

Navigating State Immunity in Admiralty Claims

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Can a foreign State’s cargo be arrested in an *in rem* action in the UK courts? This article explores how the State Immunity Act 1978 applies to Admiralty claims, and analyses the recent Supreme Court decision in *Argentum v South Africa*, where 2364 silver bars salvaged from a WWII wreck became the centre of a landmark ruling.

A foreign State is immune from the jurisdiction of the UK courts, by sections 1 and 14 of the State Immunity Act 1978, subject only to exceptions provided in the Act. That covers Admiralty proceedings and other proceedings on a claim which could be made the subject of Admiralty proceedings – see s 10(1). The reference to Admiralty proceedings includes *in rem* proceedings against a ship or cargo belonging to, or in the possession or control of or in which an interest is claimed by, a foreign State, which we will call here “foreign State’s ship” or “foreign State’s cargo” as applicable – see s 10(5).

By s 10 of the Act, the immunity is lost, in the case of an action against a foreign State’s ship or an action in personam for enforcing a claim in connection with such a ship, where the time when the cause of action arose, the ship was “*in or intended for use for commercial purposes*” – s 10(2).

In the case of an action *in rem* against a foreign State’s cargo, the immunity is lost 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*” – s 10(4)(a). Where the claim is in personam

for enforcing a claim in connection with such a cargo, the immunity is excepted if the ship carrying it was then “*in use or intended for use for commercial purposes*” – s 10(4)(b).

In the case of a sister ship arrest, that is, where one ship of the foreign State is pursued *in rem* for the liability created by another ship of the foreign State, the immunity remains intact as long as at least one of the two ships was not “*in use or intended for use for commercial purposes*”. The immunity is lost only where both the ships were “*in use or intended for use for commercial purposes*” – s 10(3).

The statutory framework reflects the shift from the absolute principle of state immunity to the restrictive theory, which distinguishes between sovereign acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*),

The working of the State immunity is demonstrated by the recent Supreme Court case of *Argentum Exploration Ltd v Republic of South Africa* [2024] UKSC 16. In this case, 2364 silver bars belonging to the Government of South Africa were being carried on the SS Tilawa from Bombay to Durban during the second world war in 1942. The silver was purchased by South Africa predominantly to be made into coins. During the voyage, the SS Tilawa was torpedoed and sunk in the Indian Ocean. About 75 years later, in 2017, the silver was recovered from the seabed by the salvage company Argentum and brought to Southampton and was delivered to the Receiver of Wreck pursuant to s 236 of the Merchant Shipping Act 1995. Subsequently, in 2019, Argentum commenced an *in rem* claim, under ss 20(2)(j) and 21(3) of the Senior Courts Act 1981, against the silver for a salvage reward, and South Africa entered an

acknowledgement of service and applied to strike out the claim on the grounds of State immunity.



Argentum argued the silver was “in use for commercial purposes” in 1942 because it was being transported under a commercial contract of carriage, following its purchase under a commercial contract of sale, and therefore the immunity was excepted by s 10(4)(a) of the State Immunity Act 1978. At the High Court, Sir Nigel Teare agreed, reasoning that it was appropriate to look at the cargo's status in 1942 ([2020] EWHC 3434 (Admlty)). He held that when a State contracts for its goods to be carried by sea – a classic commercial activity – it would be inconsistent with the restrictive theory of immunity, which restricts immunity to sovereign activities only, for it to be shielded from a salvage claim. To conclude otherwise would mean the phrase “in use” has little application to cargo, which is typically not actively used during a voyage. That decision was upheld by a majority, led by Popplewell LJ, in the Court of Appeal ([2022] EWCA Civ 1318). He added that the salvage claim depends on the silver being “cargo”, an inquiry which necessarily looks back to the circumstances of its carriage, and that this use – arranging for it to be carried under commercial contracts – was a non-sovereign activity.

Elisabeth Laing LJ, dissenting in the Court of Appeal, was of the view that as a matter of ordinary language, the silver was not “in use” for any purpose while sitting in the ship's hold; it was simply being carried. Therefore, the decisive question was its “intended for use”, which was admittedly for the sovereign, non-commercial purpose of being minted into coinage. She reasoned that the majority's interpretation would effectively mean a state-owned cargo on a commercial vessel could never be immune under s 10(4)(a), making the additional statutory requirement for cargo (compared to the ship)

redundant. She also pointed out that this interpretation was inconsistent with the Brussels Convention, and that Argentum was not left without a remedy, as an action *in personam* under s 10(4)(b) was still available.

