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## Case Mercedes Shipwreck – Odyssey Marine Exploration Inc. v. Unidentified Shipwrecked Vessel

*Odyssey Marine Exploration – Spain/Espagne – Peru/Pérou – United States/États-Unis – Archaeological object/objet archéologique – Colonialism/colonialisme – Post 1970 restitution claims/demandes de restitution post 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Ownership/propriété – Jurisdiction/conflit de juridiction – State immunity/immunité des États – Act of State – Anti-seizure legislation/garantie de restitution – Request denied/rejet de la demande – Unconditional restitution/restitution sans condition*

*In 2007, Odyssey Marine Exploration, Inc. found a shipwreck of the Spanish Royal Navy Frigate Nuestra Señora de las Mercedes, loaded with many tonnes of coins. Odyssey filed an in rem action in the United States federal court to get legal title to the shipwreck and the coins, but the court found that they did not have the jurisdiction to decide the case according to the Foreign Sovereign Immunities Act. As a result, the Mercedes and its cargo were given over to the custody of Spain.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources*

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## I. Chronology

### Colonialism – Post-1970 restitution claim

- **1804:** Spanish Royal Navy Frigate *Nuestra Senora de las Mercedes* (*Mercedes*), loaded with 900,000 silver pesos, 5,809 golden pesos, and about 2,000 copper and tin ingots, exploded and sank in combat with a British squadron while taking the treasure to Spain from Peru.<sup>1</sup>
- **March 2007: Odyssey Marine Exploration Inc.** (Odyssey), a company engaged in the exploration and archaeological recovery operations of deep-ocean shipwrecks, discovered the remains of a ship on the bottom of the Atlantic 100 miles west of the Straits of Gibraltar and recovered about 595,000 coins worth as much as \$500 million.<sup>2</sup>
- **9 April 2007: Odyssey filed a complaint** in the US District Court for the Middle District of Florida (District Court) against “the Unidentified, Shipwrecked vessel, its apparel, tackle, appurtenances and cargo”, which included a **possessory and ownership claim** pursuant to the law of finds and a **salvage award claim** pursuant to the law of salvage.<sup>3</sup>
- **11 April 2007:** Odyssey symbolically deposited with the District Court a small bronze block recovered from the ship and filed a motion for issuance of a **warrant of arrest *in rem*** against the shipwrecked vessel, its apparel, tackle, appurtenances and cargo. The District Court **granted the motion**, commanded the US Marshal to take possession of the bronze block and any future artifacts recovered from the shipwrecked vessel and appointed Odyssey as their substitute **custodian**.<sup>4</sup>
- **Summer 2007: Spain** claimed that the shipwrecked vessel was the *Mercedes*. Invoking sovereign immunity, Spain contested Odyssey’s claim and the legality of the warrant of arrest *in rem* against the *Mercedes*. During the same period, **Peru** and 25 descendants of those aboard the *Mercedes* filed ownership claims against the shipwreck and its contents.
- **22 December 2009:** The District Court endorsed Spain’s position, **dismissed** the ownership claim that Odyssey had brought against the *Mercedes* and its contents for **lack of subject matter jurisdiction** and vacated the *in rem* arrest for the same reason.<sup>5</sup> Odyssey was ordered to return the *res* to Spain within 10 days, but the order was stayed for an appeal.
- **21 September 2011:** The **US Court of Appeals for the Eleventh Circuit** (Court of Appeals) upheld the decision of the District Court.<sup>6</sup>
- **25 February 2012:** Odyssey returned the coins to Spain.<sup>7</sup>
- **14 May 2012:** The **US Supreme Court** declined Odyssey’s appeal.

<sup>1</sup> Edvard Pettersson, “Odyssey Marine Must Give Spain Shipwreck Treasure, Judge Says”, *Bloomberg Business*, February 18, 2012, accessed June 16, 2015, <http://www.bloomberg.com/news/articles/2012-02-17/odyssey-marine-ordered-to-hand-shipwreck-treasure-to-spain>.

