

## *Is It a Vessel, a Ship or a Boat, Is It Just a Craft, Or Is It Merely a Contrivance?*

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### I INTRODUCTION

Over the centuries, legislators have struggled to define the terms ‘ship’ and ‘vessel,’ and such definitions have been further beset by interpretational problems. The emergence of new commercial craft, including autonomous vessels and floating storage regasification units, as well as the development of innovative ‘contrivances’ such as amphibious cars, amphibious planes, submersible aircraft, autonomous underwater vehicles, and inflatable banana rafts,<sup>1</sup> has plagued maritime law. This problem must be seen in the context of an admiralty law system which for a substantial period of time was in the midst of a struggle taking place between the Courts of Common Law and the Court of Admiralty.<sup>2</sup> Furthermore, in those instances where statutory definitions are provided, different laws frequently provide definitions which are, in varying degrees, differently worded.

The least problematic definition of ‘vessel’ is probably the one contained in arguably the most important regulatory legislation in maritime law, i.e. the International Regulations for Preventing Collisions at Sea, 1972, otherwise known as COLREGS, Rule

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<sup>1</sup>See *McEwan v. Bingham* [2000] CLY 49.

<sup>2</sup>Roscoe E. S., *A TREATISE OF THE JURISDICTION AND PRACTICE OF THE ADMIRALTY DIVISION OF THE HIGH COURT OF JUSTICE*, 1 (2d Edition, Stevens and Sons, London, 1882).

3(a) of which provides that: “the word ‘vessel’ includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used a means of transportation on water.” The use of the terms ‘includes,’<sup>3</sup> ‘watercraft,’ as well as ‘capable of being used’ in this definition ensures that the judiciary are unlikely to be stifled if they are minded to apply a purposive interpretation to the legislation; similarly the International Convention On Liability And Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances By Sea (HNS 1996) utilises the term ‘any type whatsoever’ in its definition of ‘ship’ as meaning ‘any seagoing vessel and seaborne craft, of any type whatsoever,’<sup>4</sup> although ‘seagoing’ can be substantially restrictive as will be discussed below. The Wreck Removal Convention 2007 also utilises the ‘seagoing’ restriction and makes specific reference to the inclusion of aircushion vehicles and submersibles:

“Ship” 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.<sup>5</sup>

At the other end of the spectrum, one can refer to the definition in the International Convention on Civil Liability for Oil Pollution Damage 1969,<sup>6</sup> which was only intended to apply vis a vis a specific type of ‘ship,’ i.e. one actually employed in the carriage in bulk of persistent oil as cargo; hence, ‘ship’ is defined in Article 1(1) as meaning ‘any seagoing vessel and any sea-borne craft of any type whatsoever, actually carrying oil in bulk as cargo.’ This restricted definition has now been largely superseded by the more detailed upgrade contained in the consolidated text of

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<sup>3</sup>See *Ex p Ferguson* (1871) LR QB 280, at 291.

<sup>4</sup>HNS 1996, Article 1(1).

<sup>5</sup>*Loc.cit.*, Article 2 (See Schedule 11ZA of the Merchant Shipping Act 1995).

<sup>6</sup>CLC 1969. The same definition applies to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

the International Convention on Civil Liability for Oil Pollution Damage 1992,<sup>7</sup> which will be discussed in further detail below. Another specifically restricted definition is that contained in the Maritime Labour Convention (MLC) 2006 which defines a ‘ship’ simply by excluding one ‘which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply’; in a further exercise of delimiting application, Article II (4) of MLC 2006 provides that ‘except as expressly provided otherwise, this Convention applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. This Convention does not apply to warships or naval auxiliaries.’

When a statute imposes liability on the owner of a vessel, an issue may well arise as to ownership of a vessel which has been abandoned *sine spe recuperandi* or otherwise. There is a risk that some jurisdictions may well treat that vessel as *res nullius*, thereby depriving a victim of a remedy as the vessel has arguably no ownership. The appropriately cautious solution adopted by the United States Federal Oil Pollution Act of 1990<sup>8</sup> is to extend the definition of ‘responsible person’ to include ‘the persons who would have been responsible parties immediately prior to the abandonment of the vessel.’<sup>9</sup>

## II THE MERCHANT SHIPPING ACT 1995

The current definition of ‘ship’ in Section 313 of the English Merchant Shipping Act 1995<sup>10</sup> is a problematic one which can trace its origin to preceding and now largely defunct Merchant

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<sup>7</sup>CLC 1992.

<sup>8</sup>Public Law 101–380 (H.R. 1465), 18th August 1990.

<sup>9</sup>OPA 1990, s. 1001 (32)(F). See, further, Gauci G., *The Abandonment of an Oil Tanker: Compensation and Insurance Implications*, J. BUS. L., 105–17 (March 1995).

<sup>10</sup>1995 Chapter 21.

