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CASE AND COMMENT

TREASURE HUNTERS BEWARE! SOVEREIGN IMMUNITY PROTECTS STATES IN SALVAGE PROCEEDINGS

IN *Argentum Exploration Ltd. v Republic of South Africa* [2024] UKSC 16, the UK Supreme Court ruled that South Africa may rely on state immunity under section 10(4)(a) of the State Immunity Act 1978 ("SIA") in a salvage claim in rem for silver worth around $43 million, that had been lost some 75 years ago. In overturning the Court of Appeal's decision, the court concluded that the commercial exception to immunity in section 10(4)(a) SIA did not apply just because government-owned cargo was carried on a commercial vessel under a contract of carriage. Such cargo was not in use or intended for use for commercial purposes: it was simply being transported. The exception will usually be engaged only when a vessel is in commercial use *and* its cargo is intended for commercial use.

On 23 November 1942, a Japanese submarine sank the S.S. *Tilawa*, a ship travelling from Bombay (Mumbai) to Durban carrying over 700 passengers, most of whom were citizens of India, and 2,364 bars of silver purchased by South Africa for minting coinage. Almost 300 people were killed in the attack and *Tilawa*'s cargo was lost to the Indian Ocean. In 2017, the silver was recovered by Argentum Exploration Ltd. Article 12(1) of the International Convention on Salvage 1989, which is given effect in UK law by section 224(1) of the Merchant Shipping Act 1995, provides that "[s]alvage operations which have had a useful result give right to a reward", subject to certain conditions. Article 25 clarifies that, unless a state consents, the Convention cannot be used as a basis for the seizure, arrest or detention of or for any proceedings in rem against non-commercial cargo owned by a state which is entitled at the time of the salvage operation to immunity under international law. In English law, salvage gives rise to a maritime lien, which is enforceable against purchasers of the property regardless of whether they have notice

(at [47]). Argentum claimed for voluntary salvage and sought to enforce its maritime lien through proceedings in rem against the silver.

As owner of the silver, South Africa argued that its property was immune from Argentum's action in rem, as per section 1 of the SIA. Argentum argued that the exception to immunity in section 10(4)(a) of the SIA applied: a state is not immune in respect of "an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes". The question was whether the silver was "in use or intended for use for commercial purposes" when the cause of action arose – that is to say, 1942, when the *Tilawa* sunk (at [64], [65]). The parties agreed that the *vessel* was engaged in a commercial activity during its voyage and that the silver was intended for a non-commercial purpose. However, the Court of Appeal had ruled that the silver had been "in use" for commercial purposes during the voyage because of the commercial arrangements under which it was shipped and because the question of intended use was "legally and logically irrelevant" before the voyage was completed ([2022] EWCA Civ 1318, at [90]–[97]). Laing L.J. dissented, observing that "I do not agree that, as a matter of ordinary language, a cargo of silver which was sitting in the hold of a ship was being used . . . for any purpose, commercial or otherwise" – it is simply being carried and the commercial arrangements for its carriage are not part of the relevant inquiry (at [142]).

The Supreme Court unanimously allowed South Africa's appeal. Giving the judgment of the court, Lords Lloyd-Jones and Hamblen endorsed the approach taken by Laing L.J., holding that it would be a "distortion of language" to read "in use" as including cargo being transported on a vessel (at [70]). In their view, to find that cargo is "in use" for a commercial purpose when being carried would collapse the dual criteria for immunity under section 10(4)(a) of the SIA into a single question: was the vessel carrying the cargo in use for commercial purposes? This would frustrate parliamentary intention by conflating the broader immunity test under section 10(4)(a) with the narrower test in section 10(4)(b) covering in personam claims concerning cargo, which asks only whether a vessel carrying the cargo was in use for commercial purposes (at [78]). There are compelling reasons for more stringent criteria being applied to actions in rem as opposed to actions in personam as proceedings in rem are "far more intrusive into the rights of a state over its property" (at [80]–[87]).

