RECENT DEVELOPMENTS: FOREIGN STATE IMMUNITY AND MARINE WRECKS

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In an article in this journal in 2021[1] the author considered the question of foreign state immunity in cases involving salvage of wrecks. A salvage claim allows persons who give assistance to a ship or its cargo to seek a reward. A salvor may often choose to pursue an *in rem* action after identifying articles in the salvage and proceeding against them directly, as opposed to bringing a personal action against the cargo owner. An *in rem* action may have significant advantages to a claimant in terms of enforcement and jurisdiction, particularly where the owner is not within the jurisdiction. A problem arises however when the owner of the cargo is a foreign state, as this entity may seek to defeat the action by pleading immunity from jurisdiction. Both the Australian *Foreign States Immunities Act 1985* (Cth) ('FSIA') and the United Kingdom *State Immunity Act 1978* (UK) ('SIA') contain provisions dealing with immunity in *in rem* proceedings brought by a salvor against the cargo carried by a vessel.

In the 2021 article, the decision of the English Admiralty court in *The SS Tilawa*[2] was examined. This case involved a claim for a salvage reward in England in respect of a cargo of silver bars owned by the Republic of South Africa ('South Africa'). While the vessel containing the silver was sunk by a torpedo in 1942, the salvage did not occur until 2017. Teare J rejected South Africa's claim to immunity from jurisdiction and the English Court of Appeal recently upheld this decision.[3] This note considers the Court of Appeal judgments.

The relevant provision in the SIA is section 10(4)(a), which provides that 'a state is not immune as respects 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 focus of the first instance and appeal judgments was whether the cargo was, at the time when the cause of action arose, in use or intended for use for commercial purposes. Teare J rejected South Africa's claim to immunity, finding that the cargo was in use for commercial purposes when the vessel was carrying the cargo, prior to sinking, in 1942. In the 2021 article, the author agreed with Teare J's conclusion while acknowledging the difficult questions of statutory interpretation involved, including whether cargo on board a ship can be said to be 'in use'. The English Court of Appeal, by a two to one majority (Popplewell and Andrews LJJ; Elisabeth Laing LJ dissenting) upheld the decision of the trial judge.

Two main questions were addressed by the Court of Appeal. The first was the time at which the cause of action for salvage arose and the second was whether, at that time, the cargo was in use for commercial purposes. On the first issue, the Court of Appeal was unanimous in finding that the cause of action arose in 1942, at the time of sinking of the vessel, rather than 2017, when the salvage services were performed. The Court of Appeal reached this conclusion by two distinct but interlocking routes.

The first approach involved examining the nature of the cause of action for salvage. The key ingredient in such a claim is that the property must be recognized as a proper subject of salvage, which occurs when the property is or has been cargo carried on board a ship at sea and concerned in a maritime adventure.[4] The Court also noted that many of the successful claims for salvage historically involved wrecks and section 10(4)(a) essentially applies to salvage claims. Consequently, the drafters must have intended the provision to apply to ships and cargoes which had become wrecks. This conclusion was critical in assessing when the cause of action arose. In determining such time, it is necessary to focus on the point at which '*the relevant aspect*'[5] of the cause of action for salvage arises. This moment will not be when the cause of action is complete, with the occurrence of the last necessary ingredient, namely the provision of salvage services. Instead it will be when the key ingredient of the cause of action for salvage materialises, that is, is when the goods acquire the status of cargo while on board a vessel concerned in a maritime adventure.

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[1] Richard Garnett, 'Foreign State Immunity and Marine Wrecks' (2021) 35 *Australian and New Zealand Maritime Law Journal* 1.
[2] [2020] EWHC 3434 (Admlty).
[3] [2022] EWCA Civ 1318.
[4] Ibid [57], citing *The Gas Float Whitton (No 2)* [1897] AC 337.
[5] Ibid [70] (emphasis in original).

The court agreed with the first instance judge that adoption of a last ingredient approach (as advocated by South Africa) would have an anomalous result. Specifically, a foreign state would have 'blanket immunity from claims for salvage … in all cases of wreck even if the state-owned cargo was a commercial cargo shipped on a merchant vessel.'[6] Such conclusion is at odds with the customary international law principle of restrictive state immunity (upon which the SIA is based), which excludes immunity for state conduct that is private or commercial in nature.