Shipping statutes. The current statute defines a 'ship' without defining a vessel<sup>11</sup> and states that "'ship' includes every description of vessel used in navigation".<sup>12</sup> The preceding corresponding definition can be found in legislation enacted a century earlier in section 742 of the Merchant Shipping Act 1894, which provided a circular<sup>13</sup> definition of a 'vessel' and a ship: "'vessel' includes any ship or boat or other description of vessel used in navigation; 'ship' includes every description of vessel used in navigation not propelled by oars."<sup>14</sup> Under this provision a 'boat' with oars could be included under the term 'vessel' but, subject to the decision in *Ex p Ferguson*<sup>15</sup> would be excluded as a 'ship.' The 1894 Act does not provide a definition of a 'boat.' Whereas part of the definitional problem, i.e. the requirement of not being propelled by oars,<sup>16</sup> was altered by a pre-consolidation amendment,<sup>17</sup> the current definitional reliance of 'used in navigation' has been beset by problems which the English judiciary in particular have struggled to handle. Courts have at times tended to examine whether the craft in question was actually being used in navigation during the operation giving rise to litigation. This process may well be achieved not merely by assessing the operation of the craft but also by assessing the susceptibility of the actual waters to being navigated. The case of

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<sup>11</sup>A 'vessel' is defined, however, for the purposes of Part IX (Salvage and Wreck) of the Merchant Shipping Act 1995 in section 255(1) as 'including any 'ship or boat, or any other description of vessel used in navigation.' This provision utilises the same wording used in the definition of 'vessel' in section 742 of the Merchant Shipping Act 1894.

<sup>12</sup>An almost identical definition is utilised in the Civil Procedure Rules Part 61 (Admiralty Claims) where 'ship' is defined as including 'any vessel used in navigation' [§61.1.2(k)].

<sup>13</sup>Mandaraka-Sheppard, A., *MODERN MARITIME LAW*, 14 (2d Ed., Routledge, London, 2007).

<sup>14</sup>Similarly, the 1854 Merchant Shipping Act provided that: "ship shall include every description of vessel used in navigation, not propelled by oars."

<sup>15</sup>(1871) LR 6 QB 280.

<sup>16</sup>See *Ex p Ferguson* (1871) LR 6 QB 280.

<sup>17</sup>See the Merchant Shipping (Registration etc.) Act 1993, Schedule 4, paragraph 2(1)(a).

*Curtis v. Wild*<sup>18</sup> is an illustration of this process related to the time-bar defence under section 8 of the Maritime Conventions Act 1911,<sup>19</sup> which necessitated the use of the definition of ‘vessel’ under section 742 of the Merchant Shipping Act 1894. The craft in this case was a so-called ‘lark dinghy’ being used on a reservoir (Belmont reservoir) with a width of less than one half of a nautical mile. In the penultimate paragraph of the judgment, the judge makes quite clear his reliance on his view that the waters of the reservoir in question were ‘not waters which can be navigated within the sense used by authorities.’ A lark dinghy, it seems, can be a craft ‘used in navigation’ but never on Belmont reservoir. A similar decision had been reached in relation to an electric launch on an inland lake in *Southport Corporation v. Morriss*.<sup>20</sup> On the other hand, in *Weeks v. Ross*,<sup>21</sup> a river is treated differently from a reservoir and Judge Bray was of the opinion in that case that: ‘a river is a place for navigation and a canal is a place for navigation, and they are none the less places for navigation because as it happens this vessel only used a portion of them.’<sup>22</sup> Lord Coleridge in the same case similarly was of the view that ‘if ships coming to and from the sea were clearly navigating these waters, the fact that these particular vessels in question did not proceed to sea does not prevent these waters being navigated by them as they would be by ships going to and from the sea.’<sup>23</sup>

The judge in *Curtis v. Wild* also used the familiar reasoning used by Judge Schofield in the well-known case of *Steedman v. Scofield*,<sup>24</sup> to the effect that movement on water does not constitute navigation, i.e. “there was no evidence . . . that there was any navigation in the sense of proceeding from an originating place A to a terminus B for the purpose of discharging people or cargo at the destination point.”<sup>25</sup> This approach led the court of

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<sup>18</sup>[1991] 4 All ER 172, Henry J, QBD Manchester.

<sup>19</sup>See now section 190 of the Merchant Shipping Act 1995.

<sup>20</sup>[1893] 1 QB 359.

<sup>21</sup>[1913] 2 KB 229.

<sup>22</sup>*Id.*, at 234.

<sup>23</sup>*Id.*, at 235.

<sup>24</sup>[1992] 2 Lloyd’s Rep. 163.

<sup>25</sup>(1991) 4 All ER 172 at 176.

first instance in *Steedman v. Scofield* to exclude the applicability of the two year time-bar to an incident involving a jet-ski. In that case the jet-ski was being used for fun as distinct from strict conventional navigation. The second reason was that the jet-ski was, unlike traditional watercraft, not hollow structured. The same approach was adopted by the Criminal Court of Appeal in *R. v. Goodwin*,<sup>26</sup> in the application of the definition of 'vessel' in section 313 of the Merchant Shipping Act 1995 to section 58 of the same statute. Paragraph 33 of the judgment in this case by the Criminal Court of Appeal goes seemingly further in excluding jet-skis from the definition of 'vessel' irrespective of the actual use:

The words 'used in navigation' exclude from the definition of 'ship or vessel' craft that are simply used for having fun on water without the object of going anywhere, into which jet-skis plainly fall.

