Civil Court, First Hall, in Malta, and the court may thereupon adjudge the ship with her tackle, apparel and furniture to be forfeited to the Government of Malta and make such order in the case as to the court seems just.

Any such officer as in this article mentioned shall not be responsible either civilly or criminally to any person whomsoever in respect of any seizure or detention as aforesaid, notwithstanding that the ship has not been brought in for adjudication or, if so brought in, is declared not to be liable to forfeiture, if it is shown that there were reasonable grounds for such seizure or detention.

In addition to the above Maltese Law includes provisions on the issuance of executive warrants of arrest of sea vessel⁹ and detention of vessel when in breach of local regulations.

⁸ Article 37(A)(1) of the MSA.

⁹ Article 388C et seq and Article 855 et seq. of the COCP.

Foreclosure

This is allowed when a mortgagee of a vessel, following the default of the ship owner takes possession of the vessel (**without him being deemed to be considered as owner of the vessel**) and thereafter proceeds with the sale of the vessel or share in respect of which the Mortgage is registered (subject to the concurrence of any prior mortgagee); any surplus in the sale of the vessel shall be distributed to the other creditors and to the Mortgagor.

Forced Sale

The MSA and the Code of Civil Procedure and Organization (“**COCP**”) (Chapter 12 of the Laws of Malta) contain provisions for the Judicial Sale of Vessels and Private Court Sales of Vessel¹⁰ which are designed for this particular asset.

Ranking

Section 50 of the MSA lists those debts secured by a special privilege upon the vessel, as well as any proceeds from any indemnity arising from collisions and other mishaps and any insurance proceeds.

Section 54 of the MSA grants a possessory lien to ship repairers, shipbuilders or other creditors into whose care and authority a ship has been placed for the execution of works or other purposes.

A possessory lien shall not be extinguished if the vessel is released pursuant to a court order or following a judicial sale of the vessel. In the latter case the creditor shall enjoy the priority specified in article 54A over the proceeds of sale of the ship.

Priority of Claims

Rules on ranking are specified under **Section 51** and **54A of the MSA**.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

No, this was not given legal force in Malta¹¹. Having said so, Maltese Law provisions on mortgages and maritime liens are modelled closely to the UK Merchant Shipping Act.

¹⁰ Article 358 et seq of the COCP.

¹¹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Yes it is. In fact Article 3 (1) of the MSA states that “No ship, other than a ship exempted from registry, or a ship referred to in subarticle (7), shall enjoy the rights and privileges of a Maltese ship or be recognised as a Maltese ship unless such ship is registered under the MSA”.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

No they would not.

Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

They would. However, Maltese Courts are still bound to recognise judgments given in other Member States and falling under the scope of the EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Similarly, Maltese provisions cater for the recognition and enforcement of British Judgments¹² which is extended to judgments given in Gibraltar¹³, New South Wales¹⁴, Bermuda¹⁵, Western Australia¹⁶, Victoria¹⁷, and Tasmania and its dependencies¹⁸.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) ***non-self propelled barges*** – In *Diane Holdings Limited (C34633) and Cassar Fuels Limited (C28453) vs Il-Kontrollur tad-Dwana (Citazzjoni Numru. 117/2008)* the judge defines a barge as a vessel.

¹² British Judgments (Reciprocal Enforcement) Act (Chapter 52 of the Laws of Malta).

¹³ S.L. 52.01

¹⁴ S.L. 52.02

¹⁵ S.L. 52.03

¹⁶ S.L. 52.04

¹⁷ S.L. 52.05

¹⁸ S.L. 52.07

- 2) self-propelled barges – No.
- 3) *accommodation barges* – No.
- 4) *mobile offshore drilling units* – No.
- 5) *wind turbine towers (floating or permanently fixed)* – No.
- 6) *jack up drill rigs* – No.
- 7) *construction barges* – No.
- 8) *submarines* – No.
- 9) *seaplanes* – No.
- 10) *hydroplanes (air cushion)* – No.
- 11) *vessels under construction* – No.
- 12) *unmanned vessels* – No.
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities* – No.
- 14) *vessels in “cold layup”* – No.
- 15) *derelict Vessels or “dead ship”* – No.
- 16) *vessels under conversion or renovation* – No.

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

No.



RESPONSES OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

Admiralty and maritime law in the United States are matters of federal law and the definition of vessel is derived from federal statutes which have been interpreted by federal courts. The Rules of Construction Act (the “RCA”) provides the default definition of “vessel” used throughout the U.S. Code,¹ which definition applies “unless the context indicates otherwise.”² Under Section 3 of the RCA (“Section 3”), the definition of “vessel” includes “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”³

Courts have applied the Section 3 definition in different contexts, including liability cases arising under suits brought against “vessel” owners pursuant to the Longshore and Harbor Workers’ Compensation Act (the “LHWCA”),⁴ in determining whether a person is a “seaman” for purposes of the Jones Act⁵ and when assessing federal admiralty jurisdiction generally.⁶ There is little legal doubt as to the nature of traditional categories of vessel (such as bulkers, oil tankers, etc.), but a substantial amount of litigation has occurred as to whether marginal structures are vessels, and to the extent that courts may occasionally reach divergent conclusions, a degree of uncertainty may exist in the jurisprudence.

Before the decision of the United States Supreme Court in *Stewart v. Dutra*,⁷ the general consensus of federal courts was that structures other than traditional vessels must be either instrumentalities of commerce, used for transportation purposes on navigable waters, or actually involved in transit at the time of the relevant incident in order to be considered “vessels” for purposes of federal law.⁸

¹ See *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 490 (2005).

² See 1 U.S.C.A. § 1 (2012). It should be noted that the term “vessel” is also defined with variations in specific provisions of federal statutes, e.g., 19 U.S.C.A. § 1401(a), 49 U.S.C.A. § 13102 (25).

³ See 1 U.S.C.A. § 3 (2012).

⁴ See 33 U.S.C.A. §§ 901-950 (2012); *Stewart*, 543 U.S. at 490.

⁵ See 46 U.S.C.A. § 30104 (2012); *Holmes v. Atl. Sounding Co.*, 429 F.3d 174, 182 (5th Cir. 2005).

⁶ See *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 740 (2013).

⁷ See *Stewart*, 543 U.S. at 481.

⁸ See, e.g., *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 33-34 (2d Cir. 1996); *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1123 (1st Cir 1992).



For Jones Act purposes, it was necessary to show that a worker was assigned to a “vessel in navigation” in order to invoke the protections for seamen available under this statute.⁹

Stewart involved a worker injured on a temporarily stationary dredge primarily designed and used for the digging of an underwater trench, which incidentally transported workers and equipment to the worksite in the course of its operation. In this case, the Court determined that a watercraft qualifies as a Section 3 vessel so long as its use as a means of transportation on water “is a **practical possibility** [rather than] a merely theoretical one[.]”¹⁰ Therefore, under *Stewart*, it is not necessary that a watercraft’s primary purpose be transport over water, or that it actually “be in motion” to be considered a Section 3 vessel.¹¹ The inquiry instead depends on the particular facts of each case relating to the practical possibility of the use of the structure for water transportation.¹²

In elaborating this test, the *Stewart* Court acknowledged long-held judicial precedent that required a watercraft be “in navigation” in order to qualify as a vessel for purposes of the Jones Act, but clarified that the navigation requirement is relevant for the purpose of evaluating “whether the craft is ‘used, or capable of being used’ for maritime transportation . . .” in accordance with Section 3.¹³ Based on this approach, watercraft “taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport” may be considered “out of navigation” and thus not Section 3 vessels.¹⁴ Applying this approach, the *Stewart* Court concluded that the dredge was a Section 3 vessel because, though not designed primarily for transport, it was actually engaged in maritime transportation and, though stationary at the time of the injury, remained “in navigation” because it was only temporarily halted for repair.

Following *Stewart*, courts sometimes struggled to apply its analysis with respect to structures that are indefinitely or permanently moored to land. Additionally, certain structures were susceptible to findings that they are vessels when they might not have been prior to *Stewart*.¹⁵ During this time, the Fifth Circuit found that an accommodation barge was a vessel in *Holmes v. Atlantic Sounding Inc.*, a 2006 case in which the court withdrew its decision and reconsidered the relevant facts in light of *Stewart*.¹⁶ The court’s analysis turned on the basis that the relevant structure had

⁹ See, e.g., *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991) (“We believe the better rule is to define ‘master or member of a crew’ under the LHWCA, and therefore ‘seaman’ under the Jones Act, solely in terms of the employee’s connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of ‘seaman’ and Congress’ land-based/sea-based distinction.”) (emphasis added).

¹⁰ See *Stewart*, 543 U.S. at 496.

¹¹ See *id.* at 495-96 (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995)).

¹² See *id.* at 496 (citing *Chandris*, 515 U.S. at 373).

¹³ See *id.* at 489 (citing 14 Stat. 178 (1866)).

¹⁴ See *id.* at 496.

¹⁵ After *Stewart*, the U.S. Coast Guard released guidance to indicate its approach for determining whether for a marginal structure is a vessel for documentation purposes. The test included various factors including an assessment of the structure’s “purpose, function and mission” and whether the craft “(i) is surrounded by a cofferdam or other structure . . . such that . . . it is in a moat with no practical access to navigable water, (ii) is affixed to shore, (iii) would be endangered by its construction if operated in navigation, and (iv) and can get underway in less than 8 hours.”U.S. Coast Guard Commandant Instr. 16000.7B, Marine Safety Manual, Vol. II: Materiel Inspection B5.I.4 (2014).

¹⁶ 437 F.3d 441.



the practical capability of being used for navigation on water. Similarly, in *Bunch v. Canton Marine Towing Co., Inc.*, a cleaning barge moored to a river bottom was found to be a vessel following the analysis set forth in *Stewart*.¹⁷ By contrast, a number of other cases have led to outcomes where floating casinos and spars were determined not to be vessels when moored in such a manner such that they are effectively removed from navigation on an indefinite basis.¹⁸

The Supreme Court returned to the subject of vessel status in *Lozman v. City of Riviera Beach*, a 2013 case involving a maritime lien on a floating home designed and used exclusively as a residence, but which had occasionally been moved over water in the past. In *Lozman*, the Court added a reasonable observer standard to the application of *Stewart*'s "practical possibility" test, stating that "a structure does not fall within the scope of [Section 3] unless a reasonable observer, looking to the [structure]'s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."¹⁹ Applying this test to the floating home, the *Lozman* Court found that it was not a Section 3 vessel.²⁰ Factors of design (e.g., the lack of any means of self-propulsion or steering mechanism) and the infrequency of its actual travel over water (just four times over a period of seven years) figured prominently in the *Lozman* Court's conclusion.²¹ But the *Lozman* Court did not fully address case law following *Stewart* involving structures that were indefinitely or permanently moored to land.

Therefore, based on Section 3 and applicable judicial precedent, under U.S. law a "vessel" must be used or capable of use for transportation on water, be in navigation (or not permanently out of navigation) such that transportation is a practical possibility, but subject to whether a reasonable observer, looking to the structure's physical characteristics and actual use, would consider the structure designed to a practical degree to carry people or goods over water.

Some commentators, and the dissent in *Lozman* itself, worry that the Court has unnecessarily complicated the question of vessel status in *Lozman*, creating uncertainty in the maritime industry.²² Of particular concern is the *Lozman* majority's introduction of "a subjective

¹⁷ 419 F.3d 868 (8th Cir. 2005). See also *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144-45 (2d Cir. 2005) (finding that a bucket dredge "indistinguishable from the dredge at issue in *Stewart*" was a vessel for purposes of the Jones Act); *Pettis v. Bosarge Diving, Inc.*, 751 F.Supp.2d 1222, 1227-28 (S.D. Ala. 2010) (finding that a launch used to transport and support divers, which had not been out of service or permanently affixed so as to lose its character as a watercraft, was a vessel for purposes of the Jones Act).

¹⁸ See, e.g., *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187-88 (5th Cir. 2006) (finding that a floating casino "physically capable of sailing" but indefinitely moored, receiving services such as water and telephone lines from land-bound sources, and intended by the owners to remain used exclusively for gaming rather than any maritime purpose, was not a vessel for purposes of admiralty tort claim); *Ford v. Argosy Casino Lawrenceburg*, No. 4:07-CV-0017, 2008 WL 817113, at *1 (S.D. Ind. Mar. 24, 2008) (same); *Richardson v. Kerr-McGee Oil & Gas Corp.*, No. 08-1074, 2011 WL 2565315, at *3 (E.D. La. June 28, 2011) (finding that a spar connected to the ocean floor and moved only rarely and with difficulty was not a vessel for purposes of the Jones Act).

¹⁹ See *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 741 (2013).

²⁰ See *id.*, at 739.

²¹ See *id.* at 737.

²² Robert Force & Martin J. Norris. *The Law of Maritime Personal Injuries*, § 4:13 (2016).



component into the vessel-status inquiry” *vis-à-vis* the watercraft owner’s intent as to the watercraft’s purpose which may contribute to a sense of uncertainty in the maritime industry.²³

Moreover, by omitting to clarify the *Stewart* holding as it affects structures indefinitely or permanently moored to land, the *Lozman* Court left in place post-*Stewart* precedent that could lead to troubling outcomes. In the extreme, cases holding that such structures are not vessels could be used to challenge the validity of preferred vessel mortgages since, pursuant to the Commercial Instruments and Maritime Lien Act of 1988, a structure must be a vessel within the meaning of Section 3 in order for a preferred mortgage to attach.

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

The definition of the term “vessel” as set forth at 1 U.S.C. § 3 provides the default definition used throughout the U.S. Code (and related federal regulations) “unless the context indicates otherwise[.]”²⁴ For example, the regulations relating to registration under the U.S. flag provide that a vessel “includes every description of watercraft or other contrivance capable of being used as a means of a transportation on water, but does not include aircraft.”²⁵ The definition is generally consistent regardless of the statutory or regulatory context (such as vessel registration, taxation, etc.), and courts would generally apply the same test to whether a structure is a “vessel.”

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

Yes, in the U.S., security interests in most types of personal property are governed by the Uniform Commercial Code (“U.C.C.”) as in effect in each state. However, federal law preempts the U.C.C. with respect to vessels. Under U.S. federal law, the procedures for arrest of vessels are governed by the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, in the Federal Rules of Civil Procedure for the United States District Courts (the “Supplemental Rules”). Rule C of the Supplemental Rules governs arrest of vessels.

The Supplemental Rules provide that the order of priority of maritime liens is as follows:²⁶

²³ See *Lozman* at 751 (Sotomayor, J., dissenting).

²⁴ See *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488 (2005) (citing 1 U.S.C.A. § 1 (2012)).

²⁵ See 46 C.F.R. § 67.3 (2012).

²⁶ See 46 U.S.C.A. § 31301 (2012); *Kopac Int’l. Inc. v. M/V BOLD VENTURE*, 638 F.Supp. 87, 89-90 (W.D. Wash. 1986); *U.S. v. M/V ANDORIA*, 570 F.Supp. 413, 415 (E.D. La. 1983).



1. Expenses of justice during *custodia legis*;
2. Seamen's wage claims (wages, maintenance and cure), for crew, officers and masters;
3. Salvage and general average claims;
4. Tort claims, including personal injuries and death;
5. Liens for necessities supplied to the vessel prior to the recording of a mortgage;
6. Preferred ship mortgage liens;
7. Liens for necessities supplied to the vessel.

A preferred mortgage lien on a foreign flag (non-U.S.) vessel ranks in priority after a lien for necessities provided in the United States.²⁷

Within a class of lien (other than a mortgage lien), the more recent lien has priority over an older lien.²⁸ Earlier recorded mortgages have priority over later recorded mortgages. Other than the categories set forth above, a mortgage will prime other liens, even tax liens.²⁹

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages ("MLM-93") been adopted or followed in your jurisdiction?

No, the MLM-93 has not been ratified in the United States.

²⁷ See 46 U.S.C.A. § 31326(b)(2) (2012).

²⁸ See *The St. Jago de Cuba*, 22 U.S. 409, 416 (1824).

²⁹ *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 870 (11th Cir. 2010) ("Maritime liens have priority over non-maritime liens and priority over other maritime liens in reverse chronological order: that is, the most recent lien possesses the superior claim."); *Helm v. Vahle*, No. 3:16-CV-630, 2017 WL 1352225, at *4 (N.D. Fla. Apr. 7, 2017) (citing *U.S. v. One (1) 254 Ft. Freighter, the M/V Andoria*, 570 F.Supp. 413, 415 (E.D. La. 1983) for the order of priority of maritime lien claims, with mortgage liens taking priority over tax liens); *Cargill Inc., Skibsassuranceforening v. M/T Pacific Dawn*, 876 F.Supp. 508, 510 n.2 (S.D.N.Y. 1995) (same). See also *U.S. v. Jane B. Corp.*, 167 F.Supp. 352, 356 (D. Mass. 1958) ("A tax lien is given no priority by 26 U.S.C.A. § 3670. It is clearly a nonmaritime lien. Hence it is not entitled to priority over a subsequently recorded preferred ship mortgage.") (citations omitted); *Gulf Coast Marine Ways v. J.R. Hardee*, 107 F.Supp. 379, 385 (S.D. Tex. 1952) ("Since the Government's tax lien is non-maritime, I do not believe that it has priority, even though notice is filed pursuant to a state statute, over maritime liens in general, certainly not over the preferred maritime liens created under the Ship Mortgage Act.").



Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

No, factors such as whether a vessel is registered with the United States Coast Guard are not dispositive, but likely would be relevant to the type of factual analysis required under *Stewart*.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

Pursuant to the Commercial Instruments and Maritime Lien Act of 1988, U.S. courts will generally treat mortgages on foreign flag watercraft as preferred mortgages where U.S. admiralty jurisdiction exists.³⁰ In assessing whether admiralty jurisdiction exists, U.S. courts will analyze whether the watercraft qualifies as a vessel under U.S. law. If the watercraft does not qualify as a vessel under U.S. law, admiralty jurisdiction will not exist, and U.S. courts will not enforce a foreign law mortgage over foreign flag watercraft as a preferred mortgage.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

1) ***non-self propelled barges –***

- In the *Lozman* case, the Supreme Court observed that propulsion is an important factor in an analysis as to whether a structure is a vessel, but it is not dispositive.³¹
- Prior to *Stewart*, a barge is a vessel within the meaning of the LHWCA even when it has no motive power of its own, since it is a means of transportation on water.³²
- Following *Stewart*, a cleaning barge, originally built for navigation, but later moored to the riverbed by spud poles, which did not have propellers, did not

³⁰ See 46 U.S.C. § 31325 (2012).

³¹ *Lozman*, 133 S. Ct. at 741 (citing *The Robert F. Parsons*, 191 U.S. 17, 31 (1903)).

³² *Stewart*, 543 U.S. at 492 (citing *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944)).



move by itself, and had been moved from its mooring to travel across the river during the relevant time period, was deemed to be a vessel.³³

2) self-propelled barges –

A barge is a vessel within the meaning of the LHWCA since it is a means of transportation on water.³⁴

3) *accommodation barges* –

- Following *Lozman*, a barge used as a “floating hotel” to accommodate workers, with no rudder or capacity for self-propulsion, which had remained stationary for years and had an interior similar to living quarters, was not a vessel for purposes of 1 U.S.C. § 3.³⁵
- Following *Lozman*, a floating clubhouse, listed as a passenger barge with the Coast Guard, moored to the sea floor, and incapable of moving on its own power, was not a vessel for purposes of the Jones Act.³⁶
- Following *Stewart*, a “floating dormitory” was found to be a vessel even though it was not intended to transport passengers or cargo, since it was practically capable of being used for navigation on water.³⁷

4) *mobile offshore drilling units* –

- An offshore oil platform was not a vessel because it had no means of self-propulsion, had no steering mechanism or rudder, and had an unrailed bow; it could only be moved by being towed through the water; and when towed to its permanent location, it would not carry cargo, nor would be used to transport equipment and workers over water in the course of its regular use.³⁸
- After *Lozman*, a mobile offshore drilling unit, as well as other structures, including the Deepwater Horizon, have been held to be vessels under maritime law.³⁹
- A floating oil and gas production facility, which was moored miles offshore on the outer continental shelf, had not been moved since it was constructed and

³³ See *Bunch v. Canton Marine Towing Co.*, 419 F.3d 868, 873 (8th Cir. 2005).

³⁴ See *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944).

³⁵ *Martin v. Fab-Con, Inc.*, 9 F.Supp.3d 642, 649-50 (E.D. La. 2014).

³⁶ *Armstrong v. Manhattan Yacht Club, Inc.*, No. 12-CV-4242, 2013 WL 1819993, at *7 (E.D.N.Y. Apr. 30, 2013).

³⁷ *Holmes v. Atl. Sounding Co.*, 437 F.3d 441, 448 (5th Cir. 2006).

³⁸ See *Baker v. Dir., OWCP*, 834 F.3d 542, 546-47 (5th Cir. 2016).

³⁹ See *U.S. v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 490 (5th Cir. 2014).



installed at its current location, had no means of self-propulsion, and would require 12 months to prepare to move was not practically capable of transportation on water and was therefore, as a matter of law, not a vessel.⁴⁰

- A drilling barge which was equipped for use in navigable waters, had traveled a considerable distance through such waters to its present site and was, at the time of an accident, located in a navigable canal, was determined to be a vessel.⁴¹
- Prior to *Stewart*, a submersible drilling barge “stabilized in navigable water” was a vessel under the Jones Act.⁴²

5) ***wind turbine towers (floating or permanently fixed)*** –

We are not aware of applicable judicial precedent.

6) ***jack up drill rigs*** –

- A jack-up rig “may be a ‘vessel’ for purposes of maritime law.”⁴³
- Prior to *Stewart*, special purpose structures whose primary function is not transportation, such as a drilling barge with retractable legs that raise the barge out of the water, are vessels under the Jones Act.⁴⁴
- Fifth Circuit precedent makes clear that permanently fixed drilling platforms are not Jones Act vessels, but that jack-up rigs and liftboats are vessels even when temporarily attached to the ocean floor.⁴⁵

7) ***construction barges*** –

A flexifloat barge/platform used in part as a work platform and in part as a means of transporting men and machinery across the water to a job site may be a vessel (i.e., a motion to dismiss based on an argument that it was not a vessel was denied).⁴⁶

8) ***submarines*** –

⁴⁰ See *Warrior Energy Servs. Corp. v. ATP Titan M/V*, 551 F. App’x 749, 751-52 (5th Cir. 2014).

⁴¹ See *Producers Drilling Co. v. Gray*, 361 F.2d 432, 437 (5th Cir. 1966).

⁴² See *Marine Drilling Co. v. Autin*, 363 F.2d 579, 579-80 (5th Cir. 1966).

⁴³ *Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 537 (5th Cir. 1987).

⁴⁴ See *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

⁴⁵ *Bishop v. Chet Morrison Contractors, LLC*, No. 3:12-CV-165, 2012 WL 3648412, at *2 (S.D. Tex. Aug. 23, 2012).

⁴⁶ See *Koernschild v. W.H. Streit, Inc.*, 834 F.Supp. 711, 718 (D.N.J. 1993).



A nuclear submarine undergoing sea trials was a vessel for purposes of admiralty jurisdiction under the Suits in Admiralty Act and Public Vessel Act.⁴⁷

9) *seaplanes* –

- A seaplane is not a “vessel”, and therefore, its pilot is not a “seaman” such that survivors would be entitled to bring claims under Jones Act.⁴⁸
- Seaplanes (including helicopters) are included within the meaning of the term “vessel” in the codification of the International Regulations for Preventing Collisions at Sea, 33 U.S.C. § 1601 *et seq.* (2012).⁴⁹

10) *hydroplanes (air cushion)* –

We are not aware of applicable judicial precedent.

11) *vessels under construction* –

- A semi-submersible drilling rig under construction and on which a worker was injured, but which had not yet been put into navigation as an instrument of commerce, was not a vessel under the Jones Act.⁵⁰
- Floating hulls that are 70 to 90 percent complete are “vessels” for purposes of the LHWCA⁵¹ where floating hulls are capable of being used as means of transportation on water.⁵²
- Unfinished pleasure craft which are incapable of launch and insured as stock for sale are not “vessels.”⁵³
- A newbuilding financed under the U.S. Title XI⁵⁴ program can be mortgaged as a vessel prior to its documentation with the US Coast Guard regardless of

⁴⁷ *Crawford v. Elec. Boat Corp.*, 515 F.Supp.2d 282, 289 (D. Conn. 2007).

⁴⁸ *See Smith v. Pan Air Corp.*, 684 F.2d 1102, 1113-1114 (5th Cir. 1982).

⁴⁹ *See Barger v. Petroleum Helicopters*, 692 F.2d 337, 344 (5th Cir. 1982).

⁵⁰ *See Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 303 (5th Cir. 2008).

⁵¹ *See Caruso v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2d 14, 15-16 (11th Cir. 1987); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971).

⁵² *See Hall v. Hvide Hull No. 3*, 746 F.2d 294, 297-98 (5th Cir. 1984).

⁵³ *See Trident Marine Managers, Inc. v. M/V Serial #CEBRF0661586*, 688 F.Supp. 301, 302 (S.D. Tex. 1987).

⁵⁴ The Title XI program, named for Title XI of the Merchant Marine Act of 1936, 46 U.S.C. Appx. §1271 *et seq.* (2012), is a program to finance the United States domestic construction of vessels, featuring guaranties from the United States and as secured by preferred vessel mortgages.



whether it is capable of being used as a means of transportation on water; this holding, however, does not address non-Title XI vessels.⁵⁵

12) *unmanned vessels* –

We are not aware of applicable judicial precedent.

13) *vessels devoted temporarily or permanently to storage of bulk commodities* –

- Prior to *Stewart*, a damaged refrigerated cargo carrier which had been converted into a stationary shrimp processing, freezing, and storage plant and was connected to land with telephone and electric lines, was held to be a vessel subject to maritime lien, since it was capable of being used as a means of transportation under tow although it was without motive power and steering mechanism.⁵⁶
- In an older arbitral decision, a naval sloop without fittings and used for storage of gunpowder while permanently anchored is not a vessel.⁵⁷

14) *vessels in “cold layup”* –

In the context of seamen’s tort claims, a number of cases have determined that laid-up vessels are not vessels for purposes of the Jones Act. By contrast, certain permanently moored craft have been held to be vessels in the context of mortgage disputes.

- Decedent’s work on various vessels year-round qualified him as a “seaman” under the Jones Act, despite the fact that the ship upon which decedent was working when he died was laid up for the winter and thus out of navigation.⁵⁸
- Vessel converted to use for storage and electricity generation and contractually barred from being used for transportation remained subject to a preferred vessel mortgage (though executed when the vessel was in navigation), but the workers aboard the vessel were not “seamen” and thus did not have maritime wage liens that would be superior to the preferred ship mortgage.⁵⁹

⁵⁵ See *United States v. Trident Crusader*, 366 F.3d 391 (5th Cir. 2004).

⁵⁶ See *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621, 623 (5th Cir. 1955).

⁵⁷ See *Coelleda* (ArbtrNY), 1932 A.M.C. 1044.

⁵⁸ See *Estate of Rainsford v. Wash. Island Ferry Line, Inc.*, 702 F.Supp. 718, 724 (E.D. Wis. 1988). See also *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190-91 (1952).

⁵⁹ See *New England Fish Co. v. Barge or Vessel Sonya*, 332 F.Supp. 463 (D. Alaska 1971).



Responses of the Maritime Association of the United States

- A vessel which had been laid up for six months was not in navigation such as to be a vessel for purposes of the Jones Act.⁶⁰
- A vessel which had been laid up for winter on the Great Lakes was a “vessel” for purposes of limitation of liability statutes.⁶¹
- A vessel which had entered winter lay-up, being moored semi-permanently to the dock for the winter season, requiring further Coast Guard inspection before being permitted to sail again, with its engine having been disassembled and its crew mostly dismissed for the season, was “out of navigation,” which “render[ed] those employed upon her ineligible as non-seamen to proceed under the Jones Act.”⁶²
- Given that the Court of Appeals for the Ninth Circuit had previously held that a disputable issue of fact existed as to whether a ship which had been permanently moored for five years remained “in navigation” within the meaning of the Jones Act,⁶³ a federal district court within the Ninth Circuit erred by holding that vessels were out of navigation as a matter of law due to having been laid up for the winter.⁶⁴

15) *derelict Vessels or “dead ship”* –

Worker was not a seaman for purposes of the Jones Act where structure in question was not being used and not capable of being used as a means of transportation.⁶⁵

16) *vessels under conversion or renovation* –

A yacht during a repair period, even though repairs were so extensive as to temporarily disable her, was a vessel.⁶⁶

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

⁶⁰ See *Lupo v. Consolidated Mariners, Inc.*, 261 F.Supp. 450, 457 (S.D.N.Y. 1966).

⁶¹ See *In re Great Lakes Transit Corp.*, 53 F.2d 1022, 1022 (N.D. Ohio 1931).

⁶² See *Boyd v. Ford Motor Co.*, 948 F.2d 283, 289 (6th Cir. 1991).

⁶³ *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1137 (9th Cir. 2002).

⁶⁴ See *James v. Wards Cove Packing Co., Inc.*, 2007 A.M.C. 897, 899-900 [LTD] (9th Cir. 2006).

⁶⁵ See *Gonzales v. United States Shipping Board Emergency Fleet Corp.*, 3 F.2d 168 (E.D.N.Y. 1924).

⁶⁶ See *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 875-76 (11th Cir. 2010).



Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

The United States follows the International Regulations for Preventing Collisions at Sea and has adopted the following definition of the term “vessel” for these purposes: “vessel” means every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.⁶⁷

The United States is not otherwise party to the international conventions identified in this question.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

Although the interpretation of the statutory definition of the term “vessel” is generally applied on a consistent basis throughout the United States federal courts, the analysis is heavily fact dependent. Therefore, while courts apply the same definitions and jurisprudential framework as in effect at a given time, there may be cases where it appears similar types of watercraft are treated differently by different courts.

⁶⁷ See 33 U.S.C.A. § 1601 (2012).



RESPONSES OF THE CANADIAN MARITIME LAW ASSOCIATION

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

Yes, definitions of “ship” or “vessel” meet the basic criteria that it is a tangible moveable capable of moving over water from one place to another.

There is no one definition of “Ship” or “Vessel” under Canadian legislation, although there are many similarities: *Canada Shipping Act 2001*, SC 2001 c. 26; *Federal Courts Act*, RSC 1985, c. F-7; *Marine Liability Act*, SC 2001 c. 6 which serve different purposes. Definitions appear to be designed to meet the purpose of the particular statute and the subject matter that the statute is addressing.

Canada Shipping Act, 2001 (S.C. 2001, c. 26) – defines “vessel”

2. “vessel means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class. (bâtiment)”

This is a general definition which is referred to by a number of other laws and regulations, including:

- *Coasting Trade Act* (S.C. 1992, c. 31)

“2. Ship has the same meaning as vessel in section 2 of the *Canada Shipping Act, 2001*; (navire)”

- *Transportation of Dangerous Goods Act, 1992* (S.C. 1992, c. 34)

“vessel has the same meaning as in section 2 of the *Canada Shipping Act, 2001*. (bâtiment)”

“ship [Repealed, 2009, c. 9, s. 1]”



- *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.))

13(21) “vessel means a vessel as defined in the Canada Shipping Act. (navire)”

Federal Court Act (R.S.C., 1985, c. F-7) – defines “ship”

“2 ... “ship” means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion, and includes (a) a ship in the process of construction from the time that it is capable of floating, and (b) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up.”

This definition is used primarily to define and circumscribe the jurisdiction of the Federal Court of Canada and, incidentally, the application of Canadian Maritime Law.

Canada Marine Act (S.C. 1998, c. 10) – defines “ship”

“2 ... “ship” means every description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, whether self-propelled or not and without regard to the method of propulsion, and includes a sea-plane and a raft or boom of logs or lumber. (navire)”

This definition is used in the context of legislation governing public port authorities and the St. Lawrence Seaway and the use of public facilities.

Marine Insurance Act. S.C.1993, c.22, as amended – defines “ship”

2(1) ... ship includes the hull, machinery, materials and outfit and the stores and provisions for the officers and crew and also includes fuel, oils and engine stores, if they are owned by the insured, and, in the case of a ship engaged in a special trade, the ordinary fittings required for the trade.

This definition is used in the context of legislation governing marine insurance on whatever be considered a “ship” or a venture involving the use of a “ship”.

Pilotage Act (R.S.C., 1985, c. P-14) – defines “ship”

“ship includes any description of vessel or boat used or designed for use in navigation, without regard to method or lack of propulsion. (navire)”

This statute creates a system of compulsory pilotage in various areas in Canada and the definition’s purpose is to circumscribe the navigational objects that are subject to compulsory pilotage.

Oceans Act (S.C. 1996, c. 31) – defines “ship” and “marine installation”



2. “ship includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion. (*navire*)”

“marine installation or structure includes (a) any ship and any anchor, anchor cable or rig pad used in connection therewith, [...]”

The purpose of this statute is to extend the application of federal law to territory beyond the coastal regions of Canada and ships and other marine installations (which may not be “ships” found therein).

Marine Liability Act, S.C.2001, c.6

75 “ship” means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to its method of propulsion or lack of propulsion, and includes

- (a) a ship in the process of construction from the time that it is capable of floating; and
- (b) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up. (*navire*)

This definition is found in a section governing other liabilities arising outside of the international convention regime for oil pollution and circumscribing what object may be exposed to liability for oil pollution.

91 “ship” means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to its method of propulsion or lack of propulsion, and includes

- (a) a ship in the process of construction from the time that it is capable of floating; and
- (b) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up. (*navire*)

This definition is found in a section governing the Ship-Source Oil Pollution Fund and circumscribes from which oil pollution may occur and which can be the subject of a claim against or by the Ship-Source Oil Pollution Fund.

Under the Act, certain international conventions have the force of law and contain their own definitions of “ship” or “vessel”.

