COLONIAL-ERA TREASURE LOST IN THE MURKY DEPTHS OF FOREIGN SOVEREIGN IMMUNITY: *ODYSSEY MARINE EXPLORATION, INC. V. UNIDENTIFIED SHIPWRECKED VESSEL*

*Jack Coker III**

"[I]f you wish to avoid foreign collusions you had better abandon the ocean."

— Henry Clay[1]

I. INTRODUCTION

On February 18, 2012, Spanish Air Force transport planes touched down at Torrejon Air Base, in Madrid, laden with over 500,000 silver and gold coins worth an estimated half-billion dollars.[2] Odyssey Marine Exploration, Inc. ("Odyssey") recovered this treasure from a Spanish shipwreck on the ocean floor in a search-and-salvage operation 100 miles west of the Straits of Gibraltar.[3] Odyssey, a deep-sea exploration company based in Tampa, Florida, spent approximately $2.6 million in its recovery efforts at the site,[4] code named the "Black Swan."[5] The return of the treasure to Spain marked the end of Odyssey's nearly five-year legal battle with the Kingdom of Spain over possession of the treasure.[6]

---

* Jack Coker III, J.D. Candidate 2014, Florida Coastal School of Law; BSM 2009, Tulane University-Freeman School of Business.

[1] STEVEN WATTS, THE REPUBLIC REBORN: WAR AND THE MAKING OF LIBERAL AMERICA, 1790-1820, at 88 (1987).

[2] Susan Berfield, *Odyssey and the Lost Spanish Treasure*, BUSINESSWEEK, June 7, 2012, http://www.businessweek.com/articles/2012-06-07/odyssey-and-the-lost-spanish-treasure.

[3] Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel (*Odyssey II*), 657 F.3d 1159, 1166 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012), *and cert. denied*, 132 S. Ct. 2380 (2012).

[4] Berfield, *supra* note 2.

[5] Black Swan-Project Overview, ODYSSEY MARINE EXPLORATION, http://www.shipwreck.net/blackswan.php (last visited Aug. 28, 2013).

[6] Odyssey filed its first verified complaint for title or salvage rights on April 9, 2007.

The Eleventh Circuit, in *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, affirmed the lower court's order requiring Odyssey to turn the treasure over to Spain.[7] This case may mark the end of the maritime laws of finds and salvage,[8] at least when a foreign sovereign intervenes and asserts a colorable claim of ownership interest in the discovered vessel and its cargo.[9] This decision should make treasure hunters wary when operating in international waters, especially upon discovery of what may be the remains of a sovereign's warship.[10]

This Note will provide a brief overview of the laws at play in this case and analyze the Eleventh Circuit's holdings. Part II will describe the laws of finds and salvage and the Foreign Sovereign Immunities Act ("FSIA"). It will also introduce the reader to the history of *Nuestra Señora de las Mercedes* and discuss the procedural history of the case. Part III will include analysis of the court's findings and holdings in the case. Finally, the Note will conclude that the clearly erroneous standard, applied to the factual findings of the magistrate, really hamstrung Odyssey in this litigation. Additionally, the Note posits that the Eleventh Circuit may have misapplied the FSIA by failing to account for Congress's 1988 amendment and that Odyssey should have been allowed to retain at least a portion of its recovery.

II. BACKGROUND

A. Commercial Shipwreck Exploration: The Laws of Finds and Salvage

In Odyssey's complaint, it requested that the court give it title to the res, under the law of finds, or, in the alternative, grant it a maritime lien on the shipwreck and a liberal salvage award.[11] The law of finds, summed up succinctly as "finders, keepers," is a common-law doctrine

---

Odyssey II, 657 F.3d at 1166.

[7] *Id.* at 1182-84.

[8] *See* R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 435 F.3d 521, 531-32 (4th Cir. 2006) (explaining the laws of finds and salvage).

[9] *See Odyssey II*, 657 F.3d at 1182-84.

[10] *See id.*

[11] *Odyssey II*, 657 F.3d 1159, 1166 (11th Cir. 2011).

that traditionally only applied to property without an owner.[12] While courts did not customarily apply the law of finds in admiralty actions prior to the late 1800s,[13] admiralty courts now apply the law of finds when a finder recovers articles from "long lost" and expressly abandoned shipwrecks.[14] To establish a claim, finders must show their intent to take possession and their actual or constructive possession of the property.[15] Finders must also show either that the property has no owner or that the owner abandoned the property.[16]

Courts sitting in admiralty typically apply the law of finds in only two situations.[17] First, when an owner "expressly and publicly" abandons his or her vessel or cargo, the court will give the finder title to the property.[18] Second, courts will grant the finder title to "items . . . recovered from ancient shipwrecks [when] no owner appears in court to claim them," but if an owner intervenes in an in rem action, the court must apply the law of salvage.[19]

The law of salvage is part of the maritime *jus gentium*, and courts sitting in admiralty favor its application over the law of finds.[20] In contrast to the law of finds, which grants title to the first finder, the law of salvage grants an award to the salvor for recovering the

---

[12] Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 459-60 (4th Cir. 1992) (citing Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel (*Martha's Vineyard*), 833 F.2d 1059, 1065 (1st Cir. 1987)).