One cannot but help remarking that it is a well-known fact, at least in maritime circles, that jet-skis are 'capable of navigation,' particularly when used by military and law-enforcement authorities, in which case the purpose of the use is undoubtedly navigation and navigation related, and the element of 'fun' is excluded. However the statute does not refer to 'capability of navigation,' it is only 'use' which is referred to, and to this extent *R v. Goodwin* is correctly decided. For the purposes of the term 'ship' as used in the Athens Convention, in *The Sea Eagle*,<sup>27</sup> the Admiralty Registrar was of the opinion that 'used in navigation' means 'capable of being used in navigation whether or not she is actually being used in navigation at the relevant time.'<sup>28</sup> This would, according to the Admiralty Registrar, include navy ships like HMS Victory which were used once in navigation and at the relevant time moored and utilised as restaurants/livery halls.<sup>29</sup> The Admiralty Registrar in the same paragraph seems to suggest that jet-skis would never be considered as vessels 'as they were

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<sup>26</sup>[2005] EWCA Crim 3184.

<sup>27</sup>[2012] 2 Lloyds Rep. 37.

<sup>28</sup>*Id.*, at paragraph 28.

<sup>29</sup>*Ibid.*

designed or intended for “messing about” on the water.’ Potential future use seems to be a matter which is not relevant. On the other hand, past use is relevant.<sup>30</sup>

Even if a legal definition of ‘vessel’ were to utilise the wide terminology ‘contrivance capable of being used in navigation,’ a court is unlikely to adopt an ‘anything which floats’ approach. In a United States Supreme Court judgment *Lozman v. City of Riviera Beach, Florida*,<sup>31</sup> the litigation related as to whether or not a floating home, which was not self-propelled, should be considered to fall within the terms of the definition of vessel in terms of 1 U.S.C. §3 which defined a ‘vessel’ as including ‘every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.’ Lozman’s artificial contrivance was described by Judge Breyer in the following words:

But for the fact that it floats, nothing about Lozman’s home suggests that it was designed to any practical degree to transport persons or things over water. It had no rudder or other steering mechanism . . . Its hull was unraked, and it had a rectangular bottom 10 inches below the water. It had no special capacity to generate or store electricity but could obtain that utility only through ongoing connection with the land . . . Its small rooms looked like ordinary non-maritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows . . . . Lozman’s home was able to travel over water only by being towed. Prior to its arrest, that home’s travel by tow over water took place on only four occasions over a period of seven years . . . . And when the home was towed a significant distance in 2006, the towing company had a second boat follow behind to prevent the home from swinging dangerously from side to side . . . . The home has no feature that might suggest a design to transport over water anything other than its own furnishings and

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<sup>30</sup>See, *The Sea Eagle*, [2012] 2 Lloyd’s Rep. 37 at paragraph 19, where the judgment of Lord Gorell in the case *St John Pilot Commissioners v. Cumberland Railway and Coal*, [1910] AC 208 is referred to.

<sup>31</sup>*Lozman v. City of Riviera Beach, Florida*, 568 U.S. \_\_\_\_ (2013) (majority decision).

related personal effects. In a word, we can find nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for ‘transportation on water.’

Judge Breyer took a practical rather than a theoretical approach:

. . . in our view a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking into the home’s characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

It is probable that a similar approach would be adopted in the application of the slightly different wording of section 313<sup>32</sup> of the British Merchant Shipping Act 1995 to a floating home. One may also note that the ‘anything which floats’ approach was not applied in the recent judgment in the case *The Environment Agency v. Gibbs*.<sup>33</sup> The dispute related to the definition of ‘vessel’ in Article 2 of the Inland Waterways Order which defined ‘vessel’ as including ‘every description of vessel with or without means of propulsion of any kind and includes anything constructed or used to carry persons, goods, plant or machinery, or to be propelled or moved, on, in or by water.’ The contrivances alleged to be ‘vessels’ were houseboats; a detailed description of the assembly prior to placing into water is provided in paragraph 14<sup>34</sup> of the law report. After towage to their allocated place in the marina, these contrivances were held in place via a system of embedded poles together with chains and anchors. The houseboats were then connected to the water, sewage and electricity systems. It was held that these houseboats did not constitute ‘vessels.’ In particular Holroyde J. stated that:

To my mind, the word ‘vessel’ in its ordinary use means a ship, boat or craft designed or used to carry persons and/or goods across

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<sup>32</sup>Supra, text at fn. 12.

<sup>33</sup>[2016] 2 Lloyd’s Rep. 69; [2016] EWHC 843 (Admin). This was an appeal by way of case stated from the Crown Court.

