**IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE ACCRA COMMERCIAL DIVISION, HELD ON THURSDAY THE 11TH DAY OF OCTOBER, 2012. BEFORE HIS LORDSHIP JUSTICE RICHARD ADJEI-FRIMPONG.**

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**SUIT NO. RPC/343/12**

NML CAPITAL LIMITED - PLAINTIFF/APPLICANT

**VRS**

THE REPUBLIC OF ARGENTINA - DEFENDANT/RESPONDENT

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**PARTIES:** PLAINTIFF REPRESENTED BY MICHAEL FIELDS - PRESENT

DEFENDANT REPRESENTED BY SUSANA PATARO - PRESENT

**COUNSEL:** ACE ANAN ANKOMAH FOR PLAINTIFF/RESPONDENT APPEARING WITH HIM KWEKU AGGREY ORLEANS - PRESENT

LARRY OTOO FOR DEFENDANT/APPLICANT APPEARING WITH HIM OPOKU AMPONSAH AND NII ODOI ODOTEY PRESENT

It will be extremely useful, I suppose, in determining the instant application, to recount the background events that resulted in the commencement of this suit, in particular to explain how the Plaintiff, a foreign corporate body and the defendant a foreign state are before the High Court of Ghana.'

Sometime in October 1994, the Defendant/Applicant entered into a Fiscal Agency Agreement ("FAA") with the BANKERS TRUST COMPANY, New York banking corporation under which agreement the Defendant/Applicant issued securities and bonds for purchase by the public.

The Plaintiff purchased two series of the bonds issued by the Defendant/Applicant namely 12% Global Bonds CUSIP No. 040114FB1 ("the 12% bond") authenticated on 3rd February 2000 and 10:25% Global Bonds CUSIP No. 040114GBO ("the 10:25% Bonds") also authenticated on 21s' July 2000. The Plaintiff thus became the beneficial owner of the interest in the bonds.

When the Defendant/Applicant defaulted on the bond the Plaintiff subsequently sued and obtained judgment in the United States District Court for the Southern District of New York against the Defendant/Applicant to recover the sums due. The Defendant/Applicant did not settle the debt.

On the 15th of May 2005, the Plaintiff commenced an action in the English High Court suing on the simple debt obligation imposed on the Defendant/Applicant by the New York Judgment.

Significantly, in its commencement of the two aforesaid actions and of course the present one, the Plaintiff had relied on a particular provision in the Fiscal Agency Agreement (FAA) and in the bonds as the impetus for invoking the jurisdiction of those and this court. I shall refer to this provision in extenso soon hereafter. But from the facts available the Defendant/Applicant raised an objection to the suit in the U. K. High Court on the ground that it enjoyed state immunity under English law and that the English court had no jurisdiction to entertain the matter. This question went before the Supreme Court of the United Kingdom which held that the defendant did not enjoy state immunity and that the English Court had jurisdiction to entertain the suit.

In the subsequent proceedings' in the English High Court, the Defendant/Applicant submitted to judgment and that court made a consent order against the Defendant/Applicant and in favour of the Plaintiff for the payment of the principal sum of US$284,184,632.30 and interest of US$48,095,940.91.

Though that judgment was a consent judgment, the Defendant/Applicant did not pay any part of the sum awarded.

The records available before me speak of various attempts by the Plaintiff to execute the judgment with of course a corresponding strong resistance on the part of the judgment debtor who from all indications is not in the prospect of paying the debt.

Then on or about Is, October 2012, the vessel "ARA Libertad" (hereinafter called the vessel) belonging to the Defendant/Applicant entered Ghana's territorial waters and docked at the port of Tema. The Plaintiff thus with the leave of the court commenced the instant suit in this court claiming as follows:

a. The sum of US$284,184,632 being the amount of the judgment awarded by the United States District Court for the Southern District of New York.
b. Interest on the sum of US$284,184,632.30 at the rate of 4.95% per annum (compounded annually) and amounting to US$91,784,681.30 as at October 1st 2012.
c. Continuing interest at the rate of 4.9% per annum (compounded annually) currently amounting to US$49,071.03 per day from 1st October 21012 until judgment on sooner payment or
d. Alternatively, interest on the amount at the prevailing commercial bank rate from 18th December 2006 to date of final payment.