[13] *See* Eads v. Brazelton, 22 Ark. 499 (1861); David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-bye to Salvage in the Territorial Sea*, 19 J. MAR. L. & COM. 499, 510 (1988); *see also* R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 435 F.3d 521, 532 (4th Cir. 2006) (noting that, historically, admiralty courts applied the law of finds to objects that were never previously owned "such as marine flora and fauna").

[14] *Martha's Vineyard*, 833 F.2d at 1065; *see Columbus-Am.*, 974 F.2d at 461 (noting that a claimant must show abandonment by clear and convincing evidence).

[15] *R.M.S. Titanic, Inc.*, 435 F.3d at 532 n.3; *Columbus-Am.*, 974 F.2d at 460.

[16] *R.M.S. Titanic, Inc.*, 435 F.3d at 532 n.3.

[17] *Columbus-Am.*, 974 F.2d at 461.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 460-61; *accord R.M.S. Titanic, Inc.*, 435 F.3d at 532; Hener v. United States, 525 F. Supp. 350, 356-58 (S.D.N.Y. 1981).

property,[21] with the original owner retaining title.[22] Salvage awards tend to be very large, in many instances exceeding the value of the salvor's services.[23] As additional incentive, courts will award a salvor the total value of the property if the owner does not claim it.[24] To secure payment, courts award possession of the recovered property to the salvor and attach a maritime lien to the property.[25] For salvors to acquire a lien and right to possession of the property, they must show that the ship was in maritime peril, they volunteered their assistance and had no legal obligation to do so, and they had some measure of success in their operation.[26] Because salvors act to preserve another's property, the particular skill with which they conduct their operations increases their salvage awards.[27] Thus, when a salvor uses advanced archeological techniques in salvaging ancient shipwrecks, his or her salvage award should, in theory, be higher.[28] However, no right exists to assist imperiled vessels and their cargo if the owner rejects the salvor's services.[29] When a foreign sovereign owns the found or salvaged vessel, the FSIA may add some wrinkles to these in rem admiralty actions.[30]

B. The Foreign Sovereign Immunities Act

Congress enacted the FSIA to codify the restrictive theory of

---

[21] *Columbus-Am.*, 974 F.2d at 460-61.

[22] *R.M.S. Titanic, Inc*., 435 F.3d at 531.

[23] *See Columbus-Am.*, 974 F.2d at 459.

[24] *Id.*

[25] Should the true owner be unidentifiable or refuse to pay the salvage award, the lien entitles the salvor to execution and foreclosure of the lien, whereupon it obtains title to the salvaged property. *R.M.S. Titanic, Inc.*, 435 F.3d at 531 (citing R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 204-05 (4th Cir. 2002)).

[26] Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir. 1985).

[27] *Columbus-Am.*, 974 F.2d at 468.

[28] *Id.*

[29] *See* International Aircraft Recovery, L.L.C. v. Unidentified Wrecked & Abandoned Aircraft, 218 F.3d 1255, 1260-63 (11th Cir. 2000) (stating that the owner of a vessel has the right to refuse help before assistance has started, and the owner will not have to pay for the services).

[30] *See infra* Part II.B. (discussing that the FSIA provides guidelines for admiralty suits involving foreign-owned vessels).

sovereign immunity—that foreign states are immune from suits based on their public acts but not from those based on their private acts.[31] The FSIA provides presumptive immunity to a foreign sovereign and its property, and federal courts only have subject matter jurisdiction if an exception to the FSIA applies.[32]

In the case of maritime treasure recovery operations conducted outside the territorial jurisdiction of a federal court, a court must arrest the ship, or a portion of it, in order to obtain jurisdiction.[33] However, if the shipwreck belongs to a foreign sovereign, the plaintiff bringing an action for possession or a salvage award must comply with the terms of § 1605 of the FSIA.[34] One of these requirements includes giving notice to the person in possession of the ship.[35]

Providing notice to a person in possession of a sunken, ancient vessel becomes tricky because determining ownership and possession of such vessels is difficult to impossible.[36] If a salvor brings a traditional in rem action against the vessel, so long as no foreign sovereign intervenes, the action proceeds in standard fashion.[37] However, when a foreign sovereign intervenes and asserts ownership claims to the vessel, the court must look to the FSIA to ensure it has jurisdiction.[38] Prior to the 1988 amendments, the FSIA barred claims if a plaintiff wrongfully

---

[31] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2006).