The court's conclusion was supported by section 13(4) of the SIA, which provides an exception to the general rule that the property of a state shall not be subject to enforcement processes for property that is for the time being "in use or intended for use for commercial purposes". Previous cases on section 13(4) confirmed that what is relevant is the "*purpose* for which

the property was in use or intended to be used and not the nature of the relationship or activity that gave rise to it" (at [72], emphasis added). In *SerVaas Inc. v Rafidain Bank* [2012] UKSC 40, for example, the nature of the origin of certain debts was not relevant to the question of whether the property was in use for commercial purposes (at [73]). It would be "inconceivable" to suggest that the words in section 13(4) and section 10(4)(b) SIA do not bear the same meaning (at [71]–[76]).

For salvors, *Argentum* acts as a warning: there is no guarantee that a claim in respect of state-owned cargo recovered from private vessels will not be subject to state immunity. They would therefore be advised to initiate salvage proceedings in personam if they have any doubt as to the provenance of their salvage, given the narrower grant of immunity in section 10(4)(b) of the SIA. States should be reassured that property intended for use for sovereign purposes will be protected against surprise in rem proceedings, even if that property has been lost at sea for decades.

Despite providing a helpful clarification of the application of state immunity to salvage claims, it is somewhat surprising that the case reached the Supreme Court. Lords Lloyd-Jones and Hamblen observed that the application of section 10(4)(a) SIA to the facts is "entirely unambiguous": the *Tilawa* silver was not in use for commercial purposes when being carried, but it was undeniable that the intended purpose of transporting it was a sovereign one (at [110]). Here, the Court of Appeal erred by considering that the sole question in determining the existence of state immunity is whether the state was acting with sovereign authority or not (at [99]–[101]). *Argentum* is a welcome reminder that the purpose of an act may sometimes be relevant when determining the existence of state immunity, particularly where enforcement jurisdiction is exercised over the property of a foreign state (see "Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment", (2012) I.C.J. Rep. 99, at para. 119 on measures of constraint against Villa Vigoni, a state-owned German cultural centre on Lake Como). The court's characterisation of section 10(4)(a) of the SIA as a hybrid provision that engages both an adjudicative and enforcement jurisdiction reflects the fact that Admiralty proceedings are more intrusive for a foreign state as compared with proceedings in personam, thereby justifying a more extensive immunity (at [87]–[89], [115]).

Argentum also argued that, if the South African Government were entitled to immunity under section 10(4)(a) of the SIA, the provision would have to be "read down" under section 3 of the Human Rights Act 1998 to protect Argentum's right to access a court under Article 6 European Convention on Human Rights ("ECHR") ([111]). As in *Benkharbouche v Sudan* [2017] UKSC 62, the Supreme Court declined to determine whether state immunity must be justified as an interference with Article 6 ECHR or does not engage Article 6 ECHR at all. The

former view is expressed in Strasbourg jurisprudence: Article 6 ECHR interpreted in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, accepts that restrictions on access to a court are proportionate where those limitations are "generally recognised rules of public international law" (*Al-Adsani v United Kingdom*, ECtHR (Application no. 35763/97), Judgment of 21 November 2001, at [55], [56]). The latter view was expressed by Lord Bingham in *Jones v Saudi Arabia* [2006] UKHL 26: Article 6 ECHR only concerns the exercise of enforcement jurisdiction "enjoyed by states in accordance with international law", such that "the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state" (at [113]). Without deciding this question, the court noted that neither approach would benefit Argentum. Following the Strasbourg approach, section 10(4)(a) of the SIA is a proportionate measure which serves a legitimate aim of giving effect to a restrictive theory of state immunity. On the *Jones* approach, recognising state immunity from actions in rem based on the intended use of property for a sovereign purpose "conforms with and is required by" international law (at [115]). Although there is little practical difference between the two approaches (as *Argentum* demonstrates) the latter approach erroneously suggests that immunity means the absence of jurisdiction when immunity is traditionally understood as being an obligation under international law requiring a state to bar jurisdiction that a court would otherwise possess. Hence, when a state waives its immunity, this is not a conferral of jurisdiction by a foreign state on the forum court – rather, it means that the court may exercise jurisdiction without the state being in breach of its international obligations.

Argentum is a welcome decision insofar as it clarifies the effect of state immunity in an area which has hitherto received limited judicial attention, but it is nevertheless regrettable that the Supreme Court did not clarify the relationship between the right of access to a court and the grant of immunity under international law.

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