<sup>34</sup>Per Lindblom LJ.



water. *The word connotes not merely something which floats, or something which floats and upon which persons and/or goods may be supported; it connotes something which is designed or used to convey persons and/or goods across water, and for that reason is capable of being directed to its intended destination.*<sup>35</sup>

On the other hand, In *Chelsea Yacht and Boat Co. Ltd v. Pope*,<sup>36</sup> a houseboat was held not to be part of the land for the purposes of the Housing Act 1988, and Tuckey LJ was of the view that ‘it is common sense that a boat on a river is not part of the land. A boat, albeit one used as a home, is not of the same genus as real property.’<sup>37</sup>

Similarly in *The Craighall*,<sup>38</sup> a landing stage described as ‘a huge floating structure intended to be a permanent structure and stationary, except in one respect, namely, that, for the convenience of passengers, it has the power of rising and falling with the water . . . [o]therwise . . . absolutely fixed’<sup>39</sup> was held not to be a vessel for the purposes of the Rules of the Supreme Court, 1883.<sup>40</sup>

There is no requirement for self-propulsion or self-direction for a craft to be considered as vessel for the purposes of the Merchant Shipping Act 1995 and its predecessors. In *The Mudlark*,<sup>41</sup> a dredger (sea-going hopper barge) with no autonomous means of propulsion, i.e. other than by way of tugs, was held to be a vessel with the right to limit liability. Similar decisions were reached in

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<sup>35</sup>Loc. cit., at §82, emphasis added.

<sup>36</sup>[2000] 1 W.L.R. 1941 (Court of Appeal).

<sup>37</sup>[2000] 1 W.L.R. 1941, p. 1946.

<sup>38</sup>[1910] P. 207 (Court of Appeal).

<sup>39</sup>Per Fletcher Moulton L.J., [1910] P. 210 at 212.

<sup>40</sup>Order XIX, r. 28, Rule 28: “In actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act . . . and which shall contain a statement of the following particulars: “(a) the names of the vessels which came into collision and the names of their masters; (b) . . . .”

<sup>41</sup>[1911] P. 116.

and *The Lighter (No. 3)*<sup>42</sup> and *The Harlow*.<sup>43</sup> Newly launched vessels create specific definitional problems of their own, but the lack of self-propulsion and self-direction is not a bar to such craft being deemed to be a vessel: this has been borne out by various decisions including *The St Machar*,<sup>44</sup> in relation to a just launched new build. According to Lord Carmont:

I am of the opinion that the *Gwenthills* was being used in navigation at the collision took place. She was waterborne at the time, and I cannot deny to her the character of a vessel merely because she was not capable of self-propulsion as was suggested, or because she was incapable of self-direction, on the assumption that she had no rudder.<sup>45</sup>

### III MARINE INSURANCE

Ability to navigate and a hollow structure, however, were held insufficient on their own to give a craft the character of a vessel for the purposes of a collision liability clause (in a marine insurance contract) which provides for indemnification of the insured owner with respect to liabilities arising as a result of a collision 'with any other ship or vessel.' In *Polpen Shipping v. Commercial Union*,<sup>46</sup> the issue related to whether a flying boat constituted a vessel when it was damaged in Falmouth Harbour by the *Polperro* which had dragged its anchor. Despite the fact that the craft in question had the attributes of a flying boat rather than

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<sup>42</sup>[1902] 18 T.L.R. 322.

<sup>43</sup>[1922] P. 175.

<sup>44</sup>(1939) 65 LL. L. Rep. 119 (Court of Session, Scotland). See also, *The Andalusian (No. 2)* [(1877) LR 3PD 182] where Sir Robert Phillimore denied the right to limitation of liability to a newly built craft which had damaged a vessel at launching not on the grounds that she was not a vessel but rather on the grounds that the right accrued to a British registered ship under the 1854 Merchant Shipping Act.

<sup>45</sup>Per Lord Carmont, at (1939) 65 Ll. L. Rep. 125.

<sup>46</sup>(1943) 74 Ll. L. Rep. 157.

a seaplane,<sup>47</sup> it was held by the court of first instance that the policy wording ‘ship or vessel’ did not include a flying boat as ‘ability to navigate’ is only ‘incidental to its real work’ i.e. flying.<sup>48</sup> A flying boat undoubtedly *regularly* navigates in water to take off and land, but this part of its work is not its *primary* purpose. It is not clear from a reading of the judgment whether the flying boat was anchored or moving in contact with the water at the time of the incident; the actual use at the time of the incident is not taken into account by the judge. In *Merchants Marine Insurance v. North of England P & I*,<sup>49</sup> the Court of Appeal addressed the issue as to whether a floating crane was a ship or a vessel for the purpose of an exclusion in a Protection and Indemnity Rulebook; according to Lord Justice Bankes, who gave the leading judgment, the structure as well as past and future use of the floating crane are relevant;<sup>50</sup> it was held that the floating crane was not a ship or vessel.<sup>51</sup> The approach taken by the adjudicator in such cases will in practice be relevant as to which insurer is likely to pick up the obligation of indemnification, i.e. whether it is the hull insurer providing coverage in whole or in part for collision liability, or whether it is the Protection and Indemnity (P & I) Club in whole or in part as the general liability insurer.

Also in the context of the collision liability clause, one comes across the issue as to whether a sunken vessel constitutes a vessel or ship. The existence of a reasonable prospect of salvaging the sunken vessel is likely to determine whether or not the sunken

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<sup>47</sup>The differences are highlighted by Judge Atkinson in his judgment at (1943) 74 Ll. L. Rep. 158, column 2.