Having filed the claim the Plaintiff obtained in this court an Exparte limited order of interlocutory injunction in effect restraining the movement from the port of Tema, the vessel and the interim preservation of same.

It is this order the Defendant/Applicant seeks to set aside by the instant motion. The grounds for this relief have been set out in an affidavit sworn to by Lawrence Otoo Esquire Counsel for the Defendant/Applicant which affidavit has quite a number of annexures.

The application has been vehemently opposed. The first issue I think I should deal with is jurisdictional in nature. I consider it fundamental not just relative to the application but to the action itself. It was argued on behalf of the Defendant/Applicant that the laws of Ghana do not permit this court to entertain proceedings to execute a judgment from the court of the United States of America i.e. the New York Judgment. Reference was made to Section 81 of the Courts Act 1993, Act 459 and its pursuant instrument, THE FOREIGN JUDGMENTS AND MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) INSTRUMENT 1993 LI 1575. The argument on behalf of the Defendant/Applicant is that since United States of America and for that matter the State of New York has not been listed in the schedule to the instrument as one of the states recognized for reciprocal enforcement of judgments, this court wrongfully entertained the Plaintiffs action and on that wrongful footing granted the interlocutory orders.

I do agree that the provisions in the whole of part 5 of the Courts Act and the LI 1575 provide a regime of reciprocal enforcement of foreign judgments. The mode of enforcement in those provisions is by registration of the judgment. And I do not find any controversy about the fact that the United States of America or any of its states has not been listed for reciprocal enforcement of judgments under that regime.

Clearly therefore the New York judgment is not registrable under the law and hence unenforceable under that. But then the qualm about the Defendant/Applicant's argument lies in the suggestion that every foreign judgment must necessarily go through the regime of registration under the

provisions of part 5 of the courts Act and LI 1575 before a court in Ghana can entertain an action in relation to its enforcement.

That is not my understanding of the law. I am of the view that the common law regime which permits the filing of a fresh action founded on a foreign judgment for purposes of enforcement is still applicable in Ghana. Under English law where specific statutory provisions are available for registration of foreign judgments for reciprocal enforcement, there is still the avenue outside the statutes to maintain a cause of action to enforce foreign judgments. The rationale behind that avenue is that the foreign Judgment creates an enforceable contract between the parties which can found an action at common law. The English position finds explanation in Halsbury Laws of England Vol. 8 4th edition paragraph 997.

Thus:

"ENFORCEMENT OF FOREIGH JUDGMENTS BY ACTION AT COMMON LAW".

> *"Actions on foreign Judgments: Subject to certain qualifications, a judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England.*
>
> *Apart from statute, it will not be enforced directly by execution or any other process, but will be regarded as creating a debt between the parties to it; the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. The debt created is a simple contract debt and not a specialty debt and is subject to the appropriate limitation period...."*

Whilst there is paucity of local authorities on the applicability of the common law regime in the jurisdiction. I find what should be Ghana's position on the matter summed up by the Learned Author of CIVIL PROCEDURE, A PRACTICAL APPROACH (S. KWAME TETTEH) at page 690 as follows:

> "A foreign judgment not registrable under LI 1575may be enforced by fresh action. The basis of the action for enforcement is that the judgment constitutes a simple contract debt between the parties to the judgment, the judgment debtor impliedly promising to pay the judgment debt. The relative limitation period is applicable. The Plaintiff may apply for summary judgment on ground that the defendant had no defence to the action. The judgment in such action would be the judgment of the domestic court and capable of enforcement as such".

Now, at common law, the general rule is that a party who has obtained judgment against a Defendantis barred from suing again on the original cause of action. The original cause of action is said to have merged in the judgment - "transit in rem judicatam" and therefore is extinguished. The authorities however' suggest that this is not the rule relative to foreign judgments. A foreign judgment does not occasion a merger of the original cause of action and therefore the Plaintiff has the option either to resort to the original ground of action or to sue on the judgment obtained.