Schedule 2 – *The Athens Convention relating to the Carriage of Passengers*

3 ship means only a seagoing vessel, excluding an air-cushion vehicle;

Schedule 3 – the *Hague-Visby Rules*

(d) **ship** means any vessel used for the carriage of goods by water;



Schedule 5 – *International Convention on Civil Liability for Oil Pollution Damage*

Ship means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

Schedule 8 – *International Convention on Civil Liability for Bunker Oil Pollution Damage*

Ship means any seagoing vessel and seaborne craft, of any type whatsoever.

Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3 **ship** includes

- (a) every description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion, and
- (b) a dynamically supported craft; (*navire*)

Tankers and Cargo Vessels Remission Order, 2010, SOR/2010-202 (under the Customs Tariff, (S.C. 1997, c. 36)) – defines “cargo vessel”

“cargo vessel means a freighter, container vessel, self-unloader, car carrier or bulk carrier classified under tariff item No. 8901.90.91 or 8901.90.99 in the List of Tariff Provisions set out in the schedule to the Customs Tariff, but does not include a barge or its pusher vessel. (navire de charge)”

Ship Construction Subsidy Regulations (C.R.C., c. 347) (under the Appropriation Act No3, 1970) – defines “fishing vessel” and “vessel”

“fishing vessel means a ship equipped for and to be used in the catching or trapping of fish for sale; (bateau de pêche)” [...]

“vessel means

- (a) *a vessel that is*
 - (i) *customarily engaged in the transportation of goods or passengers,*
 - (ii) *used in the construction, servicing or maintenance of other vessels or marine works, or*
 - (iii) *used in the exploration or exploitation of offshore mineral resources, and that is at least of*
 - (iv) *100 tons gross tonnage if self-propelled,*



- (v) 200 tons gross tonnage if not self-propelled,
 - (vi) 50 tons gross tonnage if a tug, or
 - (vii) two tons gross tonnage if a submersible capable of operating at depths of at least 1,000 feet, or
- (b) a fishing vessel over 75 feet in overall length in respect of which a certificate of preliminary eligibility has been obtained from the Minister of Fisheries and Oceans. (navire)”

Canadian Environmental Protection Act, 1999 – S.C. 1999, c. 33

122(1) The definitions in this subsection apply in this Division and in Part 10.

ship includes a vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, without regard to its method or lack of propulsion, and includes an air cushion vehicle.

149 The definitions in this section apply in this Division and in Part 10 as it relates to the enforcement of this Division.

engine means any prescribed internal combustion engine, but does not include

- [...]
- (c) a marine compression-ignition engine that is rated at 37 kW or more and is designed to propel a vessel. (*moteur* ;)

vehicle means any prescribed self-propelled vehicle, but does not include

- [...]
- (c) a vessel that is fitted, for the purpose of propulsion, with a marine compression-ignition engine that is rated at 37 kW or more. (*véhicule* ;)

vessel means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water.

These definitions are found under divisions proscribing certain activities related to disposal at sea and to enforcement.

Antarctic Environmental Protection Act, SC 2003, c 20

vessel means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to the method or lack of propulsion, but does not include a fixed platform. (bâtiment)



Criminal Code – R.S.C., 1985, c. C-46

Seizing control of ship or fixed platform / endangering safety of ship or fixed platform / false communication / threats causing death or injury/ definitions/ “fixed platform” / “ship”

S 78.1(1) Every one who seizes or exercises control over a ship or fixed platform by force or threat of force or by any other form of intimidation is guilty of an indictable offence and liable to imprisonment for life.

- (2) Every one who
- (a) commits an act of violence against a person on board a ship or fixed platform,
 - (b) destroys or causes damage to a ship or its cargo or to a fixed platform,
 - (d) places or causes to be placed on board a ship or fixed platform anything that is likely to cause damage to the ship or its cargo or to the fixed platform,

where that act is likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty of an indictable offence and liable to imprisonment for life.

False communication

(3) Every one who communicates information that endangers the safe navigation of a ship, knowing the information to be false, is guilty of an indictable offence and liable to imprisonment for life.

Threats causing death or injury

(4) Every one who threatens to commit an offence under paragraph (2)(a), (b) or (c) in order to compel a person to do or refrain from doing any act, where the threat is likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty of an indictable offence and liable to imprisonment for life.

(5) In this section,

Fixed platform means an artificial island or a marine installation or structure that is permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes:

ship means every description of vessel not permanently attached to the seabed, other than a warship, a ship being used as a naval auxiliary or for customs or police purposes or a ship that has been withdrawn from navigation or is laid up.



Part VIII – Offences against the Person and Property

214 In this Part,

operate

- [...]
- (c) includes, in respect of a vessel or an aircraft, to navigate the vessel or aircraft;
(*conduire* ;)

vessel includes a machine designed to derive support in the atmosphere primarily from reactions against the earth's surface of air expelled from the machine.

Examples:

Dangerous operation of motor vehicles, vessels and aircraft

249 (1) Every one commits an offence who operates

(b) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;

Unseaworthy vessel and unsafe aircraft

251 (1) Every one who knowingly

(a) sends or being the master takes a vessel that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament and that is unseaworthy

- (i) on a voyage from a place in Canada to any other place in or out of Canada, or
- (ii) on a voyage from a place on the inland waters of the United States to a place in Canada,

and thereby endangers the life of any person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.



Part XIV – Jurisdiction

Special Jurisdictions [where an offence is committed]

Definition of *ship*

477 (1) In sections 477.1 to 477.4, *ship* includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, without regard to method or lack of propulsion.

Offences outside of Canada

477.1 Every person who commits an act or omission that, if it occurred in Canada, would be an offence under a federal law, within the meaning of section 2 of the *Oceans Act*, is deemed to have committed that act or omission in Canada if it is an act or omission

- (c) that is committed outside Canada on board or by means of a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

Provincial Statutes

Attached to this Questionnaire is a survey of the statutes of each of Canada's ten provinces for reference.

Question 2:

In your system, does the definition of 'vessel' (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

As appears in the answer to question 1, the answer is "yes".

Shipping and navigation in Canada is a subject matter which is within the exclusive power of the Federal Parliament, and regulated by Federal Laws, but there are activities involving ships upon which the various provincial legislatures can regulate. As such, the definition of ship or vessel remains fairly consistent throughout the federal and provincial regimes, but are designed to meet a specific purpose of the subject matter of any particular statute.

There is some variation when it comes to the applicability to Provincial law in the area of Maritime worker safety legislation, particularly as it pertains to the fishing industry. While Federal jurisdiction over Maritime torts still holds, Provincial occupational health and safety regimes have been found valid by Canadian Courts.



Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

While Canada has not adopted any of the Arrest Conventions, arrest of a vessel, or its property, is available as an Action “*in Rem*” for a variety of claims set out under the *Federal Courts Act*, s. 22(2), which sets out examples over which jurisdiction is exercised in the context of the application of Canadian Maritime Law:

Maritime jurisdiction

(2) Without limiting the generality of subsection (1). for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

- (a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;
- (b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;
- (c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;
- (d) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;
- (e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;
- (f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;
- (g) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;



- (h)** any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;
- (i)** any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;
- (j)** any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;
- (k)** any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;
- (l)** any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;
- (m)** any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;
- (n)** any claim arising out of a contract relating to the construction, repair or equipping of a ship;
- (o)** any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;
- (p)** any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;
- (q)** any claim in respect of general average contribution;
- (r)** any claim arising out of or in connection with a contract of marine insurance; and
- (s)** any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.

In the event of a successful judgment following trial, or in default of payment where a case is not defended, an order for appraisalment and sale of the defendant's property may issue.

Rule 490 of our *Federal Courts Rules of Practice* governs the sale of ships, and the distribution of sale proceeds is subject to a ranking, or prioritization, of various claims against the sale proceeds and reads as follows:



Disposition of arrested property

490 (1) On motion, the Court may order, in respect of property under arrest, that

- (a) the property be appraised and sold, or sold without appraisal, by public auction or private contract;
- (b) the property be advertised for sale in accordance with such directions as may be set out in the order, which may include a direction that
 - (i) offers to purchase be under seal and addressed to the sheriff,
 - (ii) offers to purchase all be opened at the same time in open court, that the parties be notified of that time and that the sale be made pursuant to an order of the Court made at that time or after the parties have had an opportunity to be heard,
 - (iii) the sale not necessarily be to the highest or any other bidder, or
 - (iv) after the opening of the offers and after hearing from the parties, if it is doubtful that a fair price has been offered, the amount of the highest offer be communicated to the other persons who made offers or to some other class of persons or that other steps be taken to obtain a higher offer;
- (c) the property be sold without advertisement;
- (d) an agent be employed to sell the property, subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent as may be stipulated in the order;
- (e) any steps be taken for the safety and preservation of the property;
- (f) where the property is deteriorating in value, it be sold forthwith;
- (g) where the property is on board a ship, it be removed or discharged;
- (h) where the property is perishable, it be disposed of on such terms as the Court may order; or
- (i) the property be inspected in accordance with rule 249.

While there is no statutory order to distribution, priorities have developed through UK and later Canadian jurisprudence roughly as follows:

- *Marshall's expenses of arrest;*
- *Costs of the sale, including Sheriff's disbursements, advertising, appraisal, etc;*
- *Crew wages and repatriation costs;*



- *Special statutory liens;*
- *Possessory liens attaching prior to maritime liens, including maintenance of the vessel while under arrest;*
- *Traditional maritime liens;*
- *Possessory liens arising subsequent to maritime liens;*
- *Mortgages; and*
- *Statutory “right in rem” creditors and*
- *Other unsecured creditors.*

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

Canada is not a party to any of the international conventions on maritime liens and mortgages. Its law on these subjects is found in the Federal Courts Act, and other statutes such as the Canada Shipping Act, the Canada Marine Act, the Pilotage Act as well as the general body of law referred to as “Canadian Maritime Law”, all of which have been referred to herein.

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Yes, however any rejection by a registrar or other governmental body may be challenged by an application to the court to review the decision and determine its legality, even on the issue whether the particular moveable is a “ship” or a “vessel”.

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

This issue has never been decided in the Canadian jurisdiction, principally because it is highly unlikely, given the broad definition of “ship” in the Federal Courts Act, which reads as follows:

“2(1) “ship” means every description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, whether self-propelled or not and without regard to the method of propulsion, and includes a sea-plane and a raft or boom of logs or lumber. (navire)”



The Court is granted jurisdiction over “all ships” under s.22(3) which reads:

Jurisdiction applicable

- (3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies
- (a) in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;
 - (d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not.

In theory, the Court’s jurisdiction is circumscribed by the definition of “ship” and if anything that is called a “ship” in a foreign jurisdiction is not a “ship” under the above definition, then the Court does not have jurisdiction and the thing and any securities attached thereto would be treated in accordance with conflict of law rules contained in the province in which the thing is located.

Arrest of foreign vessels in Canada is common, and not particularly onerous. As long as the claimant is able to provide the facts and supporting documentation to substantiate the claim, the amount owing, and that the object to be arrested is a “ship” under its nationality and is registered in a named port, then the Warrant of Arrest will issue.

Federal Courts Rules of Practice – Rule 481

Warrant for the arrest of property

481 (1) A designated officer may issue a warrant for the arrest of property in an action *in rem*, in Form 481, at any time after the filing of a statement of claim.

Marginal note: Affidavit

- (2) A party seeking a warrant under subsection (1) shall file an affidavit, entitled “Affidavit to Lead Warrant”, stating
- (a) the name, address and occupation of the party;
 - (b) the nature of the claim and the basis for invoking the *in rem* jurisdiction of the Court;
 - (c) that the claim has not been satisfied;
 - (d) the nature of the property to be arrested and, where the property is a ship, the name and nationality of the ship and the port to which it belongs; and



- (e) where, pursuant to subsection 43(8) of the Act, the warrant is sought against a ship that is not the subject of the action, that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

1) *non-self propelled barges* –

City of Fort William v McNamara Construction Co. (1957) 10 D.L.R.(2nd)625 (Ont.High Ct.) – dredge incapable of independent navigation not a ship

R. v Star Luzon [1984] 1 W.W.R.527 (B.C.S.C.) – floating dry dock bolted to a pier not a ship

R v St John Shipbuilding & Dry Dock Co Ltd (1981), 126 DLR (3d) 353; 43 NR 15 (FCA) at para. 29 (“I am of the opinion that the “Glenbuckie” was a ship within the meaning of the definition of that word in the Federal Court Act [R.S.C. 1970, c. 10, s. 22]. She was a barge built for use on the water. She was capable of being moved from place to place and was so moved from time to time ... She was capable of carrying cargo ... of carrying people ... While it appears that she was not capable of navigation herself and was not self-propelled, these facts do not detract from the fact that she was built to do something on water, requiring movement from place to place.”

2) *self-propelled barges* –

Falconbridge Nickel Mines Ltd. v Chimo Shipping [1974] S.C.R.933

R. The Aladdin [1977] 2 W.W.R.677 (B.C.C.A.)

3) *accommodation barges* –

4) *mobile offshore drilling units* –

Seafarers’ International Union of Canada v Crosbie Offshore Services Ltd. [1982]

2 FC 855 (FCA)

Bow Valley Huskey (Bermuda) Ltd. v Saint John Shipbuilding Ltd. (1995), 130Nfld & PEI 92 (Nfld.SCTD) and at [1997] 3 SCR 1210

5) *wind turbine towers (floating or permanently fixed)* –

J.D. Irving, Limited v. Siemens Canada Limited, 2011 FC 791.



- 6) *jack up drill rigs* –
- 7) *construction barges* –
- 8) *submarines* –

Cyber Sea Technologies Inc. v Underwater Harvester Remotely Operated Vehicle 2002 FCT794 – submersible designed and used in logging in a flooded reservoir but was tethered to and manoeuvred from a barge or shore cabin by means of cables and a compressed air line held to be a “ship”
Seaplanes and amphibious vehicles

Ontario Central Airlines Ltd. v Gustafson (1957) 8 DLR (2d)584 (Ont.CA) a seaplane is not a ship, when on the water it is considered to be a power-driven vessel and the Collision Regulations apply

R v General Motors Canada (1984) 48 OR (2d)204 (HC) – where an amphibious vehicle sank with loss of life – held to be subject to Canada Shipping Act

- 9) *seaplanes* –
- 10) *hydroplanes (air cushion)* –

Imperial Oil Ltd v “Expo Spirit” (The) (1986), 1986 CarswellNat 760. 6 FTR 156 (Fed TD) at para. 2 (“It is certainly not plain and obvious to me ... that a hovercraft is not a ship under the [*Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 2]. To the contrary, as I read the definition above referred to under s. 2 of the *Federal Court Act*, a “ship” includes any description of vessel or board used in navigation. That wide description does, in my view, encompass a craft used in navigation, even if there is some airspace left between it and the water.”)

- 11) *vessels under construction* –
- 12) *unmanned vessels* –
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities* –
- 14) *vessels in “cold layup”* –
- 15) *derelict vessels or “dead ships”* –

Hamilton Harbour Commissioners v AM German (The) [1973] 1254 – a decommissioned ship awaiting dismantling is still a “ship”

- 16) *vessels under conversion or renovation* –

PG du Canada v Services d’Hôtellerie Maritimes [1968] CS 431 (Que.SC.) vessel permanently moored and used as a hotel was not considered a “ship”



Salt Spring Island Local Trust Committee v B&G Ganges Marine Ltd. 2008 BCCA 544 – structure originally designed for navigation but has been put to another use for many years with no intention to resume navigation is not a “ship”.

Herbstreit v Ontario Regional Assessment Commissioner Region 15 (1982) 38 OR (2d) 642 (Co.Ct) – ship converted to use as a restaurant and secured to land is not a “ship”

If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court’s views.

[To be done after final approval of text]

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

Canadian legislation is fairly consistent with definitions found in various international conventions, even those which Canada has not signed or ratified, but has adopted similar legislation, all with a view to being in harmony with those legal systems of its major trading partners.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

No.

April 12, 2018



**APPENDIX A TO
RESPONSES BY THE CANADIAN MARITIME LAW ASSOCIATION**

Survey of Provincial Statutes

ONTARIO STATUTES AND REGULATIONS

Fuel Tax Act, RSO 1990, c F.35

Definitions

1 (1) In this Act,

“vessel” means a ship, boat, barge or other watercraft that is designed to move in or through water, but does not include an aircraft capable of operating on water or a vehicle moving on ice; (“bâtiment”)

Products used as clear fuel

- (3) Every person is liable to pay to the Minister a tax at the rate imposed by this Act upon a purchaser of clear fuel in respect of,
- (b) fuel that is not clear fuel that the person places in a fuel tank of a motor vehicle or vessel if the motor vehicle or vessel is operated or intended to be operated principally for the pleasure or recreation of its owner or operator.

NOVA SCOTIA

Mill Lakes Watershed Protected Water Area Regulations, NS Reg 75A/2017

“vessel” means a means of conveyance used on water and includes any accessory to the vessel;

Prohibited and restricted activities

4 A person must not do any of the following things in the Protected Water Area:

- (g) wash a vehicle, vessel or mechanical equipment;
- (h) carry out maintenance, other than emergency repair, of a vehicle, vessel or machinery.