<sup>48</sup>(1943) 74 Ll. L. Rep. 157, at 161.

<sup>49</sup>(1926) 26 Ll. L. Rep. 201.

<sup>50</sup>(1926) 26 Ll. L. Rep. 201 at 202.

<sup>51</sup>One must note however that the owners of the Titan, a floating crane adrift, (according to Lord Justice Bankes [(1926) 26 Ll. L. Rep. 201 at 202] differently constructed and possessing a different life history to the one in the 1926 Merchant Marine judgment), were allowed to limit liability ‘the claim being unopposed.’ (1923) 14 Ll. L. Rep. 484 at 485.

craft is a vessel or a wreck.<sup>52</sup> Temporary loss of the ability to navigate does not deprive a sunken craft from its status as a vessel for the purposes of the collision liability clause. Again, in practice the issue is likely to be whether the obligation of indemnity is one for the hull underwriter or one for the Protection and indemnity Club.

#### IV THE CLC 1992 / FUND CONVENTION 1992 DEFINITION OF 'SHIP'

As indicated in the introductory part of this article, the definition of 'ship' in the 1969/1971 versions of these two Conventions defines a ship on the basis of the determining factor that the said craft is actually carrying oil in bulk as cargo at the time of the incident; that specific definition was a clear one and avoided the problems associated with convoluted wording in an earlier draft.<sup>53</sup> The upgraded definition in the 1992 versions unfortunately largely overlooks the general requirement of 'actual carrying of oil in bulk' and it seems very difficult, if not impossible, to argue that a purposive interpretation of the Convention is likely to insist on the requirement of actual carriage

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<sup>52</sup>See Lambeth R.J., *TEMPLEMAN ON MARINE INSURANCE – ITS PRINCIPLES AND PRACTICE*, 401, (6th Ed., Pitman Publishing, London, 1986). This view is supported by the statement of Mr Justice Greer in *Pelton SS v. North of England P & I*, to the effect that: "Just as a man may be moribund without ceasing to be a man if the doctors are hopeful that they will be able to secure his recovery by treatment, so I think a ship may remain a ship or vessel even though she be damaged and incapable of being navigated, if she is in such a position as would induce a reasonably minded owner to continue operations of salvage; and if so she would in the ordinary use of the English language be still described as a ship or vessel though described as one which was in serious danger of ceasing to be a ship or vessel." 1925 22 LL. L. Rep. 510 at 512. A limited definition of 'wreck' can be found in section 510 of the 1894 Merchant Shipping Act 1894 (reproduced in section 255 of the Merchant Shipping Act 1995) which provides that 'wreck' "includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water."

<sup>53</sup>See IMCO, *Official Records of the International Conference on Marine Pollution Damage 1969*, at pp. 442 et seq.

other than in the limited application of the last part of the definition, i.e. in relation to combination carriers. Articles 2(1) and 2(3) of the CLC and Fund Conventions 1992 Protocol define 'ship' as meaning '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.'

The International Oil Pollution Compensations Funds (IOPC Funds) have been at the cutting edge of discussions relating to the definition of a ship for the purposes of the CLC 1992/Fund Conventions 1992, particularly in relation to floating storage and offloading units (FSOs) and Floating Production storage and offloading units. A legal opinion on the construction of the term 'ship' by Professor Vaughan Lowe QC who was engaged by the Director of the IOPC Funds is available in IOPC Funds documentation.<sup>54</sup> There are various types of FSOs, in particular some with their own motive power and some without. FSOs without motive power can only be regarded as ships 'if they are or about to be under tow.'<sup>55</sup> If they are under tow, they should be considered as vessels as tug and tow should be considered as one unit. This raises the difficulty of ownership of the 'vessel' if tug and tow are in different ownership. The reference in the legal opinion to 'about to be under tow' raises the further difficulty of the point in time when carriage commences and storage ends. Another related issue is the difficulty created as to whether tankers utilised for the mobile storage of oil constitute vessels—this is the so-called mother-ship problem. Such mother ships anchor for varying periods of time, and may well engage in slow steaming and engage in ship-to-ship transfer operations when a buyer is found for the oil. An IOPC Director's Note dated 14

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<sup>54</sup>IOPC/OCT11/4/4, Annex 1.

<sup>55</sup>IOPC Funds documentation: IOPC/OCT11/4/4 (14th September 2011, Annex 1, paragraph 120).

September 2011,<sup>56</sup> states that such ships are within the definition of 'ship' 'because they are in the course of a voyage carrying oil as cargo, which they would continue after the STS transfer.'<sup>57</sup> However the IOPC Funds Director proceeds to state in the next paragraph<sup>58</sup> that 'the legal opinion also states that it is within the discretion of the Member States to decide, if they so wish, the appropriate time beyond which it would not be reasonable to say that a vessel remains on a voyage, for the carriage of oil by sea as cargo, and thus to deprive a vessel of its character as a 'ship' for CLC purposes...' On this last point, it is submitted with respect by the author that there is no legal basis for this view under the 1992 Conventions which largely did away with the 1969/1971 requirement for a Convention 'ship' to be actually carrying oil in bulk as cargo. It is furthermore submitted that a vessel constructed or adapted for the carriage of oil in bulk as cargo should be considered a CLC ship, irrespective of its actual use as a storage unit as long as the vessel is seaborne and seagoing. Actual carrying of oil is a requirement only for the application of the second part of CLC 1992 article 1(1) in respect of a combination carrier, i.e. a ship capable of carrying oil and other cargoes e.g. oil bulk ore carriers (obo's); this last part also covers a ballast voyage in respect of a combination carrier 'unless it is proved that it has no residues of such carriage of oil in bulk aboard.'