Andrews LJ provided a further basis for concluding that the cause of action arose in 1942, rather than 2017. Her Ladyship suggested that the word 'arose' in section 10(4)(a) was synonymous with 'originate' or 'begin to exist'. Consequently, in the context of salvage, attention should be placed on the time when the cause of action for salvage begins rather than its completion.

The approach of the majority finds some support in the context of the rules for service of originating process out of the jurisdiction, with one ground being where the proceeding is founded on 'a cause of action arising in' the forum.[7] In *Distillers (Biochemicals) Ltd v Thompson*,[8] the Privy Council (on appeal from New South Wales) held that in the context of a claim for negligence, the cause of action arises in the forum when the act on the part of the defendant that gives the claimant its cause of complaint occurs there.[9] The court specifically rejected the view that a cause of action arises when the last ingredient of the cause of action — the event that completes it — occurs. Hence, in the context of negligence, while damage is the last and necessary event completing the cause of action, it is not the key element in the claim. Similarly, in the context of salvage, while the last event to complete the cause of action is the performance of salvage services, the key ingredient of the cause of action is when goods are placed on board a ship by the owner and acquire the status of cargo while the ship is engaged in a maritime adventure.

The next inquiry under section 10(4)(a) was whether the goods were 'in use' by South Africa for commercial purposes at the time the cargo was on board the vessel prior to sinking. Again, the majority agreed with the first instance judge that the goods were in use for commercial purposes at that time. The use consisted of South Africa 'making arrangements for the silver to be put on board the vessel and carried to South Africa by sea'. Two activities were critical in this regard: South Africa entering into: (a) a contract of purchase on fob terms for the silver to be delivered on board the vessel; and (b) a contract of carriage with the owners of the vessel for the cargo to be carried by sea to South Africa.[10] Both these acts amounted to 'activity for commercial purposes' within section 10(4) of the SIA. The majority rejected the dissenting view of Elisabeth Laing LJ[11] that the contracts were simply entered into for the purpose of placing the goods on the vessel and having them carried, with the result that the cargo was not 'in use' while on board. Instead, the contracts were the means by which the goods became cargo.[12] The term 'use' is therefore not confined to physical handling of the goods but can also involve the transporting of them from A to B.[13] To decide otherwise would mean that the silver would not be in use for any purpose at all when on board the vessel; such an interpretation would 'deprive the word 'use' of any substantial content in section 10(4)(a) in relation to cargoes'.[14]

Popplewell LJ also noted (obiter) that the effect of the above interpretation is that a state that contracts to buy and transport in a merchant ship any form of military equipment, such as boots or armaments, would be engaged in commercial activity under both the SIA and customary international law.[15] The relevant activity is having the goods transported under a commercial contract of carriage. Andrews LJ, while seeing 'the force of that analysis' preferred to leave the issue open for future determination.[16] Elizabeth Laing LJ, by contrast, found this result 'counterintuitive', at least in the context of state-owned cargo such as armaments.[17]

[6] Ibid [119] (Andrews LJ); see also [81] (Popplewell LJ).
[7] See, eg, *Federal Court Rules 2011* (Cth) r 10.42(n) ('a cause of action arising in Australia').
[8] [1971] AC 458.
[9] Ibid, 468. This decision also represents current Australian law, see *Traxon Industries Pty Ltd ACN 009 318 987 v Emerson Electric Co* (2006) 230 ALR 297, 310.
[10] [2022] EWCA Civ 1318, [90] (Popplewell LJ).
[11] Ibid [142].
[12] Ibid [91] (Popplewell LJ).
[13] Ibid [92] .
[14] Ibid [93]; [125] (Andrews LJ).
[15] Ibid [98].
[16] Ibid [116].
[17] Ibid [140].

Finally, Popplewell LJ responded to Elizabeth Laing's LJ assertion that the existence and availability of an *in personam* claim for salvage against the cargo owner under section 10(4)(b) of the SIA justified a broad scope of immunity for *in rem* claims under section 10(4)(a). His Lordship noted that the two heads of jurisdiction provide alternative pathways for a claimant, with *in rem* jurisdiction often providing substantial advantages in a shipping context. For example, *in rem* jurisdiction is established by the presence of a *res* within the jurisdiction upon which service can be made with the *res* also being capable of being detained and sold to provide effective enforcement of a judgment. Neither of these features are present in the case of a personal claim where a claimant may often have to serve the foreign cargo owner out of the jurisdiction and show that the local court is a *forum conveniens*. It cannot therefore be assumed[18] that a personal claim will be available to a claimant salvor in every case where an *in rem* action would be available or that it would be as effective. Such a conclusion provides further support for not interpreting section 10(4)(a) to confer a wide grant of immunity.

