

April 2008 – Inaugural Issue

Developments in Sovereign Disputes

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Underwater Treasure Gives Rise to Sovereign Disputes



By **Dennis H. Hranitzky** and **David M. Bigge**

Advances in the field of undersea exploration technology have given rise to a cottage industry of shipwreck explorers, bringing from the depths not only sunken treasure but also thorny international legal disputes with foreign sovereigns claiming rights to the haul.

In May 2007, the publicly-traded, underwater exploration company Odyssey Marine Exploration Inc. announced that it raised \$500 million in colonial-era coins and other precious metals from an unidentified shipwreck. Odyssey codenamed the project “Black Swan” and divulged neither the specific location of the shipwreck nor the name of the ship itself. Some observers speculate that the wreck may be the *Merchant Royal*—an English ship commissioned by the Kingdom of Spain that was holding Spanish cargo when it sank in 1641 and which has been described as one of the most valuable shipwrecks of all time. Others, including Spain, believe that the wreck is *Nuestra Señora de las Mercedes*, a Spanish ship that sank off the coast of Portugal in 1804. Odyssey claims that the “Black Swan” is neither the *Merchant Royal* nor *Nuestra Señora de las Mercedes* and has sequestered the treasure it pulled from the wreck at an undisclosed location to be catalogued and preserved. Odyssey is expected not to announce the origin of the recovered treasure until that process is concluded.

Note from the Editors

We are pleased to present this first edition of Dechert LLP’s *Developments in Sovereign Disputes*, which we have developed to keep you informed of interesting legal developments around the world related to commercial disputes involving foreign states, state-owned or controlled businesses, and other sovereign instrumentalities. Disputes with foreign governments and their instrumentalities have become part of life for many businesses engaged in international commerce. These disputes arise disproportionately in some sectors—energy, construction, and investment in distressed emerging market debt top the list—and we plan to give significant attention to those sectors. But as our first article on shipwreck salvage demonstrates, disputes with sovereigns can arise in unexpected contexts as well.

We plan to send you a new issue every two or three months. We hope that, after reading a few of our pieces, you will come to enjoy this exciting and interesting field of law as much as we do.

Enjoy this first edition of *Developments in Sovereign Disputes*.

Editors

Robert A. Cohen
Dennis H. Hranitzky

Both Odyssey and Spain brought claims in the U.S. District Court for the Middle District of Florida, in Tampa, Florida, where Odyssey is headquartered, to preserve whatever rights they each may have to the haul. But in what other forums, and under what laws, might disputes among Spain, Odyssey, and any others claiming rights to the treasure be decided?

The answer involves a number of overlapping international treaties and local laws. The most critical component of the analysis is the location of the wreck. If the wreck lies within a nation's territorial waters, the law of that nation will apply. Such was the case in 2000, when Spain successfully sued in U.S. courts to reclaim property from the *Juno* (which sank in 1802) and *La Galga* (which sank in 1750)—two Spanish ships found in U.S. territorial waters off the coast of Virginia. Spain argued that the U.S. Abandoned Shipwrecks Act required that there be an explicitly expressed intent by the owner (in those cases, Spain) to abandon the property; otherwise, title remains with the original owner. As no such explicit expression had been made with regard to the *Juno* and *La Galga*, a U.S. federal appellate court ruled that the property was considered the property of Spain. See *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000). In the case of the “Black Swan,” if it turns out to be the *Merchant Royal*, it may be in British territory, where the United Kingdom's Merchant Shipping Act of 1995 and the Protection of Wrecks Act of 1973 would govern. The *Merchant Royal* is believed to have sunk off the coast of Cornwall.

Experts believe that if the “Black Swan” is indeed the *Merchant Royal* or *Nuestra Señora de las Mercedes*, it is probably located outside of any state's territorial waters. The *Merchant Royal* was reported to have sunk 35–40 miles off the English coast, and *Nuestra Señora de las Mercedes* sank 30 miles off the coast of Portugal. If so, two international treaties govern: the United Nations Convention on the Law of the Sea and the International Salvage Convention—both of which may allow Spain to retain ownership of the property but would require a significant fee to be paid to Odyssey for the salvage. Odyssey claims that this fee could be as high as 90% of the value of the haul. By recovering the treasure, Odyssey can place a maritime lien on it to protect its rights to this fee. (In the United States, such liens are only available in federal court.) Of course, a lien on property belonging to a sovereign gives rise to issues of sovereign immunity. But if the lien is levied in the United States, it would be permitted under the Foreign Sovereign Immunities Act 28 U.S.C. § 1605(b)(1), as

the U.S. Supreme Court recently reiterated a creditor's right to place a lien on sovereign property. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007). The British State Immunities Act of 1978, by contrast, contains no exception for maritime liens against sovereign property.

So what court or tribunal decides these complicated issues? There are several possibilities:

- By virtue of Odyssey's Tampa, Florida, headquarters, the U.S. District Court in Tampa, where Odyssey typically files actions of this nature, could retain jurisdiction.
- Spain might also pursue an action in its own courts, in which case it might argue that those courts are the more proper forum. This argument could have some force if, for example, any surviving records of the sunken ship are located in Spain.
- Some salvage companies, including Odyssey, occasionally enter into contracts with sovereigns that contain arbitration clauses. Under international law, these arbitration clauses should control. The Law of the Sea includes specific provisions for international arbitration.
- Finally, if the U.S. government were to side with Odyssey over Spain's claim of ownership, Spain could bring an action in the International Court of Justice to determine its rights under the relevant international treaties *vis à vis* the United States.