The term 'any sea-going vessel and seaborne craft of any type whatsoever' raises the issue of the meanings of the words 'sea-going' and 'seaborne.' The term 'seagoing' was addressed by the 1992 Fund Executive Committee at its 22d Session<sup>59</sup> in relation to an incident on the Volga River. The *Victoriya* 'was registered by the Russian Maritime Register of Shipping for river and sea navigation and the vessel traded regularly in the Mediterranean, Black Sea and Black Sea areas.'<sup>60</sup> The Executive Committee

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<sup>56</sup>IOPC Fund Documentation IOPC/OCT11/4/4.

<sup>57</sup>Loc. cit, at paragraph 3.15.

<sup>58</sup>Loc. cit, paragraph 3.16.

<sup>59</sup>IOPC Fund Documentation: 92Fund/EXC.22/14 24, 24th October 2003.

<sup>60</sup>IOPC Fund Documentation: 92Fund/EXC.22/14 24, 24th October 2003, at §3.8.8.

records indicate ‘that the vessel had not been adapted or appropriated for trading exclusively in rivers and that it still operated regularly as a sea-going vessel.’<sup>61</sup> The Executive Committee decided that the 1992 Conventions were applicable to this incident.<sup>62</sup> An inland water tankship actually operating at sea will also fall within the definition of ‘seagoing ship or other seaborne craft.’<sup>63</sup>

It is unfortunate that these IMO Conventions do not address the issue of oil pollution damage from waterborne mobile storage facilities. The issue is however addressed in the voluntary Offshore Pollution Liability Agreement [OPOL]<sup>64</sup> which excludes ‘any ship, barge or other craft not being used for the storage of Oil, commencing at the loading manifold thereof’ from the definition of ‘Offshore Facility.’<sup>65</sup> The manifest intention behind the OPOL agreement is to provide for remedial measures as a result of the fact that the IMO Conventions, namely CLC 1992, Fund Convention 1992, and the Supplementary Fund Protocol of 2003, do not address pollution from offshore facilities pollution.

## V

### THE INTERNATIONAL CONVENTION RELATING TO THE ARREST OF SEA-GOING SHIPS 1952

The Arrest Convention 1952 does not provide a definition of ship or vessel.<sup>66</sup> However, the issue as to whether or not an arrest is being attempted in respect of a ship/vessel has arisen on numerous occasions. A case in point is the judgment delivered by the Irish Supreme Court in *The Von Rocks*.<sup>67</sup> The craft in question

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<sup>61</sup>Ibid.

<sup>62</sup>IOPC Fund Documentation: 92Fund/EXC.22/14 24, 24th October 2003, at §3.8.13.

<sup>63</sup>IOPC Fund Documentation: 92Fund/EXC.8/8, 6th July 2000, at §4.2.5.

<sup>64</sup>Current available text effective as of April 1 2016.

<sup>65</sup>OPOL text effective as of April 1 2016, Clause 1(8).

<sup>66</sup>Similarly there is no definition of a ship in the 1999 International Convention on the Arrest of Ships.

<sup>67</sup>(1998) 2 Lloyd’s Rep. 198.

was a 'backhoe dredger, which is primarily used in harbours, channels or estuaries to deepen the waters at such locations.'<sup>68</sup> It had no means of self-propulsion or self-direction. It lacked the vessel-associated characteristics of a bow, stern, or possession of an anchor.<sup>69</sup> Dredging was carried out whilst it was jacked-up in position on the seabed through the use of hydraulically operated spud legs, which could later be raised to enable towing; an alternative method of movement would involve dismantling and transportation.<sup>70</sup>

The implementation of the Arrest Convention 1952 into Irish legislation involved the application of a definition section with words defining ship and vessel in wording identical to that contained in the amended British 1894 Merchant Shipping Act. The Court of first instance presided by Judge Barr accepted the defendant's argument that the *Von Rocks* was not a vessel. The Judge applied the 'primary/incidental purpose reasoning in marine insurance flying boat case *Polpen v. Commercial Union*,<sup>71</sup> referred to above, and came to the conclusion that the primary purpose of the backhoe dredger was that of being a rigid dredging platform.<sup>72</sup> The judgment was however reversed on Appeal to the Irish Supreme Court; Judge Keane specifically rejected this argument and came to the conclusion that the statutory definition was not exhaustive and that a vessel which was not used in navigation 'in the conventional sense' could still fall within the category of 'ship.'<sup>73</sup> However, one can envisage the difficulty which may well arise if this type of dredger whilst not being

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<sup>68</sup>Per Barr J., in court of first instance [(1998) 2 Lloyd's Rep. 198 at 199].

