

Artefact laws threaten salvage operations

Courts, legislators and diplomats have weighed in to prevent plunder of marine archaeological sites. That impact may be physical and operationally disruptive to commercial salvage operations, but the more insidious effect may be on the ancient legal underpinnings of salvage. In this abridged version of his *ITS 2008* paper, James T Shirley Jr of Holland & Knight LLP* questions whether professional salvors have put their future in peril by not facing up to the risks these measures pose, believing their impact will be felt only by 'treasure salvors'.

The past 40 years have seen an explosive growth in treasure salvage and marine archaeology. Modern deep ocean and sub-bottom search and recovery technologies spawned and nourished this growth. However, this increased activity has drawn the ire of the marine archaeological community, sometimes for good reason.

The reaction of the archaeological community has been to stifle all discovery and recovery in the belief that, in time, technology will develop sufficiently to permit recovery of marine treasure and historical artefacts fully preserved. These efforts hinder investment in search, recovery and preservation while the ravages of time and hostile conditions take their toll on the 'protected' artefacts. These efforts may also stand in the way of commercial salvage operations that have nothing to do with treasure or archaeology.

History of the law of salvage

The concept of salvage, to promote efforts to rescue property exposed to marine peril, is ancient¹. It benefits society and facilitates commerce by protecting the property interests of those who engage in maritime adventures. Salvage law, although fundamentally unchanged since the 19th century, reflects modern changes to maritime commerce, technology, values and value systems², and, most recently, public concerns for allocation of risks in the environmental arena³.

Changes in the law of salvage have reflected the era of their making, and have largely been directed at methods for determining the size and distribution of salvage awards⁴. Ancient codes provided strict formulae. Modern codes are more subjective. The criteria set out in an 1869 US Supreme Court decision, known as *The Blackwall Rules*, are typical⁵.

Judicial precedent has refined the law of salvage to better direct its purpose. Courts have treated professional salvors especially generously, taking into account the expenses they incur training and maintaining professional crews, maintaining inventories of specialised equipment, and standing by to respond⁶.

Courts have also recognised (though not yet generously rewarded) the concept of liability salvage⁷. Important to the purposes of this paper, special consideration has been given to treasure and archaeological salvors who acted to preserve historic wreck sites⁸.

The 1910 Salvage Convention⁹ captured the status of the law as then developed, and left

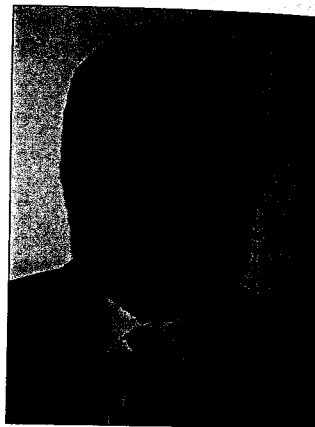
the door open for further changes as judicial precedent, legislative authority and practical circumstances might require. In recent decades, most attention has been given to protecting the environment. This led to a Draft Convention on Salvage, which was approved by the Comité Maritime Internationale at its 32nd Plenary Session in Montreal in 1981, and, on the commercial side, to the 1980 Lloyd's Standard Form of Salvage Agreement (LOF 1980) with its 'safety net' for salvors who protected the environment from laden oil tanker casualties, but saved insufficient values to warrant fair salvage awards. The next major step in this process was completing the work that became the 1989 Salvage Convention¹⁰, which received speedy ratification by most major maritime nations largely because of its strong environmental regime.

The 1989 Salvage Convention requires both the salvor and the vessel owner to take steps to protect the environment [Article 8], and includes the salvor's efforts in doing so in the criteria for determining his award [Article 13]. It also rewards those efforts even when there is insufficient salvaged value to pay the salvor an award [Article 14], in many cases removing the age-old no cure – no pay principle of salvage. After the first major test of Article 14 in the English House of Lords¹¹, marine insurers, maritime lawyers and salvage industry groups developed the Special Compensation P&I Clause ('SCOPIC Clause') to replace Article 14 in some LOF cases. LOF 2000 provides the option of this update.

Treasure/Archaeological Salvage

Under the law of finds, if a sunken vessel or cargo has been abandoned by its owner, the salvor becomes the owner by right. However, if ownership is claimed by another, the issue must be litigated¹². If the putative owner persuades the court that there was no abandonment, the salvor will still have a salvage lien against the property saved¹³, and the law of salvage will be applied.