**See SMITH VS NIGOLLS (1839) 3 SIM 438.**

If I have understood the Plaintiff's action and not misformulated it, this suit was commenced on the basis of the latter option. The judgment of the New York was not registrable under the law and so the Plaintiff chose to sue on the

judgment and I *am* satisfied that that was permissible under Ghana law. One should *not* be lured into thinking that the provisions in part 5 of the Court's Act and LI 1575 cannot co exist with the common law position. Indeed a careful reading of Section 86 of the Court's Act will reveal that the provision envisages a situation where *an* action could be commenced and proceeded with other than by registration strictly as a procedure.

The Head note of Section 86 reads
"GENERAL EFFECT OF CERTAIN FOREIGN JUDGMENTS" and
Subsection 1 states:

> *"Subject to this section, a foreign judgment to which this Act applies or would have applied if a sum of money had been payable under it, shall be recognized in a court as conclusive between the parties to it in proceedings founded on the same cause of action and may be relied upon as a defence or counterclaim in those proceedings".*

Subsection 2 *is* also relevant:

> *"Subsection 1 applies whether the foreign judgment is registered, can be registered* or *it* not *registered"*

Having said that, the next immediate question is whether *in* suing on the New York Judgment, the Plaintiff properly invoked the jurisdiction of this court.
When the Plaintiff sought leave of this court to issue a notice of a writ and service out of the jurisdiction, it relied on Order 8 of the (High Court) Civil Procedure Rules 2004 CI 47. The defendant is without doubt *a* foreign entity. The general rule is that courts exercise jurisdiction *only* over persons *who* are

within the territorial limits of their jurisdiction. It therefore requires a special statutory power for the court to order a defendant beyond its jurisdiction to appear before it either by a writ, a notice of writ or any other originating process.

See RE BUSHFIELD (1886) 32 CHD 123. That statutory Power to assume that jurisdiction in my opinion is what is contained in Order 8 of the CI 47. The Plaintiff therefore had to show that it could come within any of the specific provisions stated under subrules 1 (a) to (m) of rule 3 of Order 8.

The Plaintiff relied on subrule 1 (m) which provides a follows:

*"3. (1) Service out of jurisdiction of notice of a writ may be effected with leave of the court in the following cases:*

*(m) If the action begun by writ is in respect of a contract which contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract".*

The contract in the question is the Fiscal Agency Agreement (FAA).
The particular term in contention is contained in clause 22 and same is repeated in the two bonds in question.

The Fiscal Agency Agreement is annexed to the Plaintiff's affidavit in opposition to the motion as Exhibit KAO 1' whilst the two bonds are annexed as Exhibits KAO 2 and KOA 3.

The term in contention reads *as follows:*

> *"The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York State or Federal Court sitting in the borough of Manhattan, the City of New York and the Courts of the Republic of Argentine ("the specified Courts") over any suit, action or proceeding against it or its properties assets or revenues with respect to the securities of this series or the fiscal Agency Agreement (a "Related Proceeding') except with respect to any actions brought under the United States Federal security laws. The Republic has in the fiscal Agency Agreement waived any objection to the Related proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related proceedings have been brought in an inconvenient forum. The Republic agrees that a final non-appealable judgment in any such Related proceeding (i.e. "Related Judgment') shall be conclusive and binding upon it and may be enforced in any specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the other courts') by a suit upon such a judgment ....*
>
> *To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any specified court is located, in which any related proceeding may at any time be brought against it or any of its revenues, assets or properties or in any jurisdiction in which any specified court or other court is located in which any suit action or proceedings may at any time be brought solely for the purpose of enforcing or executing any Related judgment, to any immunity from suit from the jurisdiction of any such court, from setoff from attachment prior*

*to judgment, from attachment in aid of execution of judgment, from executionof a judgment or from any other legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction...."*