<sup>69</sup>Per Barr, J., in court of first instance [(1998) 2 Lloyd's Rep. 198 at 199].

<sup>70</sup>2 Lloyd's Rep. 198 at 202.

<sup>71</sup>See text above at fn. 46.

<sup>72</sup>[1998] 2 Lloyd's Rep. 198.

<sup>73</sup>[1998] 2 Lloyd's Rep. 198, at 208. See also *Global Marine Drilling & Co. v. Triton Holdings Ltd (The Sovereign Explorer)* [2001] 1 Lloyd's Rep. 60, where at page 61 Lord MacFadyen (Scotland Outer Court, Court of Session) refers to earlier litigation in that case (involving a mobile offshore drilling unit): "A motion for recall of that arrestment on the basis that *Sovereign Explorer* is not a ship, and on the basis that the arrestment was nimious and oppressive, was refused by Lord Marnoch on Nov. 12, 1999". This point was not addressed at the appellate stage.



navigated is used negligently and damage is caused to third parties, e.g. through the negligent triggering of dredged explosive. At that point in time, it would be extremely difficult to treat the craft as a vessel for the purpose of section 313 of the British Merchant Shipping Act 1995, as the vessel is not in the act of being navigated.

However, English Courts may well tend towards the view that actual use is less important than its capability and design. This approach may well avoid inconsistency in decisions particularly in the context of tax legislation; in *Perks v. Clark*,<sup>74</sup> Longmore L.J. expressed the view that, with a view to achieving a consistency of approach, it would be unsatisfactory to treat submersible oil rigs, semi-submersible oil rigs and jack-up rigs differently.<sup>75</sup> However, where the pilings of the structure are embedded into the seabed or ocean-floor, there will be a very strong argument that the structure is not a vessel.<sup>76</sup>

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<sup>74</sup>[2001] 2 Lloyds Rep. 431.

<sup>75</sup>“It is not part of the function of this Court to provide a definition of a ship, watertight or otherwise. It is, however, part of our function to encourage consistency of approach in fact-finding tribunals. Drilling ships and drilling barges must be ships. Semi-submersible oil rigs in which drilling operations are carried out while the rig is in a floating condition, submersible oil rigs in which drilling is carried out when the rig is resting on the sea bed, and jack-up drilling rigs which, when drilling, have legs resting on the sea bed (and are thus not subject to the heaving motion of the sea, in the same way as semi-submersible oil rigs and drilling ships) are all different forms of structure; it could be said that since the jack-up rigs cannot perform their main function without their legs being on the sea bed, they should be singled out and should not be regarded as ships. It would, however, be unsatisfactory if some forms of oil rigs were ships and others were not. One approach should be that all three forms of oil rig should either be ships or not ships” (per Longmore LJ at 441).

<sup>76</sup>See Schoenbaum, T., *ADMIRALTY AND MARITIME LAW*, §1.6 (3d Ed., 2001), and *Blanchard v. Engine and Gas Compressor Services*, 575 F. 2d 1140, 1140 (5th Cir. 1978).

## VI SHIP UNDER CONSTRUCTION

In the recently reported judgment of the Federal Court of Australia, *Virtu Fast Ferries v. The Ship Cape Leveque*,<sup>77</sup> a ship under construction which, unlike that in *The Saint Machar*<sup>78</sup> litigation, had not been launched, was held not to constitute a 'ship' for the purpose of *in rem* proceedings; the applicable legislation was quite clear that 'ship' did not include 'a vessel under construction that has not been launched.'<sup>79</sup> A requirement of 'launching' can also be found in Part II of Schedule 7 (Convention on Limitation of Liability for Maritime Claims 1976) of the Merchant Shipping Act 1995, which extends the application of that Convention to any structure (whether completed or in course of completion) launched and intended for use in navigation as a ship or part of a ship.<sup>80</sup>

## VII THE LONDON SALVAGE CONVENTION 1989

The International Convention on Salvage 1989<sup>81</sup> provides a definition in Article 1(b) to the effect that a 'vessel means any ship or craft, or any structure capable of navigation.' It would appear that capability to navigate attaches to 'structure' as distinct from 'ship' or 'craft.'<sup>82</sup> The requirement for any structure to have capability to navigate raises the issue of whether such capability should be in existence both before and after the casualty giving rise to the need for salvage assistance. Probably the better view is

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<sup>77</sup>[2015] 2 Lloyd's Rep. 222.

<sup>78</sup>[1939] 65 LL. L. Rep. 125.

<sup>79</sup>[2015] 2 Lloyd's Rep. 222, at 224.

<sup>80</sup>Merchant Shipping Act 1995, Schedule 7, Part II, paragraph 12.

<sup>81</sup>London, April, April 28, 1989.