Exceptions for landowners

- 5 An owner of land in the Protected Water Area may do any of the following:
- (b) use any of the following on Mill Lakes:
 - (i) a rowboat, canoe, or other non-motorized vessel,
 - (ii) a vessel powered by an electric motor;

Beaches Act, RSNS 1989, c 32

Interpretation

- 3 In this Act,
- (e) “vessel” means a means of conveyance of a kind used on water and includes an accessory to the vessel;

Powers of peace officer

- 7(1) A peace officer may
- (a) search without a warrant and seize a vehicle including an off-highway vehicle, vessel or other property where the peace officer has reasonable and probable grounds to believe that an offence has been committed pursuant to this Act or any other enactment, if the offence is committed on a beach, and may detain the same for a period not exceeding twenty-four hours where the peace officer has reasonable and probable grounds to believe the seizure and detention is necessary to prevent the continuation or repetition of the offence;

Davidson Lake Watershed Protected Water Area Regulations, NS Reg 74A/2017

“vessel” means a means of conveyance used on water and includes any accessory to the vessel;

Prohibited and restricted activities

- 4 A person must not do any of the following things in the Protected Water Area:
- (f) operate a vehicle or vessel on, through or over Davidson Lake or any other watercourse or wetland, except as authorized by the Water Works Operator for the purpose of protecting the Protected Water Area;
 - (h) wash a vehicle, vessel or machinery in or within 60 m of a watercourse;
 - (i) carry out maintenance, other than emergency repair, of a vehicle, vessel or machinery.



Pockwock Lake Watershed – Designation and Regulations, NS Reg 12/9

- (1) “vessel” means a means of conveyance of a kind used on water and includes any accessory to the vessel;

Vehicle and vessel restrictions

- 5(1) No person shall wash a vehicle in any watercourse or within sixty (60) metres of the shoreline or bank of any watercourse located within the Protected Water Area.
- (2) No person shall at any time operate a vessel of any kind on, through, or over Pockwock Lake, Lacey Mill Lake, Bottle Lake, Island Lake, or any watercourse in the Protected Water Area unless authorized by the Commission.

Fishing restrictions

- 7(1) No person shall fish at any time from a vessel on any lake or watercourse in the Protected Water Area.

Ozone Layer Protection Regulations, NS Reg 54/95

Fire protection equipment

- 6(1) Subject to subsection (2), no person shall import, manufacture, install, offer for sale, sell or buy new fire extinguishing equipment that contains or is intended to contain an ozone-depleting substance with an ozone-depletion potential greater than 0.05.
- (2) Subsection (1) does not apply in the following circumstances:
- (a) the use of fire extinguishing equipment for fire protection in an aircraft;
 - (b) the use of fire extinguishing equipment for fire protection in a military tactical vehicle or vessel

Bennery Lake Watershed Protected Water Area Regulations, NS Reg 211/2003

“vessel” means a means of conveyance of a kind used on water and includes any accessory to the vessel;

Restricted activities

3

- (3) No person is permitted to wash a vehicle or vessel in any watercourse or within 60 m of the shoreline or bank of any watercourse within the Protected Water Area.



- (4) No person is permitted to, at any time, operate a vehicle or vessel of any kind, on, through or over Bennery Lake or any watercourse in the Protected Water Area, unless authorized by the Water Works Operator.

Trails Act, RSNS 1989, c 476

- (k) “vessel means a means of conveyance of a kind used on water and includes any accessory to the vessel

Search and seizure

- 20(1)** A peace officer may search without warrant a vehicle, vessel or other receptacle when the peace officer has reason to believe that it contains anything or is being used in connection with the commission of an offence pursuant to this Act or the regulations or any other enactment, if the offence is committed on a trail, and the peace officer may seize the vehicle, vessel or receptacle.

Boat Builder Trade Regulations, NS Reg 228/2013

“boat” means a recreational or small commercial vessel that is used solely or partly to navigate in, on, through or immediately above water using any method of propulsion, including wind or muscular power, and includes such a vessel that is under construction;

NEW BRUNSWICK

No definitions

NEWFOUNDLAND AND LABRADOR

Mineral Exploration Standards Regulations, NLR 39/07

- (u) “Vessel” includes boat, speed boat, canoe, zodiac, longliner, and barge.

17.2 Vessel use

17.2.1 If a boat launch, dock, float or other type of mooring is proposed as part of the Exploration Program, the Applicant must specify the following in the Work Plan:

- Specific location of launch, dock, float or mooring
- Detailed design drawing of the structure in plan and profile view, including the anchoring system



- Extent of any shoreline alterations required
- Description of the construction materials to be used, and methods and timing of construction
- Number of boats to be moored and length of time to be used
- A description of the type of aquatic vegetation, shellfish, fish and mammals which may be affected by the structure.
- A general description of the substrate materials within the area of the proposed structure
- Detailed description of mitigation measures used to protect banks and fish habitat
- Colour photographs of the work site at low and high tide

17.2.2 If Vessel will be used to support the Exploration Program, the Environmental Protection Plan must describe:

- how the refueling of vessel and fuel transfers from and to vessel will occur so as to prevent leaks and spills,
- in detail the procedure for leak and spill response and clean-up
- how environmental impact and contamination of the body of water will be reduced in the case where vessel will be used but no boat launch, dock, float or mooring will be constructed.

17.2.3 Boat launches, docks, floats or other types of mooring must be located such that the least amount of impact will be caused to fish habitat. For example, in areas with hard surfaces (rocks and cobbles) as opposed to soft surfaces (mud) with aquatic vegetation.

17.2.4 Boat launches, docks, floats or other types of mooring must be located such that the least amount of impact will be caused to the shoreline and riparian zone.

17.2.5 The minimum clearance below a float at low tide must be 1.5m to avoid disturbance to the seabed caused by wash from propellers.

17.2.6 Treated wood must not be used in the construction of a launch, dock, float or any other type of mooring.

17.2.7 Subject to section 17.2.10, natural materials found at the Site may be used in the construction of crib work or a launch, dock, float or mooring.

17.2.8 If cement or concrete will be used in the construction of a launch, float, dock or mooring, pre-cast structures must be used, and if cement is poured at the site, wet cement must be isolated from the surrounding water.



17.2.9 There must be no dredging, filling, blasting or use of heavy equipment below the high water mark.

17.2.10 Existing rocks and logs in the marine environment must not be used as building materials.

17.2.11 Docks and floats must be built so as to reduce the amount of shade created by these structures, through the use of the following practices, as applicable;

- building docks at least 2m above the high water mark. (This standard does not apply to floats.)
- keeping ramps and docks to a width of 1-1.5m
- using grates or space boards on ramps, floats and docks to let light reach plants and animals below
- where feasible, aligning ramps, floats and docks to lie north to south to allow better light penetration under the structure
- limiting floats to 3m in width and 8m in length

17.2.12 Boat launches must only be used during high tide. This standard does not apply to boat launching ramps that are designed for use by small craft such as canoes and zodiacs.

17.2.13 Floats, ramps and floating docks should be removed to above the high water mark during any closure in the winter.

Personal Property Security Regulations, NLR 103/99

(d) “boat” means a vessel that is designed for transporting persons or things on water and that is propelled primarily by any power other than muscle power;

PRINCE EDWARD ISLAND

Liquor Control Act, RSPEI 1988, c L-14

“boat” means any type of boat, vessel or other craft that is designed or used to travel on water;

21.1 Transportation of liquor on boat

- (1) Any person lawfully in possession of liquor may, subject to subsection (2), transport it on a boat.

Idem



- (2) Subject to subsection (3), where the excise stamp on the package containing liquor, or a seal used to close the package containing liquor, has been broken or removed, the package shall be transported in a locked compartment in a part of the boat that is not readily accessible by the operator.

Exception

- (3) Subsection (2) does not apply
- (a) where the package containing liquor is being transported on a boat that is a licensed premises; and
 - (b) while liquor is being lawfully served on the boat.

Personal Property Security Act Regulations, PEI Reg EC270/98

- (d) “boat” means a vessel that is designed for transporting persons or things on water and that is propelled by any power other than muscle power;

For the purposes of this section, the serial number for

- (a) a motor vehicle other than a combine or tractor is the vehicle identification number marked on, or attached to, the body frame by the manufacturer;
- (b) a combine, tractor, mobile home or trailer is the serial number marked on, or attached to, the chassis by the manufacturer;
- (c) a boat that can be registered, recorded or licensed under the Canada Shipping Act (Canada) is the registration, recording or license number assigned to the boat under that Act;
- (d) a boat not referred to in clause (c) is the serial number marked on, or attached to, the boat by the manufacturer;
- (e) an outboard motor for a boat is the serial number marked on, or attached to the outboard motor by the manufacturer;



BRITISH COLUMBIA

(i) Ship

Income Tax Act, RSBC 1996, c 215

126.2(1) In this section:

“ship” means a seagoing vessel propelled by engine, but does not include

- (a) a vessel ordinarily used for personal or recreational purposes, or
- (b) a prescribed vessel.

BC’s Income Tax Act creates a tax credit for employers whose principal business is the construction, repair or conversion of ships.

Carbon Tax Act, SBC 2008, c 40

14(1) In this section, “non-commercial aircraft or ship” means an aircraft or ship used solely for personal use.

The act creates an exemption to BC’s carbon tax for non-commercial ships.

(ii) Vessel

Liquor Control and Licensing Regulation, BC Reg 241/2016

“vessel” means a vessel as defined in the Canada Shipping Act, 2001;

These regulations set out in detail the circumstances in which a vessel will be considered a private place for the purposes of liquor laws, and the circumstances in which an establishment onboard a vessel will be granted a liquor license.

BC Parks Recreation User Fees Regulation, BC Reg 136/2009

1 “vessel” means a boat, canoe, kayak or other craft used, or capable of being used, for navigation on water;

This regulation sets fees for docking or mooring vessels in certain parks and recreates areas.

Park, Conservancy and Recreation Area Regulation, BC Reg 180/90

1 “vessel” means a boat, canoe, kayak or other craft used, or capable of being used, for navigation on water;



This regulation creates a maximum stay for a vessel in a recreation areas, and permits conservation officers to limit the number of vessels in a park or recreation area.

Insurance (Vehicle) Regulation, BC Reg 447/83

1(1) “vessel” means a ship, barge, boat or other description of vessel used or designed to be used in navigation but does not include a rowboat or a raft, logboom or other similar floating facility.

The regulations describe the circumstances in which the Insurance Corporation of British Columbia will (or will not) compensate an insured owner or operator of a vessel.

Motor Vehicle Act Regulations, BC Reg 26/58

24.01(1) “vessel” means a boat, canoe, kayak or other craft used, or capable of being used, for navigation on water;

This definition is used to exclude “boat haulers designed and used for the primary purpose of lifting or hoisting vessels” from the operation of the Motor Vehicle Act.

(iii) Boat

Provincial Sales Tax Act, SBC 2012

1 “boat” means a vessel or other craft that is designed for transporting or drawing on water persons or things, regardless of the method of propulsion or lack of method of propulsion;

This definition is used numerous times to govern the taxation of transactions involving boats.

Personal Property Security Regulation, BC Reg 227/2002

1(1) “boat” means a vessel that is designed for transporting persons or things on water and that is propelled primarily by any power other than muscle power;

The term is used to categorize boats as serial-numbered goods for the purposes of registering and enforcing security in a boat as collateral for another obligation.

Repairers Lien Act, RSBC 1996, c 404

1(1) “boat” includes an inboard motor and an outboard drive unit, a jet propulsion unit, or any equipment that is accessory to the motor for the purpose of propelling the boat; This act provides a possessory lien to those whose business includes storing boats for unpaid storage fees, including how the lien is registered, prioritized, and enforced.



Controlled Alien Species Regulation, BC Reg 94/2009

9(1) “boat or water equipment” means any of the following items:

- (a) a boat, including personal watercraft;
- (b) a boat trailer;
- (c) any item used for fishing;
- (d) any item used for water-based recreational activities;
- (e) any equipment associated with, and any component of, a thing referred to in any of paragraphs (a) to (d);

This regulation permits an officer to issue a decontamination order if the boat is contaminated with certain species of mussels, or if there is reason to believe that the boat has navigated through waters contaminated with certain species of mussels.

ALBERTA

(i) Ship

No definitions.

(ii) Vessel

No relevant definitions (there are some legislative definitions of “vessel” in the sense of a piece of process equipment such as a boiler or pressure vessel).

(iii) Boat

Personal Property Security Regulation, Alta Reg 95/2001

1(1) In this Regulation,

- (e) “boat” means a vessel that is designed for transporting persons or things on water and that is propelled primarily by any power other than muscular power;

The term is used to categorize boats as serial-numbered goods for the purposes of registering and enforcing security in a boat as collateral for another obligation.



SASKATCHEWAN

(i) Ship

No definitions.

(ii) Vessel

No relevant definitions (there are some legislative definitions of “vessel” in the sense of a piece of process equipment such as a boiler or pressure vessel).

(iii) Boat

The Personal Property Security Regulations, RRS c P-6.2 Reg 1

2(1)(d) “boat” means a vessel designed for transporting persons or things on water and that is propelled primarily by any power other than muscle power;

The term is used to categorize boats as serial-numbered goods for the purposes of registering and enforcing security in a boat as collateral for another obligation.

The Wakamow Valley Authority Act, SS 1980-81, c W-1.1

2(e) “boat” includes any vessel used or designed to be used in navigation;

This regulation permits the Wakamow Valley Authority to pass bylaw permitting police or peace officers to remove any “boat” left in Wakamow Valley, which is a park in Moosejaw, Saskatchewan.

The same definition and context are used in the Meewasin Valley Authority Act, SS 1979, c M-11.1.

MANITOBA

(i) Ship

No definitions.

(ii) Vessel

The Highway Traffic Act, CCSM c H60

263.1(1) The following definitions apply in this section and section 263.2. “aircraft” and “vessel” have the same meaning as in section 214 of the Criminal Code.



264(1) In this section, “aircraft” and “vessel” have the same meaning as in section 214 of the Criminal Code;

265(1) The following definitions apply in this section. “aircraft” and “vessel” have the same meaning as in section 214 of the Criminal Code.

These definitions are used to permit police to automatically suspend a license when a Criminal Code offence is committed with respect of a vessel (such as operating a vessel while intoxicated).

(iii) Boat

The Liquor and Gaming Control Act, CCSM c L153

51 The following definitions apply in this Division.

“boat” means any type of craft or vessel that is designed or used to travel on water. The Act prohibits anyone from operating or having care and control of a boat while there is liquor in the boat.

Personal Property Registry Regulation, Man Reg 80/2000

1 “boat” means a vessel that is designed for transporting persons or things on water and that is propelled primarily by any power other than muscle power;

The term is used to categorize boats as serial-numbered goods for the purposes of registering and enforcing security in a boat as collateral for another obligation.

QUEBEC

A. STATUTORY AND REGULATORY DEFINITIONS

Quebec legislation does not abound with definitions for the terms “vessel”, “ship”, “boat” and “craft” (in French: “vaisseau”, “navire”, “bâtiment”, “bateau”, “embarcation”). While certain provisions of the *Civil Code of Quebec* cover activities relating to shipping and navigation, the Code does not provide any definitions for these terms.

The few laws and regulations of Quebec that define these terms include the *Taxation Act* and related regulations, legislation relating to environmental regulation, and occupational safety legislation.

i. Tax legislation

The *Taxation Act* (CQLR c 1-3) and related acts and regulations provide definitions for the term “vessel”. The Act applies to vessels as depreciable property, and certain vessels, such as fishing



vessels, are also subject to tax exemptions. Further, certain shipbuilding activities can qualify for tax credits under the Act and its regulations.

The Act itself provides a summary definition of “vessel” as including a semi-submersible rig. The related *Act Respecting the Sectoral Parameters of Certain Fiscal Measures* extends that definition to floating processing plants, but excludes self-elevating platforms.

The regulations refer to federal legislation for their definitions. *The Regulation respecting the Taxation Act* refers the definition back to the *Canada Shipping Act 2001*. The *Decree respecting the commercial fisheries financing program* defines “boat” (“bateau”) simply as a boat registered pursuant to the *Canada Shipping Act 2001*. Finally, the *Regulation respecting Quebec sales tax* refers to the definition in the federal duties regulations.