The issue of the intended use of the cargo in section 10(4)(a) therefore did not need to be considered on the approach taken by the majority judges. Popplewell LJ however noted (obiter) that the concept may be used to remove immunity still further, in the situation where a state uses a warship to carry military equipment or armaments. Immunity will not apply in that case if the intended purpose is commercial, such as if the state were intending to sell on the cargo at a profit.[19] Such a conclusion is consistent with the narrow approach of the majority to immunity in salvage cases more generally. For Elisabeth Laing LJ, however, the intended use of the cargo on the SS Tilawa was all important given her conclusion that the silver was not in use for commercial purposes. Her Ladyship agreed with South Africa that the cargo was not intended for use for commercial purposes as it was to be used to produce South African coinage.[20] Hence, South Africa was immune.

By way of comment, the majority judgments of the Court of Appeal were entirely correct in upholding the decision of the first instance judge to deny immunity, although they provided more detailed and persuasive reasoning. On the issue of when the cause of action arose, focus was placed on the key element of a salvage claim, namely when the goods became cargo and concerned in a maritime adventure, which was necessarily just before sinking of the vessel. Such a conclusion was further supported by a textual analysis of the term 'arose'. This outcome is hard to refute, since a finding that a claim only arose at the time of salvage would result in a vessel's status as a wreck leading to the imposition of immunity in all cases. A salvor could never bring an *in rem* proceeding against a foreign state's cargo in a sunken vessel. Such a result sits awkwardly with the doctrine of restrictive state immunity upon which the SIA is based. The legal status of the vessel and its cargo must therefore be assessed at the time the vessel was carrying the cargo.

Secondly, on the issue of the cargo being 'in use', the majority were again correct in rejecting South Africa's argument that the cargo is not in use merely because it was on board the vessel. The problem with such an interpretation is that it deprives the word 'use' of any valuable meaning and makes the alternative pathway of 'intended use' determinative in all cases. Again, since the aim of the SIA is to be consistent with the customary international law doctrine of restrictive state immunity, an analysis which gives weight to the nature of the state's acts or activities rather than the purpose of such acts should be preferred.[21] Entering into commercial contracts for the purchase and transport of the silver were acts that a private owner could equally perform and so properly constituted uses of the cargo for commercial purposes.

Finally, it is likely that an Australian court would reach the same conclusion on the facts, given the similar legislative regime on foreign state immunity. Section 18(3) of the FSIA provides that a foreign state is not immune in an action commenced *in rem* against cargo that was at the time the cause of action arose, commercial cargo. Section 18(5) defines 'commercial cargo' as cargo that is 'commercial property' under section 32(3) of the Act, with commercial property defined as 'property other than diplomatic or military property, that is, in use by the foreign state substantially for commercial purposes'. Significantly, the drafters of the FSIA anticipated the problem of cargo being 'in use' while on board a vessel, stating in section 32(5) that 'property that is apparently not in use shall be taken to be used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes'.

[18] Ibid [100].
[19] Ibid [98].
[20] Ibid [157].
[21] Ibid [81], [95], citing *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] 1 AC 244, 263; see also [113]-[114] (Andrews LJ).

Such an approach avoids the need to show that the cargo was 'in use' while on board, which was the main point that split the Court of Appeal.

Overall, while *The SS Tilawa* presents some difficult issues of statutory construction, the majority of the English Court of Appeal's conclusion in rejecting immunity is consistent with the restrictive theory of foreign state immunity. Where a foreign state engages in acts identical to those performed by a private trader, such as placing its goods on board a commercial vessel for shipment pursuant to contracts of sale and carriage, it should not in principle be entitled to plead immunity from suit by a claimant salvor of such cargo. Any other result is an unjustified protection for foreign states.

On 1 February 2023, the United Kingdom Supreme Court granted permission to appeal from the decision of the Court of Appeal. It seems that the status of the silver bars has not been finally resolved.