[32] §§ 1605-07 (providing exceptions to immunity from personal jurisdiction); §§ 1610-11 (providing exceptions to immunity from attachment, arrest, or execution of sovereign property).

[33] *See* California v. Deep Sea Research, Inc., 523 U.S. 491, 494-97 (1998); The Brig Ann, 13 U.S. 289, 291 (1815); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 967-69 (4th Cir. 1999).

[34] § 1605(b)-(c).

[35] *Id.*

[36] *See infra* Part III.E. (stating that the FSIA preempted the common-law actual-possession requirement).

[37] *See, e.g.*, Sea Hunt v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000); Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 336 n.9 (5th Cir. 1978) (noting that the parties stipulated that the ship was an abandoned vessel; therefore, the court properly exercised jurisdiction).

[38] *See* § 1609; Beg v. Islamic Republic of Pakistan, 353 F.3d 1323, 1324 (11th Cir. 2003) ("Federal courts have jurisdiction to hear claims against foreign governments only if authorized by the Foreign Sovereign Immunities Act.").

arrested a foreign vessel to assert its maritime lien.[39] After the amendments, the FSIA provides that a wrongful arrest merely requires that a court vacate the arrest and allow the plaintiff to proceed in personam against the sovereign according to standard in rem procedures, but the court will assess damages, if any, for the wrongful arrest.[40]

C. A Journey Back in Time: The History of Mercedes *and Its Final Voyage*

In 1788, the Spanish Navy built *Mercedes* in Cuba.[41] Armed with twelve- and six-pounder cannons and twenty-four and three-pounder *pedreros*,[42] *Mercedes* distinguished itself in numerous naval engagements.[43] It also conducted multiple transport missions that brought valuables back from Spain's American colonies.[44]

During the Napoleonic era, tensions between Spain and Britain ran high, and Spain accrued significant debt.[45] After the war between Britain and France, in which Spain allied with France, Spain began gathering its money in its peninsular region to ensure it could repay its

---

[39] H.R. REP. NO. 94-1487, at 21-22 (1976); *see* § 1609 ("[T]he property . . . of a foreign state shall be immune from . . . arrest . . . except as provided in sections 1610 and 1611 of this chapter.").

[40] § 1605(b)-(c); H.R. REP. NO. 100-823, at 2 (1988).

[41] *Odyssey II*, 657 F.3d 1159, 1172 (11th Cir. 2011).

[42] *Id.* at 1173.

[43] *Id.* at 1172.

[44] *Id.*

[45] *Id.* Spain's fear of France drove it to break its military allegiance with Great Britain and pledge its forces to the French. *Id.* at 1171-72. Spain's fear derived from France's military might and expansionist ideals, and the grave potential of impending French invasion. *Id.* Spain broke its allegiance with Britain by entering into a series of treaties with France, which included military support and cession of Spain's claim to Louisiana. *Id.* at 1172. This led to tension between Spain and Britain that did not end with the war, despite Spain's efforts to avoid any further conflict with the British. *Id.* When the war ended in 1802, tensions in the region remained high. *Id.* Spain tried to avoid conflict with the British by entering into yet another treaty with France to relieve Spain of its military obligation in exchange for a hefty monthly payment. *Id.* However, this attempt at peace proved futile as Britain deemed any support, even financial, as sufficient grounds to attack Spain. *Id.*

debt.[46] In 1803, due to the tensions, Spain dispatched warships to bring money and cargo back from the New World. One of these warships was *Mercedes*.[47]

During the mission, Spain sent word to delay the return due to mounting tensions with Britain.[48] This led *Mercedes* to join a four-frigate squadron under the command of the royal navy commander general.[49] In August of 1804, the commander general's squadron, including *Mercedes* and its crew of 337 officers, sailors, and marines, finally commenced the return trip to Spain.[50] *Mercedes* set sail with a cargo of nearly "900,000 silver pesos, 5809 gold pesos, 2000 copper and tin ingots[, and] . . . two obsolete bronze . . . culverins."[51]