The ramifications go beyond the issue of what percentage of value or in what specie the salvor's award will be paid. Lack of ownership may adversely affect the salvor's rights with respect to the wreck site, his continued right of recovery to the exclusion of others, and his control over the disposition of what is saved. Relevant to this paper, 'treasure' and 'archaeology' often share the same site.



Jim Shirley.

Protection of underwater artefacts

A. Convention on the Protection of Underwater Cultural Heritage

Many countries have legislation protecting artefacts of their past. The United States has a number of statutes, policies, and programmes meant to provide such protection¹⁴.

The modern significance of underwater cultural heritage may be seen in the legal decisions that followed locating the *Titanic*, and the discoveries of *Señora Nuestra de Atocha* and *SS Central America*. The most significant legal development, however, may be yet to come. It is an international treaty euphemistically named the *UNESCO Convention on the Protection of Underwater Cultural Heritage, 2001* (the UCH Convention). This treaty, when/if it goes into effect¹⁵, will reach far beyond a country protecting its own historical treasures. It will impose on all signatory states the obligation to protect almost all submerged artefacts, almost without regard to historical or archaeological value, and with limited regard to geography.

The underlying principle of the UCH Convention is to protect artefacts by restricting accessibility and prohibiting commercial exploitation. Early drafts of this treaty would have affected many, perhaps most, traditional salvage operations that involved grounded or sunken vessels. The terms have been softened, but the treaty may still adversely affect commercial salvors, and may over time erode from the legal landscape values that salvors hold dear and depend upon to stay in business.

For the purposes of this paper, which is targeted to traditional commercial salvors and not to treasure or archaeological salvors, the following terms of the UCH Convention have specific relevance:

Article 1: Definitions

1.(a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

- (i) sites, structures, buildings, artefacts

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and human remains, together with their archaeological and natural context;

(ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and

(iii) objects of prehistoric character.

5. "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

6. "Activities directed at underwater cultural heritage" means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.

7. "Activities incidentally affecting underwater cultural heritage" means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.

9. "Rules" means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.

Article 3: Relationship between this Convention and the United Nations Convention on the Law of the Sea

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.

Article 4: Relationship to law of salvage and law of finds

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorised by the competent authorities,
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Article 5: Activities incidentally affecting underwater cultural heritage

Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage¹⁶.

Article 9: Reporting and notification in the exclusive economic zone and on the continental shelf

1. All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

Article 33: The Rules

The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention

includes a reference to the Rules¹⁷.

* * *

Commercial salvors will likely be more affected by those provisions of the treaty applicable to activities "incidentally affecting" underwater cultural heritage than those applicable to activities "directed at" underwater cultural heritage. Still, those are not insignificant insofar as the "may physically disturb or otherwise damage" language may be used to delay or even prohibit operations of a routine nature in salvage. This could occur even remotely from the UCH site, eg prohibiting dredging, scouring, or airlifting up current, while the salvor goes through an uncertain permitting process. Moreover, provisions not specifically said to apply only to activities "directed at" underwater cultural heritage create ambiguities to be interpreted by persons charged with enforcing these measures. Further, an imbalance may be created because salvors from signatory states will be required to be held to more difficult standards.

It is the ambiguities of the UCH Convention that are most problematic. These begin with the definition of "underwater cultural heritage" (UCH) to include "all traces of human existence having cultural, historical or archaeological character that have been partially or totally under the water, periodically or continuously, for at least 100 years", including "sites, structures, buildings, artefacts and human remains", as well as "vessels, aircraft, other vehicles... their cargo or other contents"¹⁸. This subjective definition fails sufficiently to distinguish between objects of true archaeological-historical value and objects that have merely been on the sea floor for 100 years. The requirement that objects have "cultural, historical or archaeological character" will undoubtedly give rise to more arguments than solutions. Meanwhile, salvage of a modern container ship with values in the hundreds of millions may be arbitrarily hampered by the rotting structure of a 19th century rum-runner lying submerged nearby.

Perhaps more worrisome is the suspension of the law of salvage¹⁹, which poses direct danger to all salvors' rights. The term "activity relating to" would appear inclusive of activities "incidentally affecting" as well as those "directed at" UCH. It is not safe for commercial salvors to presume the law of salvage will be suspended only with respect to the possibly affected UCH, and not with respect to the primary object of the commercial salvor's activities. A court may hold this to be so, but that may not be until long after the salvage opportunity has been spoiled or lost.