Odyssey's recovery from the “Black Swan” site has also led to legal tangles with Spanish authorities. In the summer of 2007, reports circulated that a Spanish court had issued an order for the Spanish Civil Guard to detain any Odyssey vessel in Spanish coastal waters. And indeed, the Spanish Civil Guard detained Odyssey vessels in July 2007 and again in October 2007. Both times, Odyssey maintained that its vessels were legally in Spanish waters and that the vessels in question were not involved in the “Black Swan” exploration. Nonetheless, Spanish authorities invaded and searched Odyssey's ships. Odyssey amended its complaint in the Florida action in August 2007 claiming damages and legal costs from the July 2007 detention, but those claims were dismissed on jurisdictional grounds. While abuses of sovereign power are an inherent risk of all litigation against sovereigns (a subject we will take up in a future edition), Odyssey's operations seem particularly at risk if these two detentions are any guide.

The rights of Spain's creditors may also factor into the case. If Spain claims ownership of the recovered treasure, which is currently in the United States, Spain's creditors may seek to attach or seize that property, or may intervene in Spain's action to preserve their rights in the allegedly Spanish property. Such creditor claims could have priority over Odyssey's claims.

On March 6, 2008, the federal district court in Tampa issued several significant rulings in the "Black Swan" case. First, it ordered Odyssey to disclose enough information about the site of the wreck to determine the nature of Spain's interest, if any, in the haul. The court warned that if Odyssey did not comply with the discovery order, the Court would disclose the name of the shipwreck. The court also dismissed Odyssey's claims relating to Spain's detention of Odyssey's ships on the ground that it would not have the power to order Spain to pay damages for such claims. Finally, the court denied Spain's motion to dismiss Odyssey's claims regarding its salvage rights on the "Black Swan." The case is now in the discovery stage.

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Swiss and French Courts Affirm That State Alter Egos Are Liable for Sovereign Debts

By **Eduardo Silva Romero**



Recent decisions in the high courts of Switzerland and France have strengthened creditors' rights to pursue assets held by the alter ego of a foreign state to satisfy the debts of the state.

These critical decisions bring the French and Swiss laws of sovereign immunity more in line with U.S. law.

The *Cour de Cassation*, France's highest court, held for the first time in November 2007 that an alter ego of a state could be held liable for judgments against the state. In *Société Nationale des Hydrocarbures v. Winslow B&T*, 14 November 2007, Case No. J04-15.388, the Court examined whether a creditor of Cameroon could seize a debt that Winslow B&T, a third party, owed to Société Nationale des Hydrocarbures ("SNH"), a corporation 100% owned by Cameroon. SNH objected to the seizure of its assets, arguing that it had separate legal status from the government under Cameroon law and thus could not be liable for Cameroon's debts.

The French *Cour de Cassation*, however, found that "SNH does not have a substantial functional independence and does not enjoy a legal and factual autonomy in respect of the State." In support of this conclusion, the French high court noted the following facts about the relationship between SNH and Cameroon:

- Cameroon held 100% of SNH's capital.
- SNH was created to manage Cameroon's oil interests.
- SNH was controlled by Cameroon's president.
- SNH's board of directors was composed of representatives of the president and his ministers.
- Cameroon dictated how SNH was to perform under its contract with Winslow B&T.
- SNH provides services for Cameroon for which it receives no remuneration.
- SNH's revenues are derived from state coffers.

In American legal parlance, the *Cour de Cassation* found that SNH is an alter ego (in French, "émanation d'état") of Cameroon and that its assets could therefore be seized to satisfy Cameroon's debts. This ruling was a break from

earlier French decisions, in which alter-ego allegations were not sufficient to pierce the veil between state corporations and the state itself. The holding in *Société Nationale des Hydrocarbures* should significantly improve the prospects of successfully enforcing a judgment against a foreign state in France.

Similarly, in *Automated Air Traffic Control v. Commission de surveillance des offices des poursuites et des faillites du canton de Genève*, No. 7B/2/2007.frs (August 15, 2007), the Swiss Federal Tribunal, the highest court in Switzerland, ruled in favor of creditors of the Russian Federation against a Russian state corporation. The Russian Federation had previously concluded a settlement agreement with *Compagnie Noga d'Importation et d'Exportation* ("Noga"). The Noga settlement agreement included both an explicit acknowledgement that it was commercial in nature and a waiver of any Russian Federation claims to immunity. After the Russian Federation violated the settlement agreement, Noga obtained a Swiss court order for the seizure of all assets in Switzerland belonging to the Russian Federation "in its own name or as an economic beneficiary, through other legal entities." Noga thereafter seized tolls collected on behalf of the Moscow Center for Automated Air Traffic Control (the "Moscow Center").

In objecting to this seizure, the Moscow Center argued first that as it was not the Russian Federation but rather a government-owned corporation, it could not be liable for the Russian Federation's debts. The Swiss high court rejected this argument, finding that the Moscow Center was "a governmental entity subordinated to the Russian State." In support of its conclusion, the court noted that the Moscow Center was created as a "state company" of Russia and that its assets belong to the Russian Federation and are at the Russian Federation's disposal. The court found that these facts evidenced the Moscow Center's status as an alter ego of Russia and found that this status rendered the Moscow Center's assets available for satisfaction of Russia's debts.

Having lost its argument that it was separate from the Russian government, the Moscow Center argued that even if it could be considered liable for the Russian Federation's debts, the Russian Federation was itself immune from execution. This argument was rejected, as the underlying contract waived immunity and recognized the commercial nature of the agreement.

Taken together, these cases represent welcome developments in European law for creditors of sovereigns. As more courts recognize the application of alter-ego doctrines to state entities, sovereign debtors will have fewer ways to evade legitimate judgments against them.

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