<p><i>Loi sur les impôts</i>, RLRQ c 1-3 1029.8.36.54. Dans la présente section, l’expression: [...] «navire» comprend une tour de forage semi-submersible stabilisée par pontons submersibles et par ancrage;</p>	<p><i>Taxation Act</i>, CQLR c 1-3 1029.8.36.54. In this division, [...] “vessel” includes a semi-submergible rig stabilized by submerging pontoons and by anchoring.</p>
<p><i>Loi concernant /es paramètres sectoriels de certaines mesures fiscales</i>, RLRQ c P-5.1 CHAPITRE IX PARAMÈTRES SECTORIELS DU CRÉDIT D’IMPÔT ET DU CONGÉ DE TAXE SUR LE CAPITAL POUR LA</p>	<p><i>An Act Respecting the Sectoral Parameters of Certain Fiscal Measures</i>, CQLR c P-5.1 CHAPTER IX SECTORAL PARAMETERS OF TAX CREDIT FOR CONSTRUCTION OR CONVERSION OF VESSELS AND TAX</p>



<p>CONSTRUCTION OU LA TRANSFORMATION DE NAVIRES SECTION I INTERPRÉTATION ET GÉNÉRALITÉS 9.1. Dans le présent chapitre, à moins que le contexte n’indique un sens différent, l’expression: [...] «navire» comprend une tour de forage semi-submersible stabilisée par pontons submersibles et par ancrage, ainsi qu’une usine flottante si elle est destinée à demeurer flottante et à être enregistrée à titre de navire, mais ne comprend pas une plate-forme autoélevatrice;</p>	<p>HOLIDAY ON CAPITAL IN RESPECT OF CONSTRUCTION OR CONVERSION OF VESSELS DIVISION I INTERPRETATION AND GENERAL 9.1. In this chapter, unless the context indicates otherwise, [...] “vessel” includes a semi-submersible rig stabilized by submerging pontoons and by anchoring, as well as a floating plant if it is intended to remain floating and be registered as a vessel, but does not include a self-elevating platform</p>
<p><i>Règlement sur /es impôts,</i> RLRQ c 1-3, r 1 CHAPITRE VII ALIÉNATION DE NAVIRE c. II; D. 1981-80, titre IV, c. II; R.R.Q., 1981, c. 1-3, r. 1, titre IV, c. II; D. 134- 2009, a. 1. 104R1. Dans le présent chapitre, l’expression: [...] «navire» désigne un navire tel que défini dans la <i>Loi de 2001 sur la marine marchande du Canada</i> (L.C. 2001, c. 26).</p>	<p><i>Regulation respecting the Taxation Act,</i> CQLR c 1-3, r 1 CHAPTER VII DISPOSITION OF VESSELS c. II; O.C. 1981-80, title IV, c. II; R.R.Q., 1981, c. 1-3, r. 1, title IV, c. II; O.C. 134-2009, s. 1. 104R1. In this chapter, [...] “vessel” means a vessel as defined in the <i>Canada Shipping Act</i> (S.C. 2001, c. 26).</p>
<p><i>Règlement sur la taxe de vente du Québec,</i> RLRQ c T-0.1, r 2 VALEUR DES BIENS APPORTÉS AU QUÉBEC 17R1. Pour l’application des articles 17R3 à 17R14 l’expression: [...] «navire» a le sens que lui donne le Règlement sur la diminution ou la suppression des droits de douane sur les navires (DORS 90-304);</p>	<p><i>Regulation respecting the Quebec sales tax,</i> CQLR c T-0.1, r 2 VALUE OF PROPERTY BROUGHT INTO QUEBEC 17R1. For the purposes of sections 17R3 to 17R14, the expression [...] “vessel” has the meaning assigned to it by the Vessel Duties Reduction or Removal Regulations (SOR/90-304). (navire)</p>



<p>Décret concernant le Programme de financement de la pêche commerciale, CQLR c F-1.3, r 1 SECTION II DISPOSITIONS INTERPRÉTATIVES 2. Aux fins de l’application du présent programme, on entend par: [...] Bateau ou bateau de pêche: un bateau immatriculé conformément à la <i>Loi de 2001 sur la marine marchande du Canada</i> (LC. 2001, c. 26);</p>	<p>[no English translation provided]</p>
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ii. Environmental regulations

Several regulation enacted under the *Environment Quality Act* (CQLR c Q-2) have provisions relating to ships, vessels and other water craft. However, only one regulation provides a definition of a related term, namely the term “pleasure craft”. The *Regulation respecting the protection of waters from pleasure craft discharges* defines a “pleasure craft” as boat or craft used primarily for sport or recreation and free of charge of fees.

<p><i>Règlement sur la protection des eaux contre les rejets des embarcations de plaisance,</i> RLRQ c Q-2, r 36 1. Le présent règlement s’applique aux propriétaires et aux occupants d’embarcations de plaisance qui circulent dans les lacs et les cours d’eau visés à chacune de ses annexes. Pour l’application du présent règlement, on entend par «embarcation de plaisance» tout bateau ou engin utilisé principalement pour une navigation sportive ou récréative, qu’il soit affrété ou non, contre rémunération ou gratuitement. Sont assimilées aux embarcations de plaisance les embarcations et autres équipements flottants utilisés comme logement et qui ne sont pas raccordés à un système d’égout à terre.</p>	<p><i>Regulation respecting the protection of waters from pleasure craft discharges,</i> CQLR c Q-2, r 36 1. This Regulation applies to the owners and occupants of pleasure craft on the lakes and watercourses described in each of the schedules. For the purposes of this Regulation, “pleasure craft” means any boat or craft used primarily for sport or recreation, whether on charter or not, free of charge or for a fee. Craft and other floating equipment used for living purposes and that are not connected to a shore-based sewer system are considered to be pleasure craft.</p>
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iii. Occupational safety regulations

Several regulations enacted under the *Act respecting occupational health and safety* have provisions relating to ships, vessels and other craft, but none provide a definition of these terms. Interestingly, one regulation provides contrasting definitions of “boatbuilding” and “shipbuilding”, the former applying to “boats” of less than 5 tons displacement, the latter applying to “ships” of more than 5 tons displacement.

<p><i>Règlement sur le programme de prévention, chapitre S-2.1, r. 10</i> <i>(Loi sur la santé et la sécurité du travail)</i> (H) INDUSTRIES DU MATÉRIEL DE TRANSPORT [...] (9) Industrie de la construction et de la réparation de navires: Établissements dont l'activité principale est la fabrication et la réparation de tous genres de navires jaugeant plus de 5 tonnes. (10) Industrie de la construction et de la réparation d'embarcations: Établissements dont l'activité principale est la fabrication et la réparation d'embarcations de tous genres jaugeant moins de 5 tonnes.</p>	<p><i>Regulation respecting prevention programs, chapter S-2.1, r. 10</i> <i>(Act respecting occupational health and safety)</i> (H) TRANSPORTATION EQUIPMENT INDUSTRIES [...] (9) Shipbuilding and repair industry: Establishments primarily engaged in manufacturing and repairing all types of ships of more than 5 tons displacement. (10) Boatbuilding and repair industry: Establishments primarily engaged in manufacturing and repairing all types of boats of less than 5 tons displacement.</p>
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B. DICTIONARY DEFINITIONS

I searched the French and French-Canadian legal and lexicographic dictionaries available in our library for the following definitions: “bateau”, “bâtiment”, “chaland”, “embarcation” and “navire”, being the words most commonly found in the legislation (note that I did not search for terms such as “canot”, “voilier”, “chaloupe” or “yacht”).

i. “Bateau” :

- a. **Bateau** [*Dr. com.*] Bâtiment destiné à la navigation sur les fleuves et canaux. → *Navire*¹
- b. **bateau** n.m. **1.** Nom générique des engins conçus pour naviguer. [...] **2.** MAR Embarcation de faible tonnage (par oppos. à *navire*). [...] ²

¹ Guillen, R. et Vincent, J., *Lexique des termes juridiques*, 12e. éd. (Paris: Éditions Dalloz, 1999), page 64.

² *Dictionnaire du français Plus, à l'usage des francophones d'Amérique*, (Montréal : Centre éducatif et culturel inc., 1988), page 156.



- c. BATEAU n.m. (pl. *bateaux*) Bâtiment, grand ou petit, qui navigue sur la mer ou sur les rivières. → Le mot *bateau* est un générique qui désigne tout ce qui flotte et navigue. Par contre, le mot *navire* désigne des bâtiments de fort tonnage destinés au transport maritime (et non fluvial), tandis que le mot *embarcation* désigne de petits bateaux destinés principalement au tourisme, aux loisirs nautiques (canots, chaloupes, voiliers, etc.).³
- ii. « Bâtiment » :
- a. BÂTIMENT n.m. [...] **3.** Grand navire. Des bâtiments de mer, un bâtiment de guerre. SYN. vaisseau.⁴
- b. Bâtiment, n.m. [...] **3.** Bateau ou navire de dimensions assez importantes. *Bâtiment de ligne* : cuirassé ou croiseur de bataille.⁵
- iii. « Chaland » :
- a. 1. **chaland** n.m. Bateau à fond plat qui sert à transporter les marchandises sur les fleuves et les canaux.⁶
- b. CHALAND n.m. Bateau à fond plat.⁷
- iv. « Embarcation » :
- a. **embarcation** n.f. Petit bateau non ponté; tout petit bateau.⁸
- v. « Navire » :
- a. **Navire**. [*Dr. mar.*] Bâtiment destiné à la navigation maritime. → *Bateau*.⁹
- b. **Navire** n.m. Construction flottante qui sert ou peut servir, exclusivement ou partiellement, à la navigation maritime, qu'elle soit pourvue ou non d'un moyen propre de propulsion.

³ De Villier, M.-E., *Multi dictionnaire de la langue française*, 4e ed. (Montréal : Éditions Québec-Amérique Inc., 2003), page 170.

⁴ Supra note 3, page 171.

⁵ Supra note 2, page 157.

⁶ Supra note 2, page 274.

⁷ Supra note 3, page 258.

⁸ Supra note 2, page 570.

⁹ Supra note 1, page 354.



Rem. Cette définition, que donnent certaines lois fédérales, permet de couvrir notamment les habitations flottantes, les plateformes de forage et les hydravions. Angl. ship, vessel¹⁰

- c. **navire** n.m. Bâtiment ponté conçu pour la navigation en haute mer. (Moins cour. que *bateau*. Désigne surtout bâtiment de fort tonnage.) [...] ¹¹
- d. **NAVIRE** n.m. Bâtiment de fort tonnage destiné au transport maritime (et non fluvial). ¹²

¹⁰ Reid, H., *Dictionnaire de droit québécois et canadien*, 4^e éd (Montréal: Wilson & Lafleur Ltée, 2010), page 413.

¹¹ Supra note 2, page 1100.

¹² Supra note 3, page 976.



RESPONSES OF THE CHINA MARITIME LAW ASSOCIATION¹

Question 1:

Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either ‘vessel’ or ‘ship’? If so, which is/are the terms and their corresponding definitions?

Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.

In China, quite a few statutes and regulations governing matters relating to ships or vessels provide definitions of vessels or ships for their respective purposes. Some definitions exclude vessels that are below a certain tonnage or length; others focus on the intended usage in which the vessels are engaged. It is generally accepted that the term “vessel” bears a wider connotation than “ship”. In statutes and rules of a private law character, the term “ship” is used which focuses on the function of carriage of goods and passengers. In administrative regulations, the term “vessel” is used where the scope of application is intended to extend beyond the meaning attributed to “ship” in private law legislation.²

Details are as follows:

- 1) The Maritime Code of the People’s Republic of China, 1993 (CMC)

Article 3 of the CMC has the following definition:

“Ship” as referred to in this Code means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage.

The term ‘ship’ as referred to in the preceding paragraph shall also include ship’s apparel.

Note:

It is generally accepted in China that the CMC mainly governs the relationship between ships and relationships arising from sea carriage. These relationships governed by the CMC are mainly between parties in equal positions. Thus, the CMC basically possesses a private

¹ The content of this response letter has been approved in the group discussion of faculty members from Dalian Maritime University Law School. The author shall thank Professor Si Yuzhuo and Professor Proshanto K. Mukherjee for their valuable comments on the revision of this letter.

² Professor Si Yuzhuo takes this view.



law character and belongs to the civil and commercial law branches in terms of the Chinese legal system.

It can be seen from the above definition that the CMC looks at the following three elements and excludes certain ships from its application: A. Usage. The ships used for a military purpose and/or a public-service purpose are excluded from the definition of “ship” under the CMC, unless otherwise provided for in particular chapters. B. Tonnage. The CMC does not govern any ships below 20 gross tonnage, unless otherwise provided for in particular chapters. C. Navigation. The CMC generally governs only sea-going ships. Those that do not operate at sea are not subject to the CMC.³

Outside the framework set by article 3, there are some exceptions when it comes to the scope of ships falling under the application of the CMC. Firstly, in the area of ship mortgages, vessels under construction, which have not been completed and therefore are not real article 3 vessels, will also be considered a ship for the purposes of the CMC (see article 14). Secondly, with regard to salvage and collision, inland-water vessels and small vessels less than 20 gross tonnage, which normally should be excluded by article 3, will come within the scope of the CMC, if they are involved in salvage relating to, or collision with, an “article 3” ship (see articles 165 and 172 of the CMC).

2) The Special Maritime Procedure Law of the People’s Republic of China, 2000

(“SMPL”)

Article 6 The territorial jurisdiction of the maritime actions listed hereunder shall be determined as follows:

.....

(3) an action arising from a charter-party dispute of a seagoing ship shall be under the jurisdiction of the maritime court of ...;

...

(5) an action arising from a dispute over the service contract of the crew of a sea-going ship shall be under the jurisdiction of the maritime court of ...;

...

(7) an action arising from a dispute over the ownership, possession, employment and maritime lien of a sea-going ship shall be under the jurisdiction of the maritime court of

....

³ The word “navigation” in this response letter does not distinguish between self-propelled and non-self-propelled movements. Though some have argued that a ship for the purposes of the CMC are limited to self-propelled ships, others have taken a broad view and believe that non-self-propelled vessels are also governed by the CMC.



Note:

The maritime courts in China accept actions brought in respect of disputes relating to maritime torts and contracts and other maritime disputes such as those in relation to possession and employment of ships and property rights therein (article 4 of the SMPL). In hearing and determining maritime cases, the maritime courts, the higher people's courts of the places where such maritime courts are located and the Supreme People's Court must apply the SMPL (article 5 of the SMPL).

In determining the territorial jurisdiction of a maritime court in relation to disputes involving ships, article 6 of the SMPL uses the description "sea-going ship" as a qualifier to limit the scope of the disputes that fall under this article. But the SMPL does not provide a definition of "sea-going ship". It is in the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Special Maritime Procedure Law of the People's Republic of China"* (Fa Shi [2003] No. 3), that the Supreme People's Court has defined the term "sea-going ship" as used in the SMPL. Article 3 of the Fa Shi [2003] No. 3 states that "sea-going ship" referred to in article 6 of the SMPL means a ship that is suitable for navigation at sea or navigable waters adjacent to the sea. Thus, navigability of a ship, is the key element used to distinguish disputes falling under the SMPL from disputes pertaining to other legislation.⁴

- 3) The Maritime Traffic Safety Law of the People's Republic of China, 1984 (referred to as "MTSL")

Article 2

This Law shall apply to all vessels, installations and personnel and to the owners and managers of such vessels and installations that navigate, berth or operate in the coastal waters of the People's Republic of China.

Article 50

For the purpose of this Law, the definitions of the following terms are:

...

"Vessels" means all types of displacement or non-displacement ships, crafts, seaplanes, submersibles and mobile platforms.

"Installations" means all types of surface and underwater structures or installations, whether fixed or floating, and fixed platforms.

⁴ The Supreme People's Court of China prefers to look at the navigation area approved in the survey certificate of the ship to determine whether a ship is suitable for navigation at sea.



...

Note:

The MTSL was enacted for the purpose of strengthening the control of maritime traffic; ensuring the safety of vessels, installations, human life and property; and safeguarding the rights and interests of the state (see article 1 of the MTSL). The MTSL is administrative law (regulatory law in common law jurisdictions and international convention law) and applies to all vessels, installations and personnel as well as owners and managers of such vessels and installations that navigate, berth or operate in the coastal waters of the People's Republic of China (see article 2 of the MTSL). The main difference between “vessel” and “installation”, both governed by the MTSL, is whether the object in question is navigable or moveable. Thus, by definition, a mobile platform is a vessel but a fixed platform or a fixed underwater structure is an “installation” even if it is able to float.⁵

In addition to the element of navigability, for the purposes of it governing maritime traffic and safety, the MTSL provides a definition of “vessel” that subsumes a craft within the scope of its application whether it is of a “displacement or a non-displacement” variety. Thus, any vessel capable of navigating in the coastal waters of China, regardless of whether it is a displacement or non-displacement craft and regardless of the purpose of its usage, and its tonnage, is subject to the MTSL. In this sense, military vessels, public service vessels, fishing vessels, as well as small tonnage vessels, all fall within the definition of “vessel” under the MTSL (see article 48 and 49 of the MTSL).

- 4) Regulations of the People's Republic of China on Administration of Traffic Safety in Inland Waters, 2002, revised in 2011, issued by the State Council (referred to as the “IWTSR”)

Article 91

For the purposes of these Regulations:

.....

- (2) vessels mean displacement or non-displacement ships, boats, crafts, waterborne flying objects, submersible machinery, mobile platforms and other waterborne mobile installations;
- (3) floating facilities mean constructions and installations floating or submerging in the water which are moored with cables, anchor chains or other non-rigid fixations;

⁵ The 1984 MTSL is currently under revision. According to the latest version of the draft amendment, it has been advised that the phrase “any mobile unit” should be inserted into the definition of vessels. This has made it even more clear that the definition of “vessel” in the MTSL focuses on the element of movability.



.....