Counsel for the Plaintiff submitted whilst invoking the jurisdiction of this court for leave to issue and serve the notice of the writ and has re submitted in arguing the instant motion that, this court is perfectly within the description of the designation "other courts" specified in the term of the agreement. He argues that once an asset of the Defendant/Applicant being the vessel has found.itself in the territorial waters of Ghana which asset being the property of the Judgment Debtor is liable to be attached in aid of execution of the Plaintiff's subsisting judgment, the Ghana court becomes one of the "other courts" envisaged by the term and since the judgment constitutes a civil contract under common law, Order 8 4ule 3 subrule 1 (m) operates to property invoke the jurisdiction of this court.

I find the logic in the argument sound just as I did when the court was invited to assume jurisdiction over the matter. My appreciation of Order 8 rule 3 subrule 1 (m) is that it is anticipatory in nature ready to embrace whichever parties have left their jurisdictional demand open in their contract as the parties herein did in the FAA and the bonds.

As noted earlier, the argument of Counsel for the Defendant/Applicant on this jurisdiction question is mainly founded on the provisions in thee courts Act and the LI 1575 about which I have already expressed my opinion, I do not find sufficient basis to come to a conclusion that this court wrongfully assumed jurisdiction over the matter.

The opinion of the court on this question is just as it was in the beginning. The jurisdiction of this court was validly invoked.

But almost inseparably linked to the foregone issue is the question of sovereign immunity being raised by the Defendant/Applicant in the instant motion. The argument simply is that the Defendant is a sovereign state and is entitled to immunity.

I think of no question about the Defendant/Applicant's status of a sovereign state and its immunity to the court's jurisdiction.

The Plaintiff did not argue that and I find no need to cite authorities for it. Neither do I think of any question about the universally recognized right of sovereign state to waive immunity.

The question arises out of the assertion the Plaintiff makes that the Defendant/Applicant waived its immunity under the Fiscal Agency Agreement and the bonds.

Nation states' historical enjoyment of absolute immunity from adjudication by foreign courts has given way to the common law restrictive immunity approach whereby a claim to state immunity would not be upheld in disputes arising out of transactions entered into between states and entities which were of commercial or private law nature. Various states have varied legal regimes on the restrictive immunity approach. E.g. The U. K. has the state immunity act 1978 whilst the US has the Foreign Sovereignty Immunity Act of 1976.

It is also universally recognized that states may irrevocably waive immunity by express contract.

PHILIP R. WOOD in his work LAW AND PRACTICE OF INTERNATIONAL FINANCE (1995) at page 88-89 writes on principles of waiver clauses as follows:

> "It appears to be universally recognized in most industrialized state that a state may irrevocably waive immunity by express contract in advance and there is some support for the principle that a waiver from jurisdiction is not a waiver from enforcement".

I agree with this view. So has the Defendant/Applicant waived its sovereign immunity to the jurisdiction of this court?

Reading and re-reading the waiver provision in the Fiscal Agency Agreement and the bonds which I have already cited, my understanding is that not only did the Defendant/Applicant waive its sovereign immunity to the specified

courts", but it did' so to the "other courts" of which in the opinion of this court once again it is one.

Aside my understanding of the provision, the record before me shows that the prime issue before the U. K. Supreme Court when the case travelled there was whether the Defendant/Applicant has waived its immunity to the jurisdiction of the U. K. High Court which to my understanding was one of the *"other courts'*.

In the decision of the U. K. Supreme Court which is now reported in the (2011) 4 ALL ER 1191, holding 3 of the head note reads:

> *"The bonds contained a submission to the jurisdiction of the English Court; Argentina had unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment ....*

In construing the provision in the bond Lord PHILIPS P delivered himself at page 1210 to 1211 as follows:

> *if a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity does not cover jurisdiction where, in the case of another Defendant it would not exist. If however state immunity is the only bar to jurisdiction, an agreement to waive is tantamount to a submission to the jurisdiction.*
>
> *In this case Argentine agreed that the New York Judgment could be enforced by a suit upon the judgment in any court to its jurisdiction of which absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New*