<sup>2</sup> Ibid.

<sup>3</sup> *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011), at 1166.

<sup>4</sup> Ibid.

<sup>5</sup> *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F.Supp.2d 1126 (M.D. Fla. 2009).

<sup>6</sup> *Odyssey Marine Exploration* (2011)

<sup>7</sup> “Sunken treasure haul arrives in Spain from US”, *BBC News*, February 25, 2012. Accessed October 28, 2015, <http://www.bbc.com/news/world-us-canada-17158436>.

## II. Dispute Resolution Process

### Judicial claim – Judicial decision

- After Odyssey published a notice of arrest pursuant to the District Court’s warrant issued on 11 April 2007, Spain learned about the shipwreck discovery and filed various motions against Odyssey’s ownership claim and the warrant of arrest *in rem*. Globally, Spain claimed that the *Mercedes* was a Spanish Royal Navy Frigate that exploded and sank in combat in 1804 and was therefore subject to sovereign immunity from all claims or arrest in the United States pursuant to the *Foreign Sovereign Immunities Act* (FSIA)<sup>8</sup>.
- In addition, Peru and 25 descendants of people aboard the *Mercedes* filed ownership claims against the contents of the shipwreck.

## III. Legal Issues

### Act of State – Anti-seizure legislation – Jurisdiction – Ownership – State Immunity

- Alleging the US courts’ lack of subject matter jurisdiction, Spain sought an order dismissing Odyssey’s ownership claim, vacating the arrest, terminating Odyssey’s appointment as substitute custodian to the *Mercedes* and directing that the artifacts in Odyssey’s custody be turned over to the custody of Spain.<sup>9</sup>
- Peru, as a successor State to Spain, as well as 25 descendants of people aboard the *Mercedes* contended that they also had ownership rights in the *Mercedes* and its contents.
- **The District Court’s absence of subject matter jurisdiction over the *res*.**
- According to the United States Constitution, US federal courts have the exclusive power to adjudicate *in rem* suits against a vessel, like Odyssey’s ownership claim against the shipwreck and its cargo, but “only if the court has exclusive custody and control over the property”.<sup>10</sup> This is why, when a party files an *in rem* complaint, the court issues a warrant for the arrest of the *res* which stays in the court’s custody for the remainder of the proceedings.
- However, if the *res* at issue is the property of a foreign State, the federal courts only have jurisdiction to arrest the *res* if authorized by the FSIA. Therefore, in order to determine if it had jurisdiction, the District Court first had to determine whether the *res* at issue was the property of Spain and, in the affirmative, whether it had jurisdiction over it under the FSIA.
- Both the District Court and Court of Appeals determined that the *res* was uncontestedly the shipwreck of the *Mercedes* and thus the property of Spain.

<sup>8</sup> *Foreign Sovereign Immunities Act*, 28 U.S.C.A. § 1609 (1976).

<sup>9</sup> *Odyssey Marine Exploration* (2011) at 1168.

<sup>10</sup> *Ibid*, at 1171.