Note:

Compared with the MTSL which governs maritime traffic and safety in coastal waters, the IWTSR is aimed at maintaining traffic and safety in navigable inland waters. The IWTSR applies both to vessels and to floating facilities. The main difference between the two kinds of objects, such as those mentioned above in 2), is whether the object is capable of moving/navigating. Also, like the MTSL, the IWTSR uses the term “displacement or non-displacement” to include all kinds of vessels and mobile installations that can navigate in inland waters, regardless of their usage and tonnage.

- 5) Regulations of China Governing the Registration of Ships, effective on January 1, 1995, issued by the State Council (referred to as “Ships Registration Regulations” or “SRR”)

Article 2

The following ships shall be registered in accordance with the provisions of these Regulations:

- (1) Ships owned by citizens of the People’s Republic of China whose residences or principal places of business are located within the territory thereof;
- (2) Ships owned by enterprises with legal person status established under the laws of the People’s Republic of China and whose principal places of business are located within the territory thereof, provided that, where foreign investment is involved, the proportion of registered capital contributed by Chinese investors shall not be less than 50 per cent;
- (3) Service ships of the government of the People’s Republic of China and ships owned by institutions with legal person status; and
- (4) Other ships whose registration is considered necessary by the competent authority of harbor superintendency of the People’s Republic of China.

The registration of military ships, fishery ships and sports craft shall be handled in compliance with the provisions of the relevant laws and regulations.

Article 56

For the purpose of these Regulations:

- (1) “Ship” means any self-propelled or non-self-propelled vessel and any other mobile unit on water with the exception of life boats and life rafts equipped on board ships and boats or rafts of less than 5 meters in length;



- (2) “Fishery ship” means any vessel engaged in fishing or any vessel belonging to the fishing industry and serving the purpose of fishery;
- (3) “Service ship” means any vessel serving the administrative purposes of the government.⁶

Note

The Ships Registration Regulations applies to all ships that meet the registration conditions provided for in it. In four aspects, the SRR narrows its application to particular kinds of ships. A. Usage: military ships, fishery ships⁷ and sports craft are excluded from the application of the SRR. But government ships (public-service ships) are included. B. Navigation: all ships that can navigate, regardless of their self-propelled or non-self-propelled character, are subject to the SRR. Ships that are not movable or navigable are excluded.⁸ C. Length: boats or rafts of less than 5 meters in length are excluded. Life boats and life rafts that are part of a ship’s equipment are also excluded. D. Ownership: ships not owned by citizens or enterprises of China are excluded.

The Maritime Safety Administration of the Transport Department of China, as the authority higher than the registrar of vessels, has recently issued “Measures Governing the Registration of Ships” (Ships Registration Measures), effective February 10, 2017, to regulate ship registration practice. According to this new instrument, vessels requiring registration has now include: 1) vessels less than 5 meters in length;⁹ 2) dummy barges, floating docks, owned by Chinese enterprises whose proportion of registered capital contributed by foreign investors is more than 50 per cent, where such vessels are used for private purpose but not engaged in domestic water transport operation;¹⁰ 3) vessels owned or demise chartered by Chinese citizens or enterprises or public service unit or other social

⁶ The Ship Registration Regulations is of administrative law nature in terms of the Chinese legal system, and because of that, the term “vessel” should be used. However, it is noted from article 56 that “ship” is used and defined by reference to “vessel” in the SRR. The “ship”, “fishery ship” or “service ship” in the SRR refers to a particular kind of vessel and undoubtedly the ship in the SRR is wider than the ship for the purposes of the CMC.

⁷ In China, registration of fishing ships is subject to regulations other than the SRR and is administered by a different registration authority.

⁸ In this sense, oil rigs that are capable of moving are accepted and registered as vessels by the Maritime Safety Administration which is responsible for registration of vessels according to the SRR. By contrast, fixed oil rigs cannot be registered as ships and activities concerning them are under the supervision of the State Oceanic Administration of China.

⁹ However, it is not compulsory for vessels less than 5 meters in length to be registered. The MSA may use the Ships Registration Measures for reference when owners of such vessels apply for registration. See article 75 of the Ships Registration Measures.

¹⁰ Such groups of dummy barges and floating docks are excluded from the Ships Registration Regulations 1995. However, confirmation is required from the owners as to whether the insurance requirements can be satisfied without prior registration. Therefore, the Ships Registration Measures extends to cover these groups of vessels.



organizations; 4) vessels owned or demised chartered by enterprises with legal personality established in the Pilot Free Trade Zone.¹¹

- 6) Regulations of the People’s Republic of China Governing Survey of Ships and Offshore Installations, 1993, issued by the State Council (referred to as the “SOIS Regulations”)

Article 2

These Regulations shall apply to:

- (1) ships registered or to be registered in the People’s Republic of China;
- (2) foreign flag ships applying for survey according to these regulations or other relevant provisions issued by the State;
- (3) offshore installations located or to be located in coastal waters of the People’s Republic of China; and
- (4) sea-borne cargo containers owned by an enterprise as legal person registered in the Peoples Republic of China.

Article 29

For the purposes of these Regulations:

- (1) “ship” means any displacement or non-displacement ships and craft, hydroplanes, submersibles and diving systems, and mobile drilling units;¹²
- (2) “offshore installations” means any fixed or mobile structures and devices of various kinds above or under water, and fixed platforms;

Note

The SOIS Regulations aims to ensure that ships, offshore installations and sea-borne cargo containers meet the technical requirements for safe navigation and operation. In furtherance of this purpose, the SOIS Regulations will safeguard the safety of human life and property and prevent pollution of the marine environment. (Article 1) For its primary purpose - rendering the survey service, the SOIS Regulations apply to all Chinese flag vessels, foreign flag vessels (upon request), offshore installations located in coastal waters of China, and sea-borne cargo containers owned by Chinese enterprises. In terms of the difference between “vessels” and “offshore installations” falling within the scope of the

¹¹ The Chinese Government started the practice of Pilot Free Trade Zone (FTZ) since 2015. Due to the special status of the FTZ, the Ships Registration Regulations cannot apply to vessels owned by enterprises established in the FTZ. The Ships Registration Measures provide for specific rules in respect of registration of FTZ vessels.

¹² Professor Si Yuzhuo and Professor Proshanto K. Mukherjee both take the view that “vessel”, not “ship”, should be used in the SOIS.



SOIS Regulations, the criterion of navigability is used. Regardless of whether the craft in question is of a displacement or non-displacement type, objects that are not capable of navigation will not be considered as vessels falling under the SOIS Regulations.

In addition to the element of navigation, the SOIS Regulations actually does not provide for any other specific requirements with respect to the definition of vessels.

However, according to the Regulations on Administration of Survey of Ships (referred to as the “Regulations”), 2016, issued by the Ministry of Transport, military ships, sports crafts and fishery ships are excluded from the Regulations. The Regulations are aimed at facilitating the implementation of the SOIS Regulations. It is clear that the SOIS Regulations also uses the criterion of usage to narrow the scope of vessels which will come within its scope of application. Thus, vessels used for military, sports and fishery purposes are excluded from the SOIS Regulations.

- 7) Law of the People’s Republic of China on Vehicle and Vessel Tax, 2012 (referred to as “Vehicle and Vessel Tax Law”)

Article 3

The following types of motor vehicles and vessels are exempt from motor vehicle and vessel tax:

- (1) Fishing boats and aquaculture boats;
- (2) Vehicles and vessels used by the army and armed police;
- (3) Vehicles and vessels for police purposes; and
- (4) Vehicles and vessels of embassies, consulates, and representative offices of international organizations in China that are tax exempt under relevant laws, and of their relevant staff.

Article 4

Motor vehicles and vessels that are energy conservative or use alternative energy are entitled to tax break or tax exemption.

Note:

The Vehicle and Vessel Tax Law applies to all motor vehicles and vessels within the territory of the People’s Republic of China with some exemptions. Owners and operators of motor vehicles and vessels specified in the *Table of Items and Amounts of the Motor Vehicle and Vessel Taxes* attached to this Law, are the tax payers, and the local tax authorities are responsible for the collection of vehicle and vessel tax.



As provided in articles 3 and 4, vessels used for the purpose of fishing, aquaculture, army, police, foreign affairs, and vessels that are energy savers, are exempted from the application of the Vehicle and Vessel Tax Law. It is noted that tax exemption is based on the criterion of usage and pro-environment features of vessels. Apart from these two elements, the Vehicle and Vessel Tax Law does not give any description of motor vessels that are subject to the Law, except that in the *Table of Items and Amounts of the Motor Vehicle and Vessel Taxes* attached to the Law, yachts, tugboats and non-motorized barges are all treated as taxable vessels.

- 8) Implementation Regulations for the Law of the People's Republic of China on Vehicle and Vessel Tax, 2012, issued by the State Council (referred to as "Implementation Regulations")

Article 2

"Vehicles and vessels" mentioned in Article 1 of the Vehicle and Vessel Tax Law shall mean:

- (1) Motor vehicles and vessels that are required to be registered with the vehicle and vessel registration authorities according to law; and
- (2) Motor vehicles and vessels that drive or operate within the premises of an entity and are not required by law to be registered with the vehicle and vessel registration authorities.

Article 26

For purposes of the *Table of Items and Amounts of the Motor Vehicle and Vessel Taxes* attached to the Vehicle and Vessel Tax Law, vehicles and vessels shall mean:

Vessels shall mean various motor vessels, non-motorized vessels and other mobile marine devices, other than life rafts and life boats as part of vessels, and boats and rafts with a length of less than five meters. Motor vessels mean vessels propelled by machine. Tugboats mean specialized vessels used for towing or propelling transport vessels. Non-motorized barges mean non-motorized vessels registered as barges with vessel registration authorities. Yachts mean vessels with built-in mechanical propulsion devices, with a length of less than 90 meters, primarily intended for use in sightseeing tour, entertainment, aquatic sports or other activities, and having vessel inspection certificates and certificates of seaworthiness.

Note:

The Implementation Regulations is promulgated for facilitating the implementation of the Vehicle and Vessel Tax Law. In articles 2 and 26 of the Implementation Regulations, more specific descriptions of vessels subject to the Vehicle and Vessel Tax Law are provided.



According to the Implementation Regulations, vessels subject to the Vehicle and Vessel Tax Law are described firstly, in terms of navigability as to whether a vessel is motor-driven or non-motor-driven; its movability is an important criterion used in the Law to distinguish taxable vessels from others. Second is the criterion of length. Boats and rafts of length less than five meters are excluded. Life rafts and life boats as parts of a vessel are also excluded. The third criterion is propulsion method. Non-motorized vessels meaning vessels not propelled by machinery, are not taxable vessels with the exception that non-motorized barges are taxable under the Law.

Thus, the Vehicle and Vessels Tax Law uses five elements to prescribe the varieties of vessels that fall within its application. These are: usage, pro-environment feature, navigability, length and propulsion method.

- 9) Interim Regulations of the People’s Republic of China on Vessel Tonnage Tax, 2012, issued by the State Council. (referred to as “Vessel Tonnage Tax Regulations”)

Article 9

The following vessels shall be exempted from tonnage tax:

- (1) Vessels with a tax amount payable of below RMB 50;
- (2) Unloaded vessels the ownership of which is obtained through purchase, donation or inheritance outside the People’s Republic of China and that enter a domestic port for the first time;
- (3) Vessel that do not embark or disembark passengers or cargos within 24 hours after the expiration of their tonnage licenses;
- (4) Non-motorized vessels (excluding non-motorized barges);
- (5) Fishing boats for fishery or aquaculture;
- (6) Vessels that take asylum, are isolated for epidemic prevention or under repair, stop operation or are disassembled, and do not embark or disembark passengers or cargos;
- (7) Vessels that are exclusively used or requisitioned by the army or armed police forces;
- (8) Vessels of embassies or consulates of foreign countries or representative offices of international organizations in China or staff members thereof, which are exempted from tax in accordance with the relevant laws; and
- (9) Other vessels as prescribed by the State Council.



Article 20

For the purposes of these Regulations, the following terms shall have the meanings indicated below:

...

Non-motorized vessels refer to vessels without a power unit and driven by an external force.

Non-motorized barges refer to non-motorized vessels registered as barges with vessel administration authorities.

...

Note:

Vessels entering domestic ports of the People's Republic of China from foreign ports are regarded as taxable vessels under the Vessel Tonnage Tax Regulations. Unlike the vehicle and vessel tax which must be paid to the local tax authorities, it is the customs that is responsible for collection of tonnage tax. According to the Vessel Tonnage Tax Regulations, certain types of vessels are given tax exemption based on the following criteria: A. Tax amount. Vessels with a payable tax amount below RMB 50 are exempted. B. Unloaded vessels. Unloaded vessels where ownership is acquired through purchase, donation or inheritance outside the People's Republic of China and which enter a domestic port for the first time, are exempted. Vessels that do not embark or disembark passengers or cargo within 24 hours after the expiration of their tonnage licenses are exempted. C. Propulsion method. Non-motorized vessels (excluding non-motorized barges) are exempted. D. Usage. Vessels which are not used for embarking or disembarking passengers or cargo are exempted. Vessels used for fishery or aquaculture, requisitioned by the army or armed police forces, are also exempted. E. Special immunity. Vessels of foreign embassies or consulates or representative offices of international organizations in China or their staff members, are exempted.

- 10) Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution, 2016 (referred to as "PCAP Law")

Article 51

Motor vehicles and vessels, non-road mobile machinery shall not exceed the emission standards for atmospheric pollutants.

The State prohibits the production, import or sale of motor vehicles and vessels, non-road mobile machinery of which the emissions of atmospheric pollutants exceed the stipulated standards.



Article 63

Inland waterway vessels and river-sea vessels should use qualified ordinary diesel, and ocean-going vessels should use the marine fuel oil that satisfy the requirements for emission control of atmospheric pollutants.

Note:

The PCAP Law is formulated to protect and preserve the environment, prevent and control atmospheric pollution, safeguard public health, ensure ecological soundness in construction activities and promote sustainable economic and social development. The PCAP Law does not provide a description of the vessels that will come within its scope of application. From the aspect of environmental protection relating to vessels, it mainly concerns objects that emit pollutants. Its provisions, such as article 51 and 63, indicate that the PCAP Law applies to motor vessels only, regardless of their areas of operation, whether in inland waters, rivers, seas or oceans. Thus, the PCAP Law focuses on the element of propulsion method in prescribing which types of vessels are subject to it.

- 11) The Marine Environment Protection Law of the People's Republic of China (revised in 2016, referred to as "MEPL")

Chapter VI Prevention and Control of Pollution Damage to the Marine Environment by Marine Construction Projects

...

Article 51

Oily waste water and oily mixtures from offshore oil rigs, drilling platforms and oil extraction platforms must be properly treated and reach discharge standards before their discharge into the sea. Residual and waste oil must be recovered and may not be discharged into the sea. In discharging any recovered residual or waste oil that has undergone treatment, the oil content thereof may not exceed the standards laid down by the State.

Article 52 Offshore oil rigs, drilling platforms, oil extraction platforms and their ancillary installations on the sea shall not dispose oil-containing industrial garbage in the sea. The disposal of other industrial garbage must not cause pollution to the marine environment.

...

Chapter VIII Prevention and Control of Pollution Damage to the Marine Environment Caused by Vessels and Their Related Operations

...



Note:

The MEPL is enacted to protect and preserve the marine environment, conserve marine resources, prevent pollution damage, maintain ecological balance, safeguard human health and promote sustainable economic and social development. All enterprises, units and individuals engaged in navigation, exploration, exploitation, production, tourism, scientific research or other operations which might cause pollution to the sea areas under the jurisdiction of China must comply with this Law. The MEPL covers five kinds of activities that might have an impact on marine environment protection, among which, chapter six deals with “Prevention and Control of Pollution Damage to the Marine Environment by Marine Construction Projects”, and chapter eight governs “Prevention and Control of Pollution Damage to the Marine Environment Caused by Vessels and Their Related Operations”. Marine construction projects in chapter six refer to offshore petroleum exploration and exploitation activities. Articles 51 and 52 list most of the installations that might be involved in exploration and exploitation activities, which obviously include offshore oil rigs, drilling platforms and others. By contrast, chapter eight provides no definitions or specifications of the vessels falling within its scope.

There has been long time debate over whether vessels under chapter eight of the MEPL should include mobile offshore oil rigs. The Maritime Safety Administration (MSA) as the body authorized to administer vessel registration in the Chinese ship registry and regulate pollution from vessels, insists that the vessels under chapter eight of the MEPL should be in compliance with the Ship Registration Regulations. Thus, mobile oil rigs registered as vessels under the Ships Registration Regulations fall under the scope of chapter eight. Accordingly, matters arising from pollution caused by mobile oil rigs should come under the supervision of the MSA. However, the State Oceanic Administration (“SOA”) of China, the body authorized to administer pollution matters according to chapter six of the MEPL, holds the view that all oil rigs falling under chapter eight of the MEPL are under the supervisory ambit of the SOA, regardless of their mobile or non-mobile feature.

- 12) Administrative Regulations on the Prevention of Marine Pollution Caused by Vessels, 2010, revised in 2016, issued by the State Council (referred to as “Administrative Regulations”)

Note:

The Administrative Regulations are formulated pursuant to the MEPL with the purpose of preventing and administering marine pollution caused by vessels and the operational activities thereof (see article 1). According to article 2 of the Administrative Regulations, it is applicable to the prevention and administration of marine pollution caused by vessels and their operational activities within waters under the jurisdiction of China. Although there is no definition of “vessel” in these Regulations, it can be gleaned from the purpose of the Regulations and various provisions that any vessel likely to cause marine pollution, including military vessels and fishing vessels are subject to these Regulations (see article 4 and 76).