*York Judgment could be sued on it any country that state immunity apart would have jurisdiction. England is such a country .... The provision in the first paragraph constituted a submission to the jurisdiction of the English court. If consideration of the first paragraph alone left any doubt that the terms of the bonds included a submission to this jurisdiction, this would be dispelled by the second paragraph ....*

*"The words 'may at any time be brought' which I have emphasized once again constitute Argentina's agreement that the waiver of immunity applies respect of any country where immunity apart there is jurisdiction to bring a suit for the purpose of enforcing a judgment on the bonds. England is such a jurisdiction. Both jointly and severally the two paragraphs amount to an agreement on the part of Argentina to submit to the jurisdiction of the English Court (no doubt among other) courts".*

Lord Collins SCJ also said at page 1225 to 1226 thus:

*"The New York Judgment was in any view a "Related Judgment". Argentina agreed that it could be enforced in any other courts to the jurisdiction of which the Republic is or may be subject': This was the clearest possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English Court since the English Court had a discretion to exercise jurisdiction in an action or the New York Judgment by virtue of CPR 6.20 (9) (Now CPR P.D 6B para. 3)"*

And so the opinions went on and on. But what is the effect of this decision on this issue of waiver of sovereign immunity?

I am of the view that since the issue was determined as between the same parties by a court of competent jurisdiction, the question of waiver of immunity is res judiceta and the Defendant/Applicant is estopped form relitigating the same issue before this court.

In effect on this question of waiver of immunity, my own reading of the provision leads me to the conclusion that the defendant waived it. The decision of the U. K. Supreme Court which is of persuasive effect reinforces my conclusion. And the same issue by virtue of the U. K. Supreme Court's decision is res judicata. From all that has been said, I hold that the Defendant/Applicant is properly before this court as a defendant in the present action and is unless otherwise ordered amenable to all the orders of this court.

The next issue is about the vessel Libertad itself. The vessel has been described as a military vessel or a warship used by the Argentine Navy for training and other military activities. It has been urged on this court to note that by the status of the vessel it is immuned to the judicial process of this court.

Before considering the strong arguments made on this issue, it is important foremost to establish that status of the vessel on record. Fortunately Counsel on both sides agree on the definition of warship under Article 29 of the law of the sea convention. I have also read the affidavit sworn to by Mr. Auturo Puricelli the Minister of Defence of the Republic of Argentina about the envious profile of the vessel. From the various documentations made

available on record and given also that Counsel for the Plaintiff did not. contest the status of the vessel in any resolute manner, I hold that the vessel Libertad is a military asset of the Republic of Argentina the Defendant/Applicant.

The *following* depositions in the affidavit of Lawrence Otoo Esquire in support of the application are at the core of the Defendant/Applicant's argument.

*"7. That the provisions of the United Nations Convention on jurisdictional Immunities of States and their property 2004 and the United Nations Convention on the law of the sea excludes (sic) property of a military character or used or intended for use in the performance of military functions from measures of constraint or attachment."*

*"8 That I* am *informed and verily believe the same to be true that the principle of exclusion of military equipment and assets from attachment or constraint is a customary international law."*

*"9. That the United States District Court for the Southern District of New York in granting an order for attachment of the Defendant's assets in New York in respect of the same suit excluded at page 5 of the order, military assets pursuant to the said customary international law inspite of the Defendant's waiver of immunity regarding the enforcement of the debt...."*

The Plaintiff's response to these depositions are contained in a number of paragraphs of the affidavit of Kweku Aggrey Orleans which I have attempted to summarize as follows:

That the United Nations Conventions which recognize the immunity of warships as principle of customary international law equally permit the waiver of the immunity.

That whiles the Convention on jurisdictional Immunities of State and their property 2004 has not been ratified by both Ghana and Argentina and has not even come to force, it recognizes immunity of warship just as it recognizes the right to waive it including by contract.

That if the defendant claims that itself and the vessel are entitled to immunity under international law then it should be deemed to accept that the immunity can be waived.

