LEGAL BATTLES OVER UNDERWATER HISTORIC SHIPWRECKS IN HIGH SEAS: THE CASE OF ODYSSEY

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I. Introduction

On September 21, 2011, the U.S. Court of Appeals for the Eleventh Circuit ruled that Odyssey Marine Exploration (hereinafter "Odyssey"), an American deep-ocean salvage group, should return Spain an estimated $500 million worth of bullion that was removed from a two-century-old shipwreck in high seas[1] off the Straits of Gibraltar.[2] The judgment became final on February 9, 2012, when the Supreme Court of the U.S. rejected a motion from Odyssey seeking an injunction against the 11th Circuit Court order to turn over the treasure. This case is significant because sunken historic vessels have captured commercial treasure hunters and promoted underwater adventure and discovery, but the law governing this area is murky. The Odyssey case illustrates legal battles over underwater historic shipwrecks preservation from three aspects: the identity of a shipwreck, the jurisdiction of American courts, and the interests of former colony states. These aspects jointly determine whether commercial hunters may become keepers, salvors, or weepers of historic shipwrecks.

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[1] "High seas" refers to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State according to Art. 86 of the United Nation Convention on the Law of the Sea.

[2] *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and ET. AL. (Odyssey I), 675 F. Supp. 2d 1126 (2009). Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and ET. AL.(Odyssey II), 657 F.3d 1159 (2011).*

II. Identity of a Shipwreck: Odyssey v. Sea Hunt

The identity of a shipwreck can determine whether the law of salvage or the law of finds applies in a case. If the law of finds applies, the title of the salvaged property will be vested in the salvor; however, if the law of salvage applies, a salvor can only claim compensations for successful salvage but cannot claim title to the salvaged property. The precondition for the application of the law of finds is that the salvaged property was abandoned or was never owned. The shipwreck of a commercial vessel may presumably be abandoned after a certain period of time and under a certain condition. However, this does not apply to warships. The Odyssey case reaffirmed the Sea Hunt case, holding sunken warships can be abandoned only by an express act of abandonment of the owner.[3] Therefore, the identity of the shipwreck is extremely important for determining its ownership.

The Odyssey case is similar to Sea Hunt, because both involve Spanish warships: the Odyssey court held that the shipwreck was a Spanish Royal Navy Frigate, *Nuestra Senora de las Mercedes* (hereinafter "Mercedes");[4] the Sea Hunt court held that the shipwrecks were Spanish Royal Navy Frigates, *Juno* and *La Galga*.[5] Both courts held that the law of finds did not apply because Spain had never expressly abandoned the shipwrecks. [6]When the Sea Hunt case was decided, it received many criticisms partly because of its broad application of an express abandonment standard.[7] The Odyssey decision demonstrates the clear trend that U.S. admiralty courts become more sensitive to warship wrecks due to the concern of international comity.[8] The Odyssey case also shows that to identify a vessel as a warship the cargo that it carried is not determinative. Additionally, a warship will not lose its identity simply because its flag state is not in a war. Even peaceful time period does not negate the identity of a warship.

III. Jurisdiction of U.S. Courts: Odyssey v. Titanic

Sunk in 1912, the Titanic is probably the most famous shipwreck in history. The similarity between the Titanic case[9] and the Odyssey case is that both shipwrecks lie in high

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[3] *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 638, 642-43 (4th Cir. 2000),* cert. denied, *531 U.S. 1144 (2001).*

[4] *Odyssey II, 657 F.3d at 1172.*

[5] *Sea Hunt, Inc., 221 F.3d at 638.*

[6] *Odyssey II, 657 F.3d at 1166 and 1170. Sea Hunt, Inc., 221 F.3d at 644-45.*

[7] See, for example, Kevin Berean, *Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels: How the Fourth Circuit Rocked the Boat*, 67 Brook. L. Rev. 1249 (2002)*;* and Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 San Diego Int'l L.J. 173 (2005).

[8] See James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 Harv. Int'l L.J. 251, 256 (2005).