- As to jurisdiction, the District Court first looked at § 1609 of the FSIA which states that “[...] the property in the United States of a foreign state shall be immune from attachment [,] arrest [,] and execution [...]”.<sup>11</sup>
- Even though the *Mercedes* itself was not found *in* the United States, it was considered to be within the District Court’s territorial jurisdiction for the purposes of application of § 1609 of the FSIA, because Odyssey deposited a part of the *Mercedes* (the small bronze block) with the District Court. The fact that the *Mercedes* was not in Spain’s possession at the time of arrest was not relevant.<sup>12</sup>
- In order to overcome this immunity presumption, Odyssey had to prove one of the statutory exceptions in § 1610 and § 1611 of the FSIA applied, thus giving the US courts subject-matter jurisdiction over the *res*. Odyssey failed to invoke either.
- Odyssey however argued that the ship was not entitled to the FSIA protection at all, because the *Mercedes* was serving a “well-documented, commercial, not military purpose when she sank”.<sup>13</sup> Both the District Court and the Court of Appeals rejected this “commercial exception” argument. The Court of Appeals noted that a foreign State is commercially engaged under the FSIA when “it acts like an ordinary private person, not like a sovereign, in the market”. This was not the case here, since the *Mercedes* was performing the sovereign act of transporting specie during a time of threatened war.
- **Peru’s claim.** Peru, as a successor State to Spain, contended that it had a superior right to the cargo since the property “physically, culturally, and historically originated in Peru”.<sup>14</sup> Peru’s argument was grounded on claims of exploitation by its former colonial ruler. Spain objected to the District Court’s jurisdiction to adjudicate this dispute.
- Peru argued that Spain’s immunity did not divest the District Court of jurisdiction to resolve Peru’s claim to part of the *res*; however, the District Court dismissed this argument, stating that the *Mercedes*’ “jurisdictional mooring line” to the US Courts had been severed upon confirmation of her Spanish identity and immunity.
- The District Court indicated that even if it were to accept jurisdiction on Peru’s claim, several reasons warranted its dismissal. Notably, Peru’s claim was based upon Article 149 of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>15</sup> which neither the United States nor Peru had ratified. The District Court added that there was no customary international law applying to disputes between competing sovereigns over underwater cultural heritage discovered in international waters.<sup>16</sup>
- Finally, the District Court noted that whether viewed from the perspective of an exploited colony or of a sovereign power using its resources, the dispute between Peru and Spain

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<sup>11</sup> Ibid.

<sup>12</sup> *Odyssey Marine Exploration* (2011) at 1168.

<sup>13</sup> Press Release, Odyssey Marine Exploration “‘Black Swan’ Case to Move to Appeals Court,” December 23, 2009. Accessed June 17, 2015, <http://www.shipwreck.net/pr194.php>.

<sup>14</sup> *Odyssey Marine Exploration* (2009) at 1145.

<sup>15</sup> This provision promotes the preservation and disposition of “[a]ll objects of an archaeological and historical nature found in the Area [...] for the benefit of mankind as a whole [with] particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin”.

<sup>16</sup> *Odyssey Marine Exploration* (2009) at 1146.

implicated the act of State doctrine. Citing *Republic of Austria v. Altmann*,<sup>17</sup> the District Court said it was precluded from inquiring into the validity of the public acts committed by a recognized foreign sovereign power within its own territory.

- **No severability between the *Mercedes*' shipwreck and cargo.** Odyssey, Peru and the 25 individual claimants argued that even if the *Mercedes* was immune from arrest, its cargo, and therefore the treasure that had been salvaged, was private property not benefitting from sovereign immunity. The Court of Appeal rejected this argument, stating that the cargo and the shipwreck were interlinked for immunity purposes.<sup>18</sup>
- **Return of the *res* to Spain.** After declining jurisdiction due to the *Mercedes*' sovereign immunity, the District Court vacated the arrest and ordered Odyssey, as the substitute custodian, to return the recovered *res* to Spain.
- The Court of Appeals noted that the Federal *Supplemental Admiralty Rules* do not state to whom the *res* should be released when the court does not have subject matter jurisdiction over the property; only that it should be released according to the "terms and conditions" best seen fit by the court. In this case, releasing the *res* to Odyssey rather than Spain would have been inconsistent with Spain's rights under the 1902 *Treaty of Friendship and General Relations* between the United States and Spain, which required the United States to extend to Spanish shipwrecked vessels the same protection and immunities afforded to its own shipwrecked vessels in similar circumstances.<sup>19</sup> Since the United States protects its sunken warships from unauthorized private party access and possession, the treaty required that the *Mercedes* be afforded the same protection and immunities from unauthorized access and salvage.