- 13) Regulations of the People's Republic of China on Seafarers, 2007, revised in 2014, issued by the State Council (referred to as "Seafarers Regulations")

Note:

The Seafarers Regulations apply to the registration, qualification, training and occupational security of seafarers as well as the provision of seafarer services within the territory of the People's Republic of China. There are no prescriptions of vessels as such but it is evident from article 71 that seafarers serving on naval vessels and fishing vessels are not covered by these Regulations. Thus, the element of usage, can be taken as an implied criterion in to prescribe the types of vessels subject to the Regulations.

Apart from the Seafarers Regulations, there are some other regulations in China concerning examination, certification and watchkeeping of seafarers which provide for different descriptions of vessels that come within the respective scope of each of them. For example, the Regulations on Watchkeeping for Seafarers on Seagoing Ships of the People's Republic of China, 2013, issued by the Transport Department of China, looks at the elements of tonnage, purpose and navigation areas to prescribe which vessels fall under its application.¹³ The Regulations on Competency, Examination and Certification for Seafarers on Seagoing Ships of the People's Republic of China, 2013 has similar prescriptions for vessels (article 59).

- 14) Implementation Measures on Compulsory Insurance of Vessels Oil Pollution Damages Civil Liability, 2010, issued by the Transport Department of China (referred to as the "Measures")

Note:

These Measures have been formulated pursuant to the MEPL, the CMC, the Administrative Regulations on the Prevention of Marine Pollution Caused by Vessels, and other statutes, administrative rules, including international treaties that have been accepted by China. Their purpose is to have the risk of oil pollution damage arising from certain kinds of vessels covered by insurance or financial security. Article 2 of the Measures requires the owner of a vessel operating in waters under the jurisdiction of China, to maintain insurance or appropriate financial security to cover its liability for oil pollution damage, if that vessel carries oil as cargo or it is over 1000 gross tonnage even if not carrying oil as cargo. Notably, it is evident from Article 2 that the Measures provide for three elements to prescribe what kinds of vessels fall under its compulsory scope of application. These are navigational area

¹³ Article 2 provides: "[T]hese Provisions shall apply to seafarers serving on board Chinese seagoing ships of 100 gross tonnage and above, excluding the following ships:

1. ships of war;
2. fishing vessels;
3. pleasure yachts not engaged in trade; and
4. wooden ships of primitive build."



of the vessel, the substance carried on board and the tonnage of the vessel. It is presumed that these are the three elements which in combination produce the most serious risk of oil pollution damage to attract the compulsory insurance regime.

Question 2:

In your system, does the definition of ‘vessel’ (or the equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labour, environmental, casualty, insurance or taxation law?

It is not always the case that the word “vessel” or “ship” is conclusively defined. In several instances, the legislation describes or prescribes types of vessels to which the legislation is applicable. That is not exactly “definition” in the precise sense of that term. However, as indicated in the response to the first question, definitions, as well as descriptions and prescriptions of vessels vary in different Laws and Regulations relating to vessels.

Question 3:

Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.

1) Seizure & forced sale of vessels

Yes. In the Chinese legal system, most disputes (except those of a criminal nature) involving vessels fall within the jurisdiction of the maritime courts, instead of the ordinary people’s courts. According to the newly promulgated *Provisions of the Supreme People’s Court on the Case Acceptance Scope of Maritime Courts* (effective as of March 1, 2016), 108 kinds of cases are listed within the case acceptance scope of the maritime courts. Cases regarding seizure and forced sale of vessels are both on the list. In other words, the ordinary people’s courts have no jurisdiction over cases regarding seizure and forced sale of vessels.¹⁴ In this sense, the process of seizure and forced sale of vessels is different from the process involving ordinary properties.

The uniqueness of the process comes from, not only the division of the jurisdiction between maritime courts and ordinary people’s courts, but also the different procedural rules applied by the two court systems. Since vessels are properties with special characteristics, the maritime courts have to apply the Special Maritime Procedure Law of the People’s Republic of China, 2000 (“SMPL”) when dealing with maritime cases involving vessels. The SMPL, in many aspects, has provided for rules different from the Civil Procedural Law of the People’s Republic of China, which is used by ordinary people’s courts when

¹⁴ However, the ordinary people’s courts can assert jurisdiction over vessels that navigate only within inland waters which are not adjacent to the sea.



dealing with disputes concerning properties other than vessels. The process for seizure and forced sale of vessels is indeed a unique one.

2) Foreclosure of vessel

There are no rules of foreclosure, for any kind of property, under Chinese law.

3) Ranking and priority of claims against vessels

Yes. The ranking and priority of claims against vessels are determined according to the relevant provisions of the Maritime Code of China (CMC). Generally, claims secured by maritime liens enjoy the highest priority. Next are claims secured by possessory liens on vessels, such as a ship builder or ship repairer's claims for ship building or repairing. Claims secured by a mortgage come third in ranking. Ordinary claims without security do not have any priority (see article 25 of the CMC).¹⁵ Since maritime liens are recognized as a special property right which can only subsist in respect of vessels, and not any other kinds of property, it is apparent that the above-mentioned ranking rules are unique to vessels.

Question 4:

Has the 1993 Convention on Maritime Liens and Mortgages (“MLM-93”) been adopted or followed in your jurisdiction?

So far, China has not acceded to the MLM-93. But the Maritime Code of China (CMC) has indeed followed some rules set by that convention. For example, the five types of claims that can be secured by maritime liens in the MLM-93 (article 4) are also recognized in the CMC (article 22). However, the priorities of the five claims that can be secured by maritime liens in the CMC (article 23) differ from the priority scheme in the MLM-93 (article 5).

Question 5:

In your jurisdiction is the acceptance by a registrar or other governmental body of property as a “ship” or “vessel” or equivalent term dispositive of its status under your law?

Generally speaking, as shown in the responses to the first question, each Law or Regulation has its own definition, description or prescription of vessels for different purposes. The registrar of vessels has to follow certain rules to decide whether a particular object can be accepted as a vessel. Acceptance by the registrar only matters where issues in relation to the registry are concerned. Outside the ambit of the Registration Regulations, whether the vessel has been accepted by the registrar will not have a dispositive role in determining the status of the vessel.

¹⁵ According to article 118 of the Special Maritime Procedure Law of China, where creditors with different rankings of claims against the same vessel are seeking distribution of the proceeds from auction of the vessel or the limitation fund for maritime claims, negotiation regarding the amount and ranking of repayment is allowed. If the creditors fail to reach an agreement after negotiation, the maritime court shall, according to the ranking of claims provided in the CMC and other related laws, decide on the plan for distribution.



To be more specific, almost all vessels owned or demised chartered by Chinese citizens or Chinese enterprises are subject to registration according to the Ships Registration Regulation and the newly issued Ships Registration Measures.¹⁶ The registration will accord both a public law as well as a private law function on vessels. From the aspect of public law, a vessel without entry into the registry is not permitted to fly the Chinese flag would not be allowed to engage in certain activities. In this sense, a vessel without registration will also be subject to penal sanctions in the same manner as a legally registered vessel when it is in violation of public law. From the aspect of private law, certain property rights on vessels cannot have complete effect if it is not registered.¹⁷ If a vessel is not accepted by the registrar which means that the vessel is not recognized under public law, it will not be possible for the holder of certain property rights on that vessel to have its rights being fully recognized under private law either. Thus, in this sense the acceptance of a vessel for registration by the registrar will have a decisive effect on the determination of its status under private law.¹⁸

Question 6:

If property is categorized as a ‘vessel’ in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?

- 1) The first question raises an issue of procedural law. Procedures such as the arrest of ships are provided for in the SMPL (Special Maritime Procedure Law of China) which govern all maritime procedures in China. The Chinese maritime courts will definitely have jurisdiction over a case involving a foreign vessel, where the case is within the scope of the Provisions of the Supreme People’s Court on the Case Acceptance Scope of Maritime Courts, regardless of whether the foreign vessel can be recognized as a “vessel” under Chinese law. Once the jurisdiction is established, the Chinese maritime courts can apply the SMPL, which includes the rules relating to the arrest of ships, to adjudicate on the case. Therefore, the question whether a foreign vessel is recognized as a vessel under Chinese law will not affect the application of procedural rules by Chinese maritime courts.¹⁹

¹⁶ See article 2 & 56 of the Ships Registration Regulations. See also article 3 of the Ships Registration Measures.

¹⁷ Such as the ownership and mortgage on vessels. According to article 9 & 13 of the CMC, the ship’s ownership and mortgage shall not act against a third party unless it is registered.

¹⁸ See also the cases cited in the response to question 7: *Yu Linrong v. Cai Rongrong & Xie Xiaobin*, (2014) Zhe Hai Zhong Zi No. 106; *China Shipping Industry Co., Ltd. v. China Pacific Property Insurance Co.*, (2011) Hu Hai Fa Shang Chu Zi No. 1308.

¹⁹ The SMPL as procedural law is intended to govern all sea-going vessels. According to article 3 of the *Interpretations of the Supreme People’s Court on Several Issues concerning the Application of the SMPL* (Fa Shi (2003) No. 3), sea-going vessels in article 6 of the SMPL shall be referred to as any vessels that can navigate at sea or in waters adjacent to the sea. Thus, where the foreign vessel is able to navigate at sea, the condition to apply the SMPL can be easily satisfied.



- 2) The second question is more related to substantive law or how to find the applicable substantive law. If the subject, is a vessel for the purpose of the CMC, the Chinese court will apply provisions in chapter fourteen of the CMC and look at, e.g. the law of the flag state of the vessel where the mortgage is concerned, to determine whether such claim could be enforced.²⁰ If the subject is not a vessel for the purposes of the CMC, but is an ordinary property under Chinese law, the court will apply the *Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations* to find the appropriate applicable law, and then decide whether the asserted claims can be enforced.

Question 7:

Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property?

- 1) *non-self propelled barges* –
- 2) *self-propelled barges* –
- 3) *accommodation barges* –
- 4) *mobile offshore drilling units* –
- 5) *wind turbine towers (floating or permanently fixed)* –
- 6) *jack up drill rigs* –
- 7) *construction barges* –
- 8) *submarines* –
- 9) *seaplanes* –
- 10) *hydroplanes (air cushion)* –
- 11) *vessels under construction* –
- 12) *unmanned vessels* –
- 13) *vessels devoted temporarily or permanently to storage of bulk commodities* –
- 14) *vessels in “cold layup”* –
- 15) *derelict Vessels or “dead ship”* –
- 16) *vessels under conversion or renovation* –

- 1) *Non-self-propelled barges* & 3) *Accommodation barges*

- *Yu Linrong v. Cai Rongrong & Xie Xiaobin*
- (2014) Zhe Hai Zhong Zi No. 106
- Disputes arising under vessel lease contracts

The vessel involved in this case was a dummy barge co-owned by Ms. Cai Rongrong and Mr. Xie Xiaobin. When the co-owners chartered the barge to Mr. Yu Linrong who intended to use the barge as business premises, the barge had not completed its outfitting yet and

²⁰ See article 271 of the CMC, which is under chapter fourteen with the title “application of law in relation to foreign-related matters”.



therefore neither the ship survey²¹ nor the ship registration²² could be done. After delivery of the barge according to the lease contract, the charterer fitted the barge with necessary equipment and decorations, which made the barge able to pass the compulsory survey and obtain its “survey certificate for inland-water ship”. The survey certificate specified the type of the barge as “dummy barge for recreational purpose (cinema), no propeller”. With the survey certificate, the co-owners finished the registration of ownership. The barge was indeed partly used as a cinema and partly as a restaurant.

In dealing with the disputes between the co-owners and charterers in relation to the payment of hire and the condition of the barge at the time of redelivery, the courts hearing this case considered the issue of jurisdiction and the application of law, which was connected with the legal status of the dummy barge.

The co-owners started their claims against the charterer at a local people’s court, which is a court with general jurisdiction. When the case was appealed to the higher people’s court, it was held by the appellate court that the trial court had no jurisdiction on this case since the lease contract between the co-owners and the charterer involving the use of the dummy barge was indeed a bareboat charterparty for the purpose of article 144 of the CMC. Any disputes arising under such a charterparty shall fall under the exclusive jurisdiction of maritime courts, not within the jurisdiction of general people’s courts. The appellate court thus ordered to vacate the judgment rendered by the trial court and remand the case to the trial court for reconsideration.²³ The trial court upon receipt of the order issued by the appellate court, transferred this case to the Ningbo Maritime Court for a new trial. It was held by the Ningbo Maritime Court in the new trial that the vessel in this case was an inland - water - recreation - dummy barge, which was not a ship for the purposes of article 3 of the CMC, and therefore, the governing law of the case was not the CMC, but the Contract Law of China.²⁴ On appeal, part of the judgment rendered by the Ningbo Maritime Court was amended by the Higher People’s Court of Zhejiang Province ((2014) Zhe Hai Zhong Zi No. 106), but the decision of the Ningbo Maritime Court regarding the legal status of the barge and the governing law was untouched.

Obviously, it is noted that the maritime court and its higher court in this case looked at the survey certificate and registration certificate to determine the legal status of the non-self-propelled barge.

²¹ Subject to the *Regulations of the People’s Republic of China Governing Survey of Ships and Offshore Installations, 1993* (the SOIS Regulations). Introduction of the SOIS Regulations is provided in 6) of the response to Question 1.

²² Subject to the *Regulations of China Governing the Registration of Ships 1995* (the Ships Registration Regulations” or “SRR”). Introduction of the Ships Regulations is provided in 5) of the response to Question 1.

²³ See the order of the Wenzhou Intermediate People’s Court of Zhejiang Province, (2014) Zhe Wen Shang Zhong Zi No. 346. The dummy barge was regarded as a sea-going ship in the order, which called for the jurisdiction of maritime courts according to article 1 of the *Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Special Maritime Procedure Law of the People’s Republic of China”* (Fa Shi [2003] No. 3) and the *Provisions of the Supreme People’s Court on the Case Acceptance Scope of Maritime Courts*.

²⁴ See the judgment of the Ningbo Maritime Court, (2014) Yong Hai Fa Wen Shang Chu Zi No.15.



11) *Vessels under construction*

- *China Shipping Industry Co., Ltd. v. China Pacific Property Insurance Co.*
- (2011) Hu Hai Fa Shang Chu Zi No. 1308
- Disputes arising under marine insurance contracts

In this case, M/V *An Minshan*, a vessel under its trial navigation, collided with another vessel, and then collided with the quay and shore equipment. The Shanghai Maritime Court was asked to consider whether the owner or the shipbuilder of M/V *An Minshan* was entitled to limit its liability for damage arising from the collisions. It was held by the Court that M/V *An Minshan* was a vessel under construction, which had not been recognized as a vessel by the ship registrar since the conditions for ship registration had not been satisfied. Thus, the vessel was not within the scope of article 3 of the CMC, and its owner or shipbuilder was not the shipowner or ship operator for the purposes of chapter 11 of the CMC.²⁵ The Court declined the petition of M/V *An Minshan* for limitation of liability, *inter alia*, because the damage caused in this case was not related to the operation of the vessel, that is, the M/V *An Minshan* was under trials which was not for the purpose of operation. Finally, since the vessel in this case had not completed the registration formalities and was only a vessel under construction, the owner of such an incomplete vessel was not entitled to the right of limitation given by the CMC. Legal rights vested in a “vessel” by a substantive law might not be recognized unless the vessel has completed its registration.

Question 8:

Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.

- 1) For conventions that regulate traditional/ordinary areas of maritime law, particularly carriage of goods and passengers:

Among the conventions mentioned in this area, the Athens Convention 1974 and its protocol 1976 is the only one that has been accepted by China. Thus, within the scope of application of the Athens Convention, the notion of vessels under Chinese law is understood to be in line with the convention. As to the Hague Rules, 1924 and the LLMC Convention, 1976, part, if not most, of their provisions have been absorbed by the CMC, and the common definition of “vessels” under different chapters of the CMC, as shown in the response to the first question, is “sea-going vessels” which focuses on the element of the capability to navigate. Although, the definition of vessels in the Ships Registration Regulations is different from that in UN Convention on Conditions for Registration of

²⁵ Chapter 11 of the CMC, which was drafted on the basis of the 1976 LLMC Convention, has provided that shipowners and ship operators are parties who are entitled to limit their liability.



Ships, Geneva, 1986, the common denominator of the two definitions of “vessel”, namely, navigational capability, can be found either expressly or by implication.

- 2) For conventions that regulate a particular area, especially pollution:

In the field of oil pollution, China is a party to the *International Convention on Civil Liability for Oil Pollution Damage, 1992*, which gives great importance to oil as a pollutant. According to the *Implementation Measures on Compulsory Insurance of Vessels Oil Pollution Damages Civil Liability of China, 2010*, definition of “vessel” under the Measures also centers on oil as the substance carried on board.