[9] *R.M.S. Titanic, Inc. v. Haver (Titanic I), 171 F.3d 943, (4th Cir. 1999); R.M.S. Titanic, Inc. v.*

seas far away from the U.S. territory. However, the 4th Circuit exercised constructive in rem jurisdiction over the Titanic,[10] while the 11th Circuit dismissed the Odyssey case for lack of jurisdiction.[11] This is not a circuit split, because the Mercedes in the Odyssey case enjoys sovereign immunity[12] but the Titanic, as a commercial vessel, does not.[13]

The Mercedes is a warship, so it is a property of Spain. The court applied Section 1609 of the Foreign Sovereign Immunity Act (hereinafter "FSIA"),[14] which grants the property of a foreign state with sovereign immunity. The exceptions to Section 1609 are Sections 1610 and 1611.[15] Odyssey invoked commercial activities under Section 1610 as an exception for sovereign immunity. The FSIA defines "commercial activity" by "the nature of the course of conduct" without considering its purposes.[16] The U.S. Supreme Court further clarified that, under the FSIA, a foreign government conducts commercial activity when it "acts, not as regulator of a market, but in the manner of a private player within it."[17] The Odyssey court ruled that, although Mercedes carried mails and some private cargo, it did not conduct commercial activity because it was not "act[ing] like an ordinary private person" in a market.[18]

Moreover, inspired by the Supreme Court's decision in *Philippines v. Pimentel*[19] and considering the doctrine of comity, the Odyssey Court also granted sovereign immunity to private cargo carried by the Mercedes. Although the court's reasoning has been criticized by some commentators as an "easy application of the FSIA",[20] it reflects profound American political and military interests worldwide: through reciprocity, the U.S. seeks to protect its own sunken warships and aircrafts in international waters from exploration or exploitation without authorization.

Odyssey also advanced a possession argument as an exception to sovereign immunity. Namely, since Spain did not possess the Mercedes shipwreck during the trial, the shipwreck had no sovereign immunity. However, the court followed the teaching of *Argentine Republic*

Wrecked & Abandoned Vessel (Titanic II), 435 F.3d 521, (4th Cir. 2006).

[10] *Titanic I, 171 F.3d at 956.*

[11] *Odyssey II, 657 F.3d at 1184 (2011).*

[12] *Id.*

[13] See *Titanic I, 171 F.3d at 951; Titanic II), 435 F.3d at 532-33.*

[14] The FSIA provides that no U.S. court has jurisdiction over a foreign state unless a statutory exception to immunity applies.

[15] *28 U.S.C. § 1609*. Section 1610 regulates the voluntary waiver of sovereign immunity and the conduct of commercial activities. Section 1611 lists certain types of property that are immune from execution.

[16] *28 U.S.C. § 1603(d)*.

[17] *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, (1992).*

[18] *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and ET. AL.*, 657 F.3d 1159, 1177 (2011).

[19] *Republic of the Philippines v. Pimentel 553 U.S. 851 (2008).*

[20] K. L. Alderman, *High seas shipwreck pits treasure hunters against a sovereign nation: the black swan case*, *available at* http://ssrn.com/abstract=1619330 (last visited April 1, 2012).

v. Amerada Hess Shipping Corp., where the U.S. Supreme Court held that the FSIA "provide[d] the sole basis for obtaining jurisdiction over a foreign state."[21] The court also correctly distinguishes the Mercedes case from *California v. Deep Sea Research*[22] and *Aqua Log, Inc. v. Georgia*[23]. The latter two cases imposed a possession requirement on a U.S. state claiming immunity of its property. However, these two cases do not add the possession exception to the FSIA, because they are concerned with state property and not foreign property. Therefore, the Odyssey court clarifies that only exceptions enumerated under the FSIA can be a basis for courts to exercise jurisdiction, and therefore, since the wording of the FSIA does not contain a possession exception, possessing the property is not a precondition for a foreign state to claim immunity.

Besides Section 1609 of the FSIA, the doctrine that warships have complete immunity from the jurisdiction of any state other than the flag state is also endorsed by Article 8 of Geneva Convention on the High Seas (1958), Article 5 of the International Convention on Salvage (1989), and Article 16 of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004). Therefore, the Odyssey court is correct that the shipwreck, as a Spanish frigate conducting non-commercial activities, should have sovereign immunity.