South Africa's further appeal to the Supreme Court was unanimously allowed. The Court held that s 10(4)(a) did not remove South Africa's immunity. The judgment endorsed the reasoning of Elisabeth Laing LJ, stating that the ordinary meaning of "in use" does not cover cargo simply being carried in a ship's hold. The Court clarified that for the purposes of state immunity, the critical question is the use to which the state has chosen to put the property, not the commercial nature of the transaction that gave rise to it. It is not sufficient that the property "relates to" or is "connected with" a commercial transaction; the focus must be on its actual or intended use.

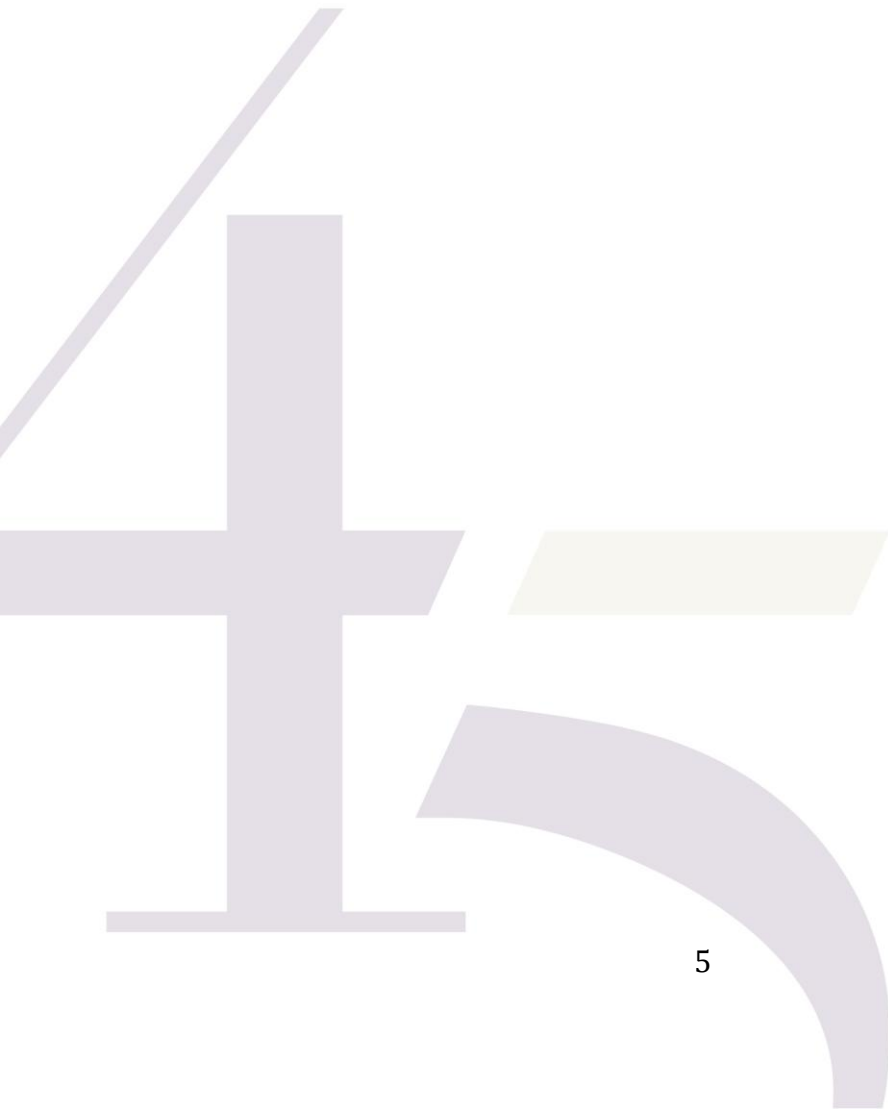
The judgment stressed that Parliament deliberately set a higher threshold for waiving immunity for an action *in rem* against cargo (s10(4)(a)) than for an action *in personam* (s10(4)(b)). To interpret "in use" as Argentum suggested would negate this important distinction, as any cargo on a commercial ship would automatically be deemed in commercial use, making the test for *in rem* claims the same as for *in personam* claims. The Court explained there are compelling reasons for this stricter test, given the highly intrusive nature of *in rem* proceedings, which encumber property, establish jurisdiction by the property's presence, and create a right of arrest. As the silver was not "in use" and was intended for a sovereign purpose, the exception in s 10(4)(a) did not apply and South Africa's immunity was upheld.

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