That the defendant has irrevocably waived the immunity claimed to be attached to the vessel by the terms of the contract exhibited as Exhibit KA02 and KAO 3.

5. That the effect of the defendant's undertaking not to assert the immunity and the irrevocable waiver of same is that both the defendant and the vessel do not enjoy any immunity under customary international law.

6. That the order contained in the order of attachment by the New York was directed to its Marshall and has no application or relevance to and not binding on this Court. In any case that order was made pursuant to and in line with the U.S. statutory law namely Foreign Sovereign Immunity Act which specifically forbids the detention of assets or properties used in connection with military activity, or of military character or under the control of a military authority or defence agency.

From these specific assertions and the responses delivered which of course formed the basis of the strong arguments made before this Court I think the questions to answer are simply as follow:

1. Is it a rule of customary international law that warships enjoy immunity from judicial processes?
   Can that immunity be waived under international law?
3. If it can be waived how can the waiver be done and
   Has the Defendant/Applicant in this case waived the immunity?

In the first question learned Counsel for the Defendant/Applicant in his submission referred to a number of authorities including judicial decisions text writers and international treaties and argued that immunity of warships is now recognized as a rule of customary international law.

Counsel for the Plaintiff did not seem to contest that but has stuck to the position that the same international customary law which his friend alludes to also recognizes the right to waive the immunity. That should have ended the controversy but I think I need to comment that it will be too sweeping a conclusion to state that there is a clear rule of customary international law on the matter even though one should concede to a predominant practice towards the attainment of that. Indeed the fact that the 2004 convention has not taken effect for the main reason that many states have not ratified it should buttress the view being expressed. And if this specie of immunity is considered as a component of the whole regime of sovereignty in international law then it is difficult to talk of a clear cut rule of customary international law.

In the "American Journal of International Law," vol.75 ames Crawford at page 82 has noted:

> *"The extent to which foreign sovereigns are entitled to immunity in municipal courts has attracted a vast literature in recent years especially the majority view now seems to be that immunity need not extend to commercial transactions entered into by the state although the precise scope of this "exception" remains unsettled, and the role of international law in "extending or "withholding" immunity has not yet perhaps been clearly analyzed. Indeed, it has been denied that there is any international law rule at all on the subject, a view that would presumably leave each state free to formulate or negotiate its own rule."*

But let me refer to one authority which for me represents the international thinking of the issue. The Court in the case of In Re REPUBLIC OF THE PHILIPINES 46 B ver FGE (1977) after examining several authorities on the subject conclude:

> *"There is no sufficient general practice, supported by the necessary opinion juris, to establish a general rule of customary international law prohibiting the state of the forum absolutely from compulsory execution against assets of a foreign state situated in the state of the forum. A number of states in their judgment, legislation or treaty practice do not exclude security and execution measures against foreign states, at least not when such measures are based upon activities of the foreign state which are iure gestions, and when such measures are taken against assets which do not serve governmental purposes. The attitudes of these states are of sure weight that there can be no question of a general practice*

*pursuant to international law which prohibits compulsory execution, whatever the requirement of generality of a practice before it can become the basis of a rule of customary international law".*

This court shares in the opinion expressed by the court and if I-should answer the first question I posed, I will say that though there is no well established customary international law that warships enjoy immunity, the view in support of it is widespread.

Can the immunity be waived? If immunity in whatever form is understood as a right exerciseable by state entity then it is difficult for anyone to convince me that immunity enjoyed by worships can never be waived. Indeed as one example in the United Nations Convention on jurisdictional Immunities of States and their property 2004 which the Defendant/Applicant relies on a s representing a rule of customary international law, waiver is permissible.

Under both Articles 18 at 19 which respectively deal with State Immunity from pre judgment measures of constraint and post judgment measures of constraint, waiver is permitted by the means of international agreement, or by an arbitration agreement or in a written contract or by a declaration before the court or by a written communication after a dispute between the parties has arisen.