- 3) For conventions that regulate specific objective/single purpose conventions:

China has accepted both the Salvage Convention, 1989 and the COLREGS, 1972. In the area of salvage and collision, the definition of “vessel” under Chinese law is in line with the two conventions.

Question 9:

Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of “vessel”, “ship” or equivalent term have impacted results in any legal proceedings of which you are aware? If so, please provide details.

No.

Note to responders: If you find that these questions do not invite easy or straightforward answers in the context of your legal system, please explain why and provide what information and descriptions you may believe useful to the IWG in its effort to determine the scope of the definitional issues.

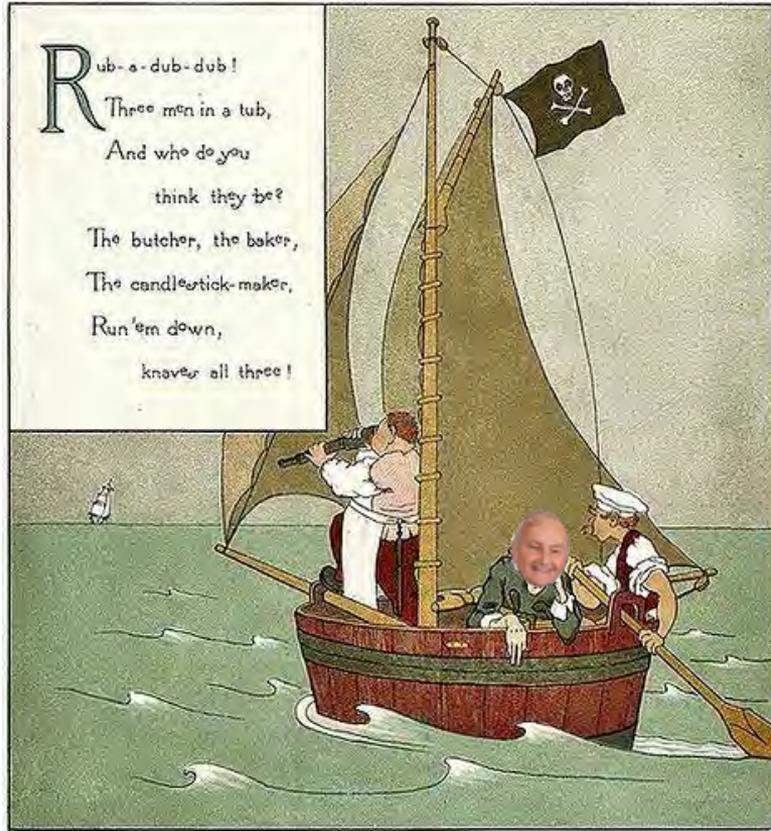


The Evolution of “Vessel” Status in U.S. Domestic and International Law

Francis X Nolan, III.

Tulane Admiralty Law Institute, March 10, 2020

Three Men in a Tub



- “No doubt the three men in a tub would also fit within our definition [of vessel], and one probably could make a convincing case for Jonah inside the whale.” *Lozman*, 649 F.3d, at 1269, quoting *Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (C.A.5 1982).
- “But the Eleventh Circuit’s interpretation is too broad. Not every floating structure is a “vessel.” To state the obvious, a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not “vessels,” even if they are “artificial contrivance[s]” capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so. Rather, the statute applies to an “artificial contrivance ... capable of being used ... as a means of transportation on water.” 1 U.S.C. § 3 (emphasis added). “[T]ransportation” involves the “conveyance (of things or persons) from one place to another.” ... and we must apply this definition in a “practical,” not a “theoretical,” way.” *Caldwell v. St James Gaming Co. d/b/a Ilse of Capri Casino – Lake Charles*, 19-1238 (La. 1/29/20)
- “After all, a washtub is normally not a “vessel” though it does not have water transportation as its primary purpose, it may be stationary much of the time, and it might be attached—but not permanently attached—to land.” *Id.* at 12.



Grain-Boat on the Erie Canal.

Grain-Boat on the Erie Canal -- from: America Illustrated / edited by J. David Williams. (Boston : DeWolfe, Fisk & Co., c1883) -- p. 88. Retrieved at: <https://www.eriecanal.org/boats-2.html>

Log “V” Rafts (vessels)

See, e.g., the *Mary*, (S.D. Alabama, June 10., 1903)



Log Raft, Columbia River, Oregon.

Retrieved at: <https://www.thevintagenews.com/2016/11/13/the-mighty-log-rafts-of-the-old-new-world-tough-work-tough-men/>

- Holding: “A log raft is a vessel, and entitled to the same rights in navigable streams as other vessels”
- Specifications: “...800 feet long, 75 feet wide at its widest part, and to contain about 1,400 logs. It was what was described and known by the mill and raftmen (a number of whom testified in the case) as a “V raft.” It was constructed by placing 6 or 7 logs at each end of the raft, and fastening them together with wooden binders and pins, which binders extended to the boom logs on the outside of the 6 or 7 logs mentioned, and were made fast to them....inclosed in these boom logs were loose logs, put in fore and aft. There were several ropes fastened at different places across the raft to the boom logs on the outside. The raft widened from each end to the center. On each end was a “sweep,” in the nature of an oar, **which was used for steering and managing the raft in its navigation...**in the then stage of the water, and under ordinary conditions, **two men were sufficient to navigate and manage such a raft.**” (emphasis supplied) *The Mary* at 609.

Sack Rafts (not vessels)

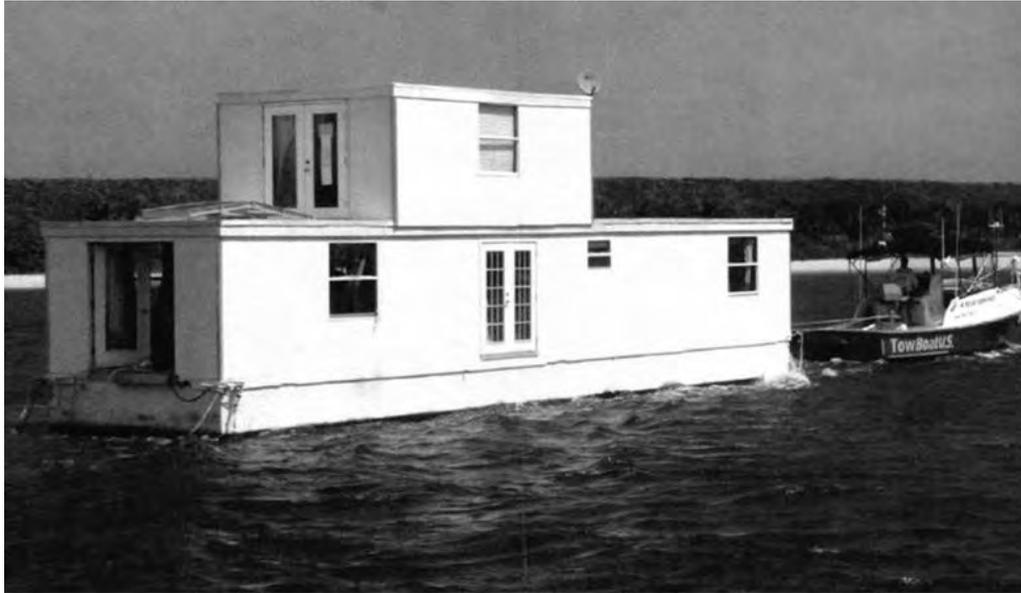
See *The Mary*; see also, e.g. *U.S. v. Kennebec Log Driving Co.*, 491 Fed 2d (1st cir 1973)



Logs in boom. Attribution: Patten Lumbermen's Museum. Retrieved at: <https://www.mainmemory.net/artifact/8348>

- Holding: Not vessels.
- Specifications: “round, or nearly so, in shape, the outside or boom logs fastened together at their ends with chains or ropes in a loose manner, with considerable slack. Inclosed in these boom logs are loose logs, put in without regard to position or order, with no binders of any sort, **no propelling or steering power, and no arrangement or facilities for carrying men on them.** They are usually towed by a steam vessel. When the tow line is made fast, and the towboat begins to pull on it, the raft becomes more or less elongated, and takes somewhat 'the shape of a sack or bag. If left to float with the current, they drift with a rotary motion-as described by the witness, "**go around and around,**" with **no definite or direct course,** and are dangerous to navigation.”(Emphasis supplied) *The Mary* at 611.

Lozman v. City of Riviera Beach, 586 U.S. 115 (2013)



Attribution: Reuters/Landov (undated photo from court documents). Retrieved at <https://www.npr.org/2013/01/15/169452244/supreme-court-rules-that-houseboats-are-houses-not-boats>

- Holding: Not a vessel.
- Rule: vessel status is determined based upon whether “a reasonable observer, looking to the [object]’s physical characteristics and activities, would ... consider it to be designed to any practical degree for carrying people or things on water”
- Specifications: No rudder; No steering mechanism; Unraked hull; Rectangular bottom 10” below water; No ability to generate or store electricity; “small rooms looked like ordinary nonmaritime living quarters”; “And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows;”
- Conclusion: “a reasonable observer, looking to [Lozman’s] home’s physical characteristics and activities, would not consider it to be *designed* to any practical degree for carrying people or things on waters” (emphasis supplied) Lozman at 116.

Casino Ship *M/V Crown Casino*.

See *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006)

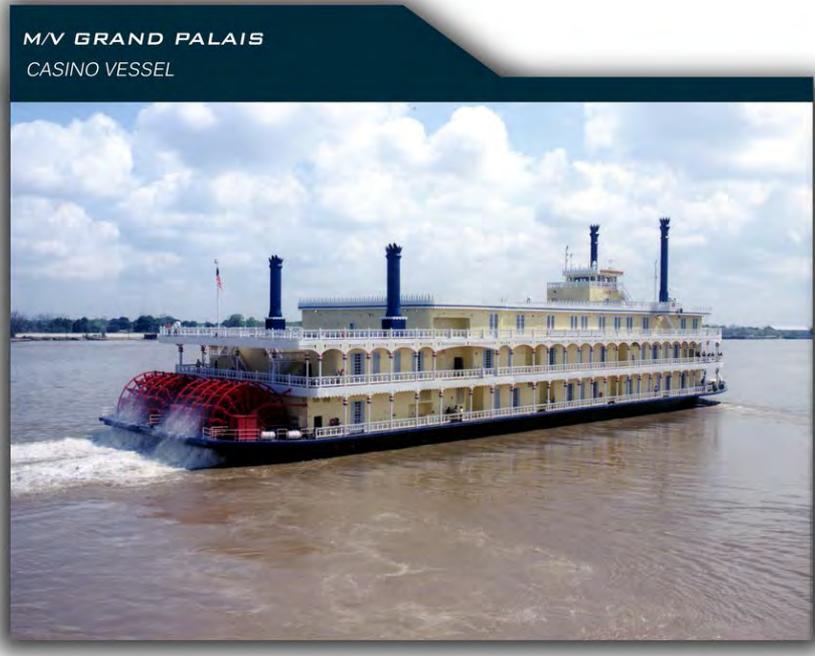


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- Holding: “Structure not a vessel where ‘physically,’ but only theoretical[ly] capable of sailing, and owner intends to moor it indefinitely as a floating casino.”
- Reasoning: “the Crown Casino is indefinitely moored to the land by lines tied to steel pilings. It receives water, telephone lines, sewer lines, cable television and ate processing lines from land-based sources. It has not been used as a seagoing vessel since March 28, 2001, when it was moored at its present location on Lake Charles, and the Defendants do not intend to use it as such.”

Casino Ship *M/V Grand Palais*.

See *Caldwell v. St James Gaming Co. d/b/a Ilse of Capri Casino – Lake Charles, 19-1238* (La. 1/29/20)



Attribution: Guido Perla & Associates. Retrieved at: <http://www.gpai.com/grand-palais>

- Holding: *M/V Grand Palais* is not a vessel.
- Specifications:
 - 109-meter sternwheel casino vessel built by Bender Shipbuilding and Repair Co. in 1995.
 - Capable of carrying 2,000 passengers and 500 crew members
 - Equipped with a diesel-electric propulsion system consisting of six 1,090 kW main generators
 - Moored in the same location for >14 years and physically integrated into adjacent land based pavilion and hotel, with all operations required for gaming activities serviced via land based utility lines.
- Reasoning:
 - “although the Grand Palais was originally designed to transport people over water, and theoretically is capable of navigation, **as a result of the changes to its physical characteristics, purpose, and function** spanning nearly a decade and a half, it is no longer a vessel used in maritime transportation.”

Floating Production Facility *ATP Titan*.

See *Warrior Energy Servs. Corp. v. ATP Titan*, 941 F. Supp 2d 699 (E.D. LA 2013)



Attribution: Offshore Technology. Retrieved at: <https://www.offshore-technology.com/projects/telemarkhub/>

- Holding: ATP Titan is not a vessel.
- Specifications: floating production platform that was designed to be wet-towed to the site, secured to the seabed under 4,000 feet of water, “by twelve moorings, each of which weighs over 170 tons” and “is embedded 205 feet into the seafloor”

Spar *Red Hawk*.

See *Mendez v. Anardarko Petroleum Corporation*, 466 Fed. Appx. 316 (5th Cir. 2012)



Attribution: Offshore Technologies. Retrieved at: <https://www.offshore-technology.com/projects/red-hawk/>

- Holding: *Red Hawk* spar not a vessel in navigation.
- Specifications:
 - Floating gas production platform anchored in the same location since 2004
 - Attached to seabed with mooring lines and export pipelines used to transport oil and gas to shore based facilities
 - Classified by USCG as an industrial vessel, but not permitted to carry passengers.
- Reasoning:
 - “Some of the spar’s features, including “tow bollards,” and the shape of its hull, could facilitate movement from one offshore location to another, but the work and expense needed to unmoor it, prepare it for transportation, and to reattach it to a new location, make that difficult and expensive. As a result, the spar was designed to remain permanently moored to the seabed and stationary for the life of the oil and gas production field.” *Mendez* at 317.

Floating Clubhouse *The Honorable William Wall*. See *Armstrong v. Manhattan Yacht Club, Inc.*, [2013 U.S. Dist]



Attribution: Manhattan Yacht Club. Retrieved at: <https://myc.org/clubhouse/honorablewilliamwall/>

- Holding: not a vessel.
- Specifications: Two story floating platform moored in marina in Manhattan with two forty foot steel spuds secured to the seabed as well as a four point anchoring system, moved for six months a year to sheltered part of harbor with assistance of a crane barge, where it functions as a floating clubhouse for a sailing club. No engine, but no use of shore facilities. Designed by Sparkman & Stephens (Naval Architects).

Floating Drydocks (sometimes vessels, sometimes not...)

See, e.g. *Fireman's Fund Inc., Co. v. Great Am. Ins. Co. of N.Y.*, 2013 U.S. Dist. LEXIS 11114; *Commercial Union Ins. Co. v. Detyens Shipyard, Inc.*, 147 F.Supp.2d 413 (2001)



Pic 1: Attribution: Detyens Shipyards. Retrieved at: <https://www.marinelink.com/news/floating-drydock-detyens402221>

Pic 2: USS West Virginia in floating drydock ABSD 1 off Aessi Island 13 November 1944. Retrieved at: https://www.worldwarphotos.info/gallery/usa/us-navy/west_virginia/in-floating-drydock-absd-1-off-aessi-island-13-november-1944/

- "When a floating drydock is moored and in use as a drydock, courts have consistently found that the drydock is not a 'vessel.'"...however, when the dry dock is being transported from one location to another, the drydock may then be deemed a vessel." *Detyens* at 418.
- *Fireman's Fund*
 - Holding: insurance policy on a floating drydock was not a marine policy, as drydock was not a vessel.
 - Specifications:
 - "consisted of eight 240' x 101' x 23.5 pontoons, each complete with one fixed wing wall and one removable wing wall moored together . . ."
 - Towed across the Pacific during word War II and returned by tow to Texas in 1984.
 - Expert engineering witness testified that drydock "had ship-shaped hulls, indicating that the Drydock was built to travel long distances over the water," and that the "pontoons also contained crews' quarter."
 - "in the years leading up to its destruction, more or less permanently moored in one place." *Id.* at 15.

Tension-Leg Offshore Oil Platform *Big Foot*. See *Baker v. Dir. OWCP*, 834 F. 3d 542 (2016)



Attribution: Corpus Christi Business News. Retrieved at: <https://www.ccbiznews.com/3352>

- Holding: floating tension-leg oil platform not a vessel.
- Reasoning:
 - “Although Big Foot can float, it is not capable of self-propulsion, has no steering mechanism, does not have a raked bow, and has no thrusters for positioning once on location. Once completed, Big Foot was scheduled to be towed to a location approximately two hundred miles off the Coast of Louisiana and anchored to the sea floor by over sixteen miles of tendons.
 - “While required to carry a captain and crew when towed, the crew will only be present to ensure Big Foot’s transport to its permanent location on the OCS. And unlike the *Super Scoop*, Big Foot will not be used to transport equipment and workers over water in the course of its regular use.
 - “Big Foot will not transport objects from place to place, and is intended to remain anchored to the floor of the OCS for twenty years.
 - “The fact that Big Foot will transport a crew and material to the OCS is likewise incidental to its purpose of serving as an oil field work platform.