#### IV. Adopted Solution

##### Request denied - Unconditional restitution

- Spain's motion to dismiss was granted and all claims against the *res* (*Mercedes*) were denied without prejudice. The District Court relinquished its control of the *res* and released it to Spain who had a sovereign interest in it, which existed before Odyssey initiated its claim. All of the *res*, including the cargo of the *Mercedes*, was to be returned into the custody of Spain.
- The Court of Appeals confirmed the District Court's judgment and also dismissed the claims and arguments of Odyssey, Peru and the 25 descendants. The US Supreme Court confirmed the Court of Appeals judgment, without motives.
- Although Odyssey tried, without success, to contest the decision up to the United States Supreme Court, it eventually complied.

<sup>17</sup> 541 U.S. 677, 700. See also Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 6 Klimt Paintings – Maria Altmann and Austria," *Platform ArThemis* (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

<sup>18</sup> *Odyssey Marine Exploration* (2011) at 1180.

<sup>19</sup> *Ibid* at 1183.

## V. Comment

- UNESCO and the Underwater Heritage Convention both strongly disapprove of the use of underwater sites for commercial gain, but few of the world's major nations have signed on to this Convention.<sup>20</sup>
- Magistrate Judge Mark Pizzo commented that “more than two hundred years have passed since the *Mercedes* exploded [...] international law recognizes the solemnity of their memorial, and Spain's sovereign interests in preserving it”.<sup>21</sup> District Judge Steven D. Merryday added that “[t]he ineffable truth of this case is that the *Mercedes* is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary”.<sup>22</sup> We believe this shows that the US judges' decisions were based not only on strong legal motives, but also on ethical and moral considerations.
- President Clinton also stated his express concern that recent technological advances made the unauthorized disturbance of sunken State craft possible and asserted that the United States “recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea”.<sup>23</sup>
- In the middle of the US legal dispute concerning the *Mercedes*, Odyssey received a \$160,000 award for recovering artifacts for the UK from the English Channel.<sup>24</sup>
- This case also raised cultural property and identity issues for Peru. Professor John Norton Moore of the University of Virginia School of Law observed that the case is not “about sovereign rights over wrecks [...] or the dispute between salvors and sovereigns” but “as between Peru and Spain this case is about future custody of property physically, culturally and historically originating in Peru”.<sup>25</sup>
- In April 2015, the treasure was put on display at the Archaeological Museum of Alicante, as part of an extensive exhibit relating to the sinking of the ship and the recovery of the treasure.<sup>26</sup>

## VI. Sources

### a. Court decisions

- *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 132 S. Ct. 2379.

<sup>20</sup> Fincham, Derek, “UNESCO Wants HMS Victory Preserved,” *Illicit Cultural Property*, February 6, 2009, accessed June 16, 2015, <http://illicitculturalproperty.com/unesco-wants-hms-victory-preserved/>.

<sup>21</sup> *Odyssey Marine Exploration* (2009) at 1148.

<sup>22</sup> *Ibid* at 1128.

<sup>23</sup> *Ibid.* at 1143-44.

<sup>24</sup> Fincham, Derek. “Odyssey Marine Salvage Award.” *Illicit Cultural Property*, September 18, 2009, accessed June 17, 2009. <http://illicitculturalproperty.com/odyssey-marine-salvage-award>.

<sup>25</sup> *Odyssey Marine Exploration* (2009) at 1129.

<sup>26</sup> “MARQ Alicante The last journey of the Frigate Mercedes”, *Alicante Today*, April 27, 2015, accessed October 28, 2015, [http://alicantetoday.com/marq-alicante-the-last-journey-of-the-frigate-mercedes\\_21198-a.html](http://alicantetoday.com/marq-alicante-the-last-journey-of-the-frigate-mercedes_21198-a.html).

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b. Legislation

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c. Documents

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