The British sent out four of its own frigates to intercept the Spanish warships and take them back to England.[52] On October 5, 1804, only one-day's sail from their destination and about one hundred miles from the Straits of Gibraltar, the Spanish squadron sighted the British ships and assumed an attack formation.[53] Just minutes into what would become known as the battle of Cape Saint Mary, the British fired on *Mercedes*; it exploded at the surface and sank to the ocean floor, leaving a widely scattered debris field.[54]

After lying in the murky depths for more than 200 years, as the magistrate judge stated in his report, "Odyssey set out to find . . . *Mercedes* and found it."[55] After months of research and exploration, using some of the most high-tech equipment available, Odyssey found

---

[46] *Id.*

[47] *Id. Mercedes* docked at Lima, Peru, and was to bring mail, "an extensive amount of [government-owned] specie," and privately owned specie and cargo back to Spain. *Id.*

[48] *Id.* at 1173.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 1172-73.

[52] *Id.* at 1173.

[53] *Id.* at 1166, 1173.

[54] *Id.*

[55] Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel (*Odyssey I*), 675 F. Supp. 2d 1126, 1133 (M.D. Fla. 2009), *aff'd*, 657 F.3d 1159 (11th 2011). In 2006, Odyssey started researching shipwrecks off the coast of Gibraltar. *Odyssey II*, 657 F.3d at 1166.

what it termed the "Black Swan" site.[56] The site, a shipwreck located "in international waters 100 miles west of the Straits of Gibraltar," is more than 3600 feet beneath the Atlantic Ocean and spans roughly ten acres of the seabed.[57]

D. Procedural History

After a detailed survey of the site, Odyssey filed a verified in rem admiralty complaint against "The Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo" on April 9, 2007, in the Middle District of Florida.[58] Two days later, Odyssey moved for a warrant of arrest in rem against the vessel, presenting the court with a bronze block recovered from the wreckage, to bring it within the court's territorial jurisdiction.[59] Later, the court appointed Odyssey as the substitute custodian of the res, allowing it to continue its recovery efforts, as an agent of the court, until the court ordered otherwise.[60]

After Odyssey published the required notice of arrest, the Kingdom of Spain intervened.[61] Spain asserted that the res was *Nuestra Señora de las Mercedes* and claimed ownership of the vessel and its contents.[62] Spain moved to dismiss Odyssey's complaint claiming that the wreck was, indisputably, *Mercedes*, a Spanish Royal Navy frigate that sank in combat, which gave the vessel and its cargo sovereign immunity from arrest and claims under the FSIA.[63] Spain requested that the court dismiss all claims against the res, vacate the arrest, and

---

[56] Black Swan-Project Overview, ODYSSEY MARINE EXPLORATION, http://www.shipwreck.net/blackswan.php (last visited Aug. 28, 2013).

[57] *Odyssey II*, 657 F.3d at 1166.

[58] *Id.*

[59] *Id.* at 1166-67.

[60] *Id.* at 1167.

[61] *Id.*

[62] *Id.* at 1167-68. After it became public that the res might be *Mercedes*, the Republic of Peru intervened as a claimant contending it had "sovereign rights to property aboard the *Mercedes*" because either the cargo originated in its territory or its people produced the cargo when Peru was a Spanish Viceroyalty. *Id.* at 1168. Twenty-five other claimants also intervened, asserting that their ancestors owned some of the cargo aboard *Mercedes*. *Id.*

[63] *Id.* at 1167-68.

order Odyssey to turn all artifacts over to Spain.[64]

Based on an "encyclopedic treatment of the issues" the claimants and parties presented through their filings, the magistrate judge, without evidentiary hearing, delivered his report and recommendation to the district judge on June 3, 2009.[65] Wholly adopting the report and recommendation, the district court ruled that the res was *Mercedes* and hence belonged to Spain, that *Mercedes* was immune from arrest under the FSIA, and that the court lacked subject matter jurisdiction over the dispute.[66] Accordingly, the district court dismissed the claims of Odyssey, Peru, and the individual claimants for lack of subject matter jurisdiction. It also vacated the arrest and ordered the res returned to Spain but stayed the order pending appeal.[67]

III. ANALYSIS

A. Overview of the Appeal

Odyssey, Peru, and the individual claimants all appealed to the Eleventh Circuit, raising five issues.[68] First, the appellants challenged the district court's treatment of Spain's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, arguing that the lower court should have applied a Rule 56 standard because the jurisdictional issue was intertwined with the merits of the claims.[69] Second, the appellants challenged the district court's failure to hold an evidentiary hearing prior to finding that the res was *Mercedes*.[70] The court quickly

---

[64] *Id.* at 1167.

[65] *Odyssey I*, 675 F. Supp. 2d 1126, 1128 (M.D. Fla. 2009).