IV. Interests of Former Colony States

The Sea Hunt and the Titanic cases are battles between ship owners and salvors. However, besides the ship owners and salvor, the Odyssey case also involves the interest of a former colony state, namely Peru. The coins on aboard of the Mercedes were minted and mined in Upper Peru before 1803.[24] Peru claimed to have the better preferential rights to the coins and other treasure on the shipwreck compared with Spain, because they were "physically, culturally, and historically originating in Peru"[25] and were "taken from Peru in a period now widely understood as a period of shameful exploitation of the native population of Peru."[26] The Odyssey court expressed admiration to this argument. However, the court still ruled that what Peru argued was not the current governing law in the U.S. [27]This is sadly true. Not only the U.S. law remains silent but also relevant international conventions are unclear on protecting the interests of former colony states.

The United Nations Convention on the Law of the Sea (hereinafter "UNCLOS Convention") provides that, if a sunken ship is on the seafloor in areas beyond the 200

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21 *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989)*

22 *California v. Deep Sea Research*, *523 U.S. 491, at 494, 507-08 (1998).*

23 *Aqua Log, Inc. v. Georgia*, *594 F.3d 1330, at 1335 (11th Cir. 2010).*

24 *Odyssey I, 675 F. Supp. 2d, at 1146, footnote 24.*

25 In Re: Peruvian Artifacts, Professor John Morton Moore's Affidavit to the U.S. District Court Middle District of Florida, Case No. 8:07-CV-00614-SDM-MAP, P5.

26 Id.

27 *Odyssey I, 675 F. Supp. 2d, at 1129.*

nautical mile Exclusive Economic Zone and the Continental Shelf, the state of origin, or the state of cultural origin, or the state of historical and archaeological origin has preferential rights to the vessel over all other states.[28] However, the UNCLOS Convention does not indicate which state has preferential rights when the state of origin is different from the state of cultural, historical and archaeological origin. If sunken ships have been partially or totally under water, periodically or continuously, for at least 100 years, they qualify as underwater cultural heritages under the UNESCO Convention on the Protection of the Underwater Cultural Heritage[29]（hereinafter "UNESCO Convention). Compared with the UNCLOS Convention, the UNESCO Convention expands the rights of costal states but meanwhile ensures the information right of states with a verifiable cultural, historical or archaeological link to the ship.[30] However, the UNESCO Convention neither regulates the title to the shipwrecks nor clarifies what substantive rights a state with a verifiable cultural, historical or archaeological link may have to a sunken vessel discovered outside of its territory.

V. Conclusion

The Odyssey court held that Spain was the most appropriate custodian of the shipwreck because it had a sovereign interest in it.[31] This ended the U.S. litigation. Peru and Odyssey have to litigate the case in a Spanish court. If lucky enough, Odyssey may be compensated according to the law of salvage in the Spanish court. However, Peru's interests may be very hard to protect. The significance of the Odyssey case is that it raised an important question not only in maritime law but also in public international law: who, a former colonial power or the colonized indigenous peoples, should receive the cultural and financial benefits of cultural heritage derived from the previously colonized states?

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[28] Art. 149 of United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. "As of September 20, 2011, 162 states have ratified, acceded to, or succeeded to, the UNCLOS." Available at http://www.un.org/Depts/los/reference_files/status2010.pdf.(last visited August 23, 2012).

[29] Art. 1 of UNESCO Convention on the Protection of the Underwater Cultural Heritage, adopted by the UNESCO General Conference on November 2, 2001, effective on January 2, 2009. 41 I.L.M. 40 (2002). The list of States Parties may be obtained on UNESCO's website. *Conventions*, UNESCO, http://portal.unesco.org/la/convention.asp?KO=13520&language=E (last visited Aug. 3, 2012). The U.S. is not a member.

[30] Arts. 7, 8, and 9 of the UNESCO Convention.

[31] *Odyssey, 657 F.3d at 1184.*