Suspension of the law of salvage also conflicts with both the 1989 Salvage Convention and the United Nations Convention on the Law of the Sea 1982 (UNCLOS). The UCH Convention might thereby bring into question the force of the 1989 Salvage Convention as international law, despite its ratification by most major maritime nations²⁰. It also ignores the protection

of maritime cultural property already provided for in the Salvage Convention by way of a reservation²¹ for those countries that wish to provide alternative legislative means of protection, and by UNCLOS²².

The UNCLOS duty to protect "objects of archaeological and historical nature"²³, does not permit this archaeological duty to affect the application of the law of salvage²⁴. Some commentators suggest the UCH Convention is a proper defensive tool against what they perceive as weakness and ambiguity in the UNCLOS archaeological duty²⁵. Others question whether the archaeological duty in UNCLOS can co-exist with the laws of salvage and finds²⁶. These issues will not be resolved by adding subjectivity, which at the very least weakens the fabric of law pursuant to which salvors have been working for three millennia. One must ask, "Is the UCH Convention worth it, or even necessary?"

Those salvors most directly affected by it – treasure salvors – have already succeeded in balancing their interests with the diligence required in exercising their archaeological duty. This has been done in the natural process of legal evolution. In the case of *Central America*²⁷, the Court acknowledged the efforts made by the salvors to protect the historical and archaeological value of the wreck site and the items salvaged. Similarly, in the case of the *Titanic*²⁸, the salvor's agreement to refrain from selling items recovered from the vessel, except lumps of coal, and commitment to retain artefacts together as a collection, was taken into account by the court in deciding to grant exclusive salvage rights. Under UNCLOS commercial salvors could do no less, and under the 1989 Salvage Convention they likely could not do less where it mattered.

B. Relationship to National Legislation

The US Abandoned Shipwreck Act of 1987²⁹, (ASA) covers abandoned shipwrecks embedded in the submerged lands of a state; embedded in the coralline formation of the state; or those that are on submerged lands of a state and are included in or determined eligible for inclusion in the National Register³⁰. The ASA removed historic shipwrecks found in the territorial waters of the United States from the general principles of admiralty law³¹, and created complications in the field of wreck salvage by excluding salvors and tendering control and jurisdiction over such findings to the States³². The UCH Convention and the ASA appear similar in this respect. However, the ASA applies only to shipwrecks that have been abandoned by way of both passage of time and lack of effort to maintain ownership³³, while the UCH Convention uses only the arbitrary 100-year period.

Other countries, especially those whose ancient cultural heritage, will be most affected, eg Greece and Spain, also generally agree with the approach taken by the UCH. Indeed, Greece has established its own laws for cultural protection³⁴ and has often in the

history of its participation in the United Nations generated discussions concerning archaeological and historical treasures³⁵. The Greek Law that deals with cultural heritage in general includes a definition for UCH which is even broader than that in the UCH Convention³⁶. Greek law incorporates similar provisions to those in the UCH Convention for activities directed at UCH, including in situ preservation³⁷. Greek law is stricter, reflecting the country's archaeological wealth. Despite this strict approach, the law of salvage has been restricted but not abolished³⁸.

Spain also favours adoption of the UCH Convention³⁹ because it also has a history of non-recovery of historic wrecks. However, it does not have domestic legislation expressly devoted to UCH⁴⁰ other than the general provisions outlined in its Constitution⁴¹ and the Spanish Historical Heritage Act enacted thereafter⁴². The law of salvage is excluded from applying to Spanish UCH⁴³ so that was not a factor when Spain decided to ratify the UCH Convention.

C. The Future of the UCH Convention

Protection of UCH is a very delicate matter, whether provided by judicial fiat, national statutes, or international convention. It is indisputable that UCH is of enormous value, but one may question whether keeping items of historical value on the ocean floor is the best way to preserve them, let alone to teach their history. That procedure might involve peril to modern commercial salvage efforts; it may also result in far more wreckage on the sea floor, including cargoes of great value and those that put the environment itself in peril.

REFERENCES

¹ See, generally, 3A Norris, *Benedict on Admiralty*, §§5-11 (7th Ed. 2007).
² See, generally, B Sheen, *Conventions on Salvage*, 57 Tul L Rev 1387, 1390-94 (1983).
³ *Protecting the Environment with Salvage Law & Risks, Rewards and the 