[66] *Id.* at 1128-30.

[67] *Id.* at 1129-30.

[68] *Odyssey II*, 657 F.3d at 1168.

[69] *Id.* at 1169. The court quickly dismissed this contention, finding that, because the substantive claims were based on finds and salvage law and jurisdiction was based on the FSIA, the two could not be intertwined and a Rule 56 standard was not applicable. *Id.* at 1169-70.

[70] *Id.* at 1170. The appeals court also raised and dismissed this contention, finding that, with the "encyclopedic treatment of" the factual issues, including 125 affidavits, documents, photographs, and exhibits, the district court did not abuse its discretion by failing to hold an evidentiary hearing. *Id*.

dismissed these claims.[71]

The final three issues on appeal were the most important to the Eleventh Circuit and the parties.[72] The appellants argued that the district court had subject matter jurisdiction over the res at issue and that, even if the court lacked jurisdiction because the res was *Mercedes*, the cargo was severable from the wreck.[73] Finally, Odyssey contended that, if the district court lacked subject matter jurisdiction, it had no power to order Odyssey to return the res to Spain.[74]

B. Subject Matter Jurisdiction: The District Court's Evidentiary Findings

Perhaps the most interesting, important, and far-reaching issue that the Eleventh Circuit addressed in this case was whether the district court had subject matter jurisdiction over the res. In order to make this determination, the court first decided if the res at issue was, indeed, the Spanish warship *Mercedes*.[75] Reviewing for clear error, the Eleventh Circuit found that the evidence before the district court supported a finding that the res was shipwrecked *Mercedes*.[76] In so holding, the court looked at the ship's well-documented historical background, the evidence in the record, and the items that Odyssey recovered from the site.[77] Unfortunately for Odyssey, the court's affirmation that the res

---

[71] *See supra* notes 69-70 and accompanying text.

[72] *See Odyssey II*, 657 F.3d at 1168-84.

[73] *Id.* at 1171-82.

[74] *Id.* at 1182-84.

[75] *Id.* at 1171.

[76] *Id.* at 1169, 1171.

[77] *Id.* at 1171-74. Odyssey made two interesting contentions with regard to this part of the holding. *Id.* at 1174. First, Odyssey claimed that the artifacts recovered did not entirely match up with those on *Mercedes*. *Id.* The court dismissed that argument, stating that "failure to fully recover all artifacts . . . is understandable" because the ship exploded above the surface, sank to the ocean floor, scattered over a wide area, and sat there for 200 years. *Id.* Second, Odyssey argued that the res could not be *Mercedes* because it found no intact vessel at the site. *Id.* Calling this fact indeterminate, the court said copper hull sheathing found at the site evinces that the site was that of an actual vessel. *Id.* While Odyssey's contentions, logically, cast some doubt on the district court's findings, simple doubt is insufficient to get past the clear-error hurdle. *Id.*

was *Mercedes* drove much of the rest of the court's analysis.[78]

C. Subject Matter Jurisdiction: The FSIA

Having determined that the res was *Mercedes*, which was incontestably Spain's sovereign property, the court next set out to determine if, under the FSIA, *Mercedes* was immune from arrest.[79] A court must at least have constructive possession of the res before it can exercise its territorial jurisdiction over a shipwreck located in international waters.[80] A court obtains constructive possession when a plaintiff presents it with a portion of the wreck so that the court may arrest the res.[81] Here, because a foreign government, Spain, owned the arrested res, the court determined that § 1609 of the FSIA controlled, which provides property of a foreign sovereign with presumptive immunity from arrest unless a statutory exception applies.[82]

Instead of relying upon §§ 1610 or 1611, the only statutory exceptions to § 1609, Odyssey seized on the language of § 1609 that begins, "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act . . . ."[83] Odyssey argued that, because the United States was a party to the 1958 Geneva Convention on the High Seas[84] when Congress enacted the FSIA, the court should apply Article 9 of the Convention.[85] Article 9 of the Convention states that "[s]hips owned or operated by a State and used *only* on government *non-commercial* service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."[86] Odyssey contended that Article 9 created a commercial-activity exception to immunity under § 1609 of the FSIA.[87]

---

[78] *Id.*

[79] *Id.* at 1175.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] 28 U.S.C. § 1609 (2006); *Odyssey II*, 657 F.3d at 1176.

[84] Geneva Convention on the High Seas, *adopted* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962) [hereinafter Geneva Convention].

[85] *Odyssey II*, 657 F.3d at 1176.

[86] Geneva Convention, *supra* note 84, at art. 9 (emphasis added).