I think it would have required of the Defendant/Applicant to provide strong authorities to support its position that waiver is not permissible. This is because its own recent conduct does not indicate so. It has been

demonstrated in this court that in the Defendant/Applicant's recent issuance of new securities filed with the United States Security Exchange Commission governed by Trust Indenture dated 5th June 205 (copies of which have been annexed to the affidavit of ERIC C. KIRSCH, Attorney the New York firm of Dechert LLP), the Defendant/Applicant has inserted limitations with respect to its military assets and properties. The logical inference is that if Defendant/Applicant believes strongly in its view of the immutability of the waiver, there would not have been any need to insert that limitation because in that case whether it is there or not the law should recognize it.

On the whole I think a stronger case has been demonstrated for me to come to the conclusion that the immunity can be waived and if the provisions in the 2004 convention do represent the rule of customary international law as Counsel on both sides seem to agree then the waiver may be done by the processes specified under articles 18 and 19 i.e. by international agreement; arbitration agreement; written contract; Declaration before the court or a written communication after the dispute between the parties has arisen.

Final question is did the Defendant/Applicant waive the immunity?

In answering this question I am compelled to sacrifice brevity and at the risk of being repetitive re state the second bit of the term in the FAA and the bonds on which the Plaintiff relies to clam waiver. The second part is what directly relates to assets. It states:

> *"To the extent the Republic or any of its assets or properties shall be entitled in any jurisdiction in which any specified court is located, in which*

*any related proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any specified court or other court is located in which any suit action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, from attachment in aid of execution 0fjudgment, from execution of a judgment or from any other such legal or judicial process or remedy and to the extent that in any such jurisdiction there shall be attributed such as ¡mmunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws 0fsuch jurisdiction ...."*

It was not for nothing that Lord Collins of the U. K. Supreme Court describes the provision as "the clearest possible waiver" of immunity Argentina could have given.

What is essential to note *is* that the Defendant/Applicant gives a proviso and proceeds to list a number of things which the immunity does not cover. Even there the Defendant/Applicant names another category of courts as the "Republic's Courts" and places the list within the purview of those courts.

Learned Counsel for the Defendant/Applicant has argued that the courts of the United States of America where the judgment was given has failed to recognize the inclusion of military assets in those properties that could be attached. I do agree that the U.S Court have done so. But what I think Counsel

fails to recognize is theaspect of the provision which subjects the threshold of the assets attachable to the municipal law of the court exacting the attachment. The relevant portion reads:

> "... *the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction".*

So that if under U. S law, it is not permissible to attach military assets, then that is the U. S. Law not Ghana law.

In fact it has been shown that the U S. has a specified legal regime under the Foreign Sovereign Immunities Act which specifically forbids the detention of assets or properties used in connection with a military activity or of military character or under the control of a military authority or defence agency.

I do not know of any such legal regime in Ghana. The closest I think Counsel could come to any such regime was his reference to Section 392 of Ghana Shipping Act.

The Section provides:

> "Non Commercial Cargoes owned by a state and entitled at the time of salvage operations to sovereign immunity under recognized principles of public international law are not subject to seizure, arrest or detention by legal process or to an action in rem without the express consent of the state owner of the Cargo".

As it can be seen the whole of part 12 of the Act under which Section 392 falls is on salvage. The vessel Libertad is not on salvage in Ghana. In any case, the same provision recognizes waiver because of the phrase:

"without the express consent of the state owner of the Cargo".

Having examined the arguments from both sides, and upon reading the parties own agreement, I find that the Defendant/Applicant has in clear terms waived the immunity attributed to the vessel Libertad through the mode of a written contract which made is recognized by the rules of international law.

CONCLUSION

In the end I come to the conclusion that no sufficient basis has been demonstrated by the Defendant/Applicant for me to set aside the order I gave on the 2nd October 2012. The order was properly and validly made. It gave the Republic of Argentina the option of providing security and taking away the ship.

If that option is unattractive for whatever reason, so be the order of the Court. The motion is accordingly dismissed.

(SGD)

RICHARD ADJEI-FRIMPONG
JUSTICE OF THE HIGH COURT