<sup>82</sup>See Reeder, J., BRICE ON MARITIME SALVAGE, §1.6 (4th Ed., 2003) (London, Sweet & Maxwell).

that post-casualty capability is unnecessary.<sup>83</sup> Whether a hovercraft should fall within the definition of vessel is not addressed in the Salvage Convention, and this particular lacuna is addressed by Article 8 of the Hovercraft (Application of Enactments) Order 1972, which puts the hovercraft on a par with a ship for the purpose of the receipt of the provision of salvage services.<sup>84</sup> It is interesting to note that Article 3 of the Convention limits the application of the Convention by providing that it ‘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 sea-bed mineral resources.’

Although the Salvage Convention 1989 has gone some way in dealing with the issue of what can constitute a subject of salvage, the prior legal position gave rise to a number of instances leading to litigation. For instance in *The Raft of Timber*,<sup>85</sup> Dr. Lushington, J., stated that the raft of timber was ‘neither a ship or sea-going vessel; it is simply a raft of timber’<sup>86</sup> therefore it was held not to be a subject of salvage. In *Wells and Another (Paupers) v. Owners of the Gas Float Whitton No. 2*,<sup>87</sup> a structure including a gas cylinder functioning as a navigation beacon which had lost its moorings was held not to be a subject of salvage. These rulings, however, must be assessed in the context of the law of maritime salvage applicable prior to the Salvage Convention 1989, i.e. that the only subjects of salvage were a ‘ship, her apparel and cargo, including flotsam, jetsam, and lagan, and the wreck of these and freight; that the only subject added by statute is life salvage . . . .’<sup>88</sup> A different conclusion may well be reached under the modern law of maritime salvage as a raft of timber may, in the right circumstances, be a ‘structure capable of navigation’ under Article 1(b) of the Salvage Convention, and the *Gas Float*

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<sup>83</sup>Id. at §3.09.

<sup>84</sup>Id. at §3.21.

<sup>85</sup>166 E.R. 749 (1844).

<sup>86</sup>166 E.R. 749, at 751.

<sup>87</sup>[1897] A.C. 337 [House of Lords].

<sup>88</sup>[1896] P. 42, CA at p. 63 per Lord Esher M.R.

*Whitton* may, also in the right circumstances, constitute ‘property not permanently and intentionally attached to the shoreline’ within Article 1(c) of the said Convention.

## VIII ‘SEAGOING’ VESSEL

Some statutes refer to a seagoing vessel, and this would exclude certain vessels. *In R. v. Goodwin*, Lord Phillips did not provide an answer as to whether ‘a ship which remains within coastal waters is or is not a seagoing vessel.’<sup>89</sup> In *The Sea Eagle*,<sup>90</sup> the court decided that the rigid inflatable craft in question was ‘seagoing’ for the purposes of the Athens Convention 1974 on the basis that the trip in question was in waters classified as ‘sea’ in terms of a Merchant Shipping Notice (MSN 1776).<sup>91</sup> A distinction was made in that case between the issue as to whether a contrivance is a ‘ship’ and as to whether she was ‘seagoing.’ Seagoing went beyond ‘used in navigation’ and it is thus further necessary ‘to consider the actual use to which the vessel is being put in the context of the claim being brought against her.’<sup>92</sup> The Admiralty Registrar considered the case of *Salt Union v. Wood*,<sup>93</sup> in that case Lord Coleridge had stated,

I cannot conceive anything more likely to lead to confusion and difficulty than if we were to give a construction to the word “sea-going,” which would involve the magistrates entertaining a variety of considerations - such as whether the ship might go to sea, or might be sent to sea, or was capable of going to sea - and would involve their deciding whether those conditions precedent to the exercise of their jurisdiction were made out. It is a simple proposition to hold that a sea-going ship means a ship which does go to sea. It is not disputed that this ship does not go to sea. She is

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<sup>89</sup>[2006] 1 Lloyd’s Rep. 432, at para. 43.

<sup>90</sup>[2012] 2 Lloyd’s Rep. 37.

<sup>91</sup>See [2006] 1 Lloyd’s Rep. 432, at para. 10–15.

<sup>92</sup>[2012] 2 Lloyd’s Rep. 37 at paragraph 31.

<sup>93</sup>[1893] 1 QB 370.

one of a line of ships which conduct traffic along a river to a point in the Mersey, where they are met by, and transfer their cargo to, ocean-going ships. She cannot, to my mind, be said to be a sea-going ship. No doubt she *could* go to sea; but she does not go.<sup>94</sup>

## IX CONCLUSION

Case-law relating to differently worded definitions has struggled and probably failed to come up with future-proof literal or other interpretations which can convince a layman as to the precise meaning of the terms ‘vessel’ and ‘ship.’ Undoubtedly new ‘contrivances’ will continue to be added to the list of items which are popularly called vessels or ships, and some legal definitions will be altered and new ones created; legislators, national and international, usually lag behind an industry focussed on innovation, thereby providing a playing field for litigation lawyers. If ever any proof were needed that, in the words of an eminent Roman jurist, every definition in law is dangerous,<sup>95</sup> one need look no further than the travails of the legal profession and the judiciary in defining a ‘vessel’ and a ‘ship.’

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<sup>94</sup>[1893] 1 QB 370, at 374.

<sup>95</sup>Lucius Iavolenus Priscus: “Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset.” (Dig. 50.17.202; Iavolenus 11 epist.).