[87] *Odyssey II*, 657 F.3d at 1176.

The court rejected Odyssey's argument, stating that Article 9 was not an exception to § 1609 but an affirmative grant of immunity to non-commercial vessels.[88]

Rather than stopping there, the court continued its analysis, finding that even if the treaty did create a commercial-activities exception outside of § 1610,[89] *Mercedes* was not engaged in commercial activities.[90] A foreign nation engages in commercial activity, as defined by the FSIA and clarified by the Supreme Court and Eleventh Circuit precedent, when it acts as a private person in the market place, not as a sovereign.[91] Odyssey contended that Spain acted as a private person because seventy-five percent of *Mercedes*'s cargo was privately owned; Spain charged a one percent freight rate for shipping; Spain was not at war when the British sunk the ship; and *Mercedes* was serving in Spain's Maritime Mail Service, as a commercial transport, at the time of its demise.[92]

However, the court concluded that *Mercedes* was not serving in a commercial capacity because it was part of the Royal Spanish Navy.[93] In support, the court noted that *Mercedes*, armed according to Spanish naval regulations, had a navy captain; had a crew of naval officers, sailors, and marines; carried a significant amount of government-owned specie; and even delayed its return voyage "to comply with Spanish Navy orders to prepare for war with the British."[94] The services it provided by transporting private cargo were sovereign in nature because transport of private property was a military function during times of war or threatened war.[95]

---

[88] *Id.*

[89] 28 U.S.C. § 1610(a) (2006) ("The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune . . ." if it meets one of the seven listed exceptions). Odyssey's in rem admiralty action did not meet these exceptions. *Odyssey II*, 657 F.3d at 1175-76.

[90] *Odyssey II*, 657 F.3d at 1176.

[91] *Id.* at 1176-77 (quoting § 1603(d); Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992); Guevara v. Peru, 468 F.3d 1289, 1298 (11th Cir. 2006)).

[92] *Id.* at 1177.

[93] *Id.*

[94] *Id.*

[95] *Id.* In addition, the court found that "Spain presented ample evidence" that *Mercedes* was not part of the Maritime Mail Service. *Id.*

D. Subject Matter Jurisdiction: The Applicability of FSIA § 1605

Odyssey also argued that instead of applying § 1609, the district court should have applied § 1605(b), the section dealing with maritime liens.[96] However, the circuit court found that § 1605(b) only applied when suing the foreign sovereign itself, not when the plaintiff sues the res.[97] The plain language of the FSIA, according to the court, required that the court look only to § 1609 when determining the validity of an in rem arrest.[98] Thus, the court concluded that § 1605(b) did not apply.[99]

This quick rejection of Odyssey's invocation of § 1605(b) requires momentary pause and contemplation—especially considering that Odyssey devoted nearly twenty percent of its written appellate argument, both in its opening and reply briefs, to discussion of this section of the FSIA.[100] Congress included § 1605(b) to allow plaintiffs to enforce maritime liens against foreign states, and it is one of only two explicit admiralty provisions in the Act.[101] As originally enacted, and enforced in both the district and circuit courts here, a plaintiff would lose his remedy completely if he arrested the vessel or cargo, and if the plaintiff mistakenly arrested the vessel or cargo, § 1605(b) required the court to immediately dissolve such arrest when a sovereign intervened claiming immunity under the FSIA.[102]

However, noting the problems resulting from those procedures, Congress amended § 1605 in 1988.[103] Congress intended to do away

---

[96] *See id.* at 1178 ("Odyssey also attempts to circumvent § 1609 by arguing that § 1605(b), which refers to the immunity of a foreign state from claims when a suit is brought to enforce a maritime lien, provides this court with jurisdiction."). Section 1605(b) is an exception to the immunity of the foreign state, itself, when a plaintiff sues to enforce a maritime lien. *Id.*

[97] *See id.*

[98] *Id.*

[99] *Id.*

[100] Appellant's Opening Brief at 22, 34, 43, 49-54, *id.* (No. 10-10269); Appellant's Reply Brief at 17-20, *id.* (No. 10-10269).

[101] *See* 28 U.S.C. § 1605(b)-(c) (2006). Congress designed this section to avoid the arrest of vessels and replace an in rem action with a form of in personam action. H.R. REP. NO. 94-1487, at 21 (1976).

[102] H.R. REP. NO. 94-1487, at 21-22.

[103] H.R. REP. NO. 100-823, at 2 (1988).

with the old procedure that completely barred claims when a foreign vessel "is wrongly detained under the traditional in rem procedure," which, Congress noted, "remains the legal procedure except when the ship is owned by a foreign state."[104] The amendment "makes it clear that a case brought under section 1605(b) to enforce a maritime lien will proceed under the established maritime law principles of *in rem* suits, even though it is a suit *in personam*."[105] Odyssey, twice, brought this to the attention of the circuit court in its briefs but to no avail.[106] Perhaps the court decided not to dwell here because it already found that *Mercedes* was not conducting commercial activities[107] as required to meet the § 1605(b) exception.[108]

E. Subject Matter Jurisdiction: Possession Requirement

Having waded through most of its discussion of the FSIA's applicability, the court addressed Odyssey's contention that the FSIA and common-law sovereign immunity require a sovereign to have possession of the property for which it claims immunity.[109] Odyssey heavily relied on two cases interpreting state sovereignty under the Eleventh Amendment, the Supreme Court's *California v. Deep Sea Research*[110] and the Eleventh Circuit's *Aqua Log, Inc. v. Georgia*.[111] Odyssey also drew from *Compania Espanola de Navigacion Maritima, S.A. v. The Navemar*[112] and *Republic of Mexico v. Hoffman*,[113] pre-FSIA cases that discuss the possession requirement for immunity of foreign

---

[104] *Id.*

[105] *Id.* (emphasis added).

[106] Appellant's Opening Brief, *supra* note 100, at 50-52; Appellant's Reply Brief, *supra* note 108, at 18.

[107] *See supra* Part III.C.

[108] *See* 28 U.S.C. § 1605(b) (2006) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state . . . .").

[109] *Odyssey II*, 657 F.3d 1159, 1178 (11th Cir. 2011).

[110] California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).

[111] Aqua Log, Inc. v. Georgia, 594 F.3d 1130 (11th Cir. 2010).

[112] Compania Espanola de Navigacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938).

[113] Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

sovereigns.[114] Both the Supreme Court, in *Deep Sea Research*, and the Eleventh Circuit, in *Aqua Log*, relied on the very same pre-FSIA cases, which Odyssey cited, to support their holdings that a state sovereign must be in actual possession of the res to invoke Eleventh Amendment immunity.[115]

Here, though, the Eleventh Circuit curiously failed to follow its own precedent and use the same logic to deny foreign sovereign immunity.[116] Instead, the court found "no support to conclude these cases alter the immunity Congress specifically provided to property of foreign states under the FSIA."[117] According to the circuit court, the common-law actual-possession requirement, as it applies to foreign sovereigns, did not survive the FSIA.[118] The court remarked that the Supreme Court and the statute's legislative history supported their proposition that the FSIA was the sole basis for obtaining jurisdiction and that it preempted other laws, including the common law in that regard.[119] Finding no applicable exception to immunity under the FSIA and no possession requirement in its provisions, the court affirmed the district court's lack of subject matter jurisdiction, holding that *Mercedes* was immune from arrest.[120]

---

[114] *See* Appellant's Opening Brief, *supra* note 100, at 20 (noting that the cases discussed predate the FSIA).

[115] *Deep Sea Research*, 523 U.S. at 494-95; *Aqua Log, Inc.*, 594 F.3d at 1335 n.8.

[116] *See Odyssey II*, 657 F.3d 1159, 1178-79 (11th Cir. 2011).

[117] *Id.*

[118] *Id*. *But see* 28 U.S.C. § 1605(b)(1) (2006) (requiring notice of suit be given to the person in "possession of the vessel or cargo"); § 1605(c) (noting that the action "shall thereafter proceed . . . according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained."). When one reads these subsections together, bearing in mind the restrictive theory of sovereign immunity that Congress intended to codify in the FSIA, it begs a different approach than suggested by the Eleventh Circuit in *Odyssey*. Practically speaking, how would one effectuate notice to the person in possession, as required in § 1605(b)(1), if no one is in possession? That would be impossible. Thus, logic dictates that this indirectly codifies the requirement of possession.

[119] *Odyssey II*, 657 F.3d at 1179.

[120] *Id.*

F. Severability of the Cargo from the Vessel

Turning next to the issue of the severability of cargo from a sunken warship for the purposes of immunity, the court found, as a matter of first impression, that the cargo of the sunken warship was also immune because it was not severable from *Mercedes*.[121] Odyssey, Peru, and all of the individual claimants asserted that the privately owned treasure was severable from *Mercedes*.[122] However, no party cited case law that allowed severing a military vessel's cargo from the ship in salvage operations;[123] although, Odyssey's case law provided for severability when salvaging civilian vessels.[124] In its reply brief, Odyssey noted that, "prior to this case, no court had ever used the FSIA as a basis to dismiss an admiralty claim for salvage against cargo recovered from international waters"[125] and that the FSIA referred, in the disjunctive, to the "vessel or cargo."[126]

The court looked past these issues to a treaty that the United States and Spain signed in 1902 that declared that each country "shall afford to the [shipwrecked] vessels of the other . . . the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases."[127] The court determined that it must treat *Mercedes*, a Spanish warship, the same as American warships, which are subject to the Sunken Military Craft Act[128] ("SMCA") and the Abandoned Shipwreck Act[129] ("ASA").[130] Combined, the acts require express abandonment of shipwrecks and define "shipwreck" to

---

[121] *Id.* at 1179-80.

[122] *Id.* at 1180.

[123] *Id.*

[124] Appellant's Opening Brief, *supra* note 100, at 45.

[125] Appellant's Reply Brief, *supra* note 100, at 16.

[126] § 1605(b), (c); Appellant's Opening Brief *supra* note 100, at 43.

[127] *Odyssey II*, 657 F.3d at 1180 (quoting Treaty of Friendship and General Relations, U.S.-Spain, art. X, July 3, 1902, 33 Stat. 2105).

[128] *See* Pub. L. No. 108-375, §§ 1401, 1408(1), (3)(C) (2004) (providing that, under the SMCA, the government maintains ownership of the vessel and its debris field, including all cargo, contents, and personal effects, unless it expressly abandons its interests).

[129] *See* 43 U.S.C. § 2102(d) (2006). The ASA similarly defined shipwreck to include cargo. *Odyssey II*, 657 F.3d at 1180.

[130] *Odyssey II*, 657 F.3d at 1180-81.

include cargo.[131] Therefore, the court reasoned, Spain's comity interests[132] and the treaty required the court to treat *Mercedes*, including its cargo, as it would treat an American warship, so the court disregarded actual ownership of the cargo and granted Spain's claim to immunity over the cargo as well.[133]

G. Release of the Res to Spain

Finally, over Odyssey's arguments that, without jurisdiction, the Eleventh Circuit lacked the power to determine disposition of the treasure, the court upheld the district court's order vacating arrest and required Odyssey to turn over the treasure to Spain.[134] The court reasoned that by virtue of arrest of the res only a month after discovery, and Odyssey's status as substitute custodian for the court, all items Odyssey retrieved were merely "for and under the authority and protection of the court."[135] Therefore, aside from treasure that Odyssey obtained prior to the arrest order, the res was, and had always been, in the court's possession.[136] In the circuit court's view, the order merely relinquished control over property it had no jurisdiction to possess.[137]

IV. CONCLUSION

Had Odyssey persuaded the court that the res was not *Mercedes*, this case would have likely turned out differently, leaving Spain and the other claimants with no interests to assert. The lack of an evidentiary

---

[131] *Id*.

[132] *Id.* at 1182 (referencing Republic of Philippines v. Pimentel, 553 U.S. 851, 866 (2008) (stating that giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine)). Spain had a particular interest in the cargo aboard *Mercedes* because it was a sunken warship and Spain owned about twenty-five percent of the cargo aboard *Mercedes*. *Id.* at 1182 & n.16. The court's holding failed to account for the potential patrimonial and ownership interests of Peru and the individual claimants. *Id.* at 1182. In this regard, the court limited its holding to the facts of this case and made no determination of actual ownership. *Id.* at nn.16-17.

[133] *Id.* at 1180-82.

[134] *Id.* at 1182-83.

[135] *Id.* at 1183.

[136] *Id.*

[137] *Id.* at 1183-84.

hearing and the deference given to the magistrate's findings severely disadvantaged Odyssey in this litigation. Both the district and circuit courts seemed exceedingly dismissive of Odyssey's evidence. Furthermore, it seems apparent, given the discussion above, that Congress intended that salvage claims, like Odyssey's, be cognizable under the FSIA pursuant to § 1605(b).[138]

Finally, requiring Odyssey to give Spain the treasure that it spent millions of dollars retrieving and unknown amounts to store, as a substitute custodian, did not serve the interests of justice. At the very least, the court could have allowed Odyssey to retain a portion of the res equal to its expenses in storing the treasure while awaiting the courts' decisions. In conclusion, treasure hunters should ensure they are well versed in the nationality and history of a ship, and their circuit's interpretation of the FSIA, prior to commencing their salvage and recovery efforts. If not, they may end up in the same boat as Odyssey.

[138] *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(b) (2006) (providing exceptions to immunity from personal jurisdiction in cases of admiralty to enforce a maritime lien against a vessel or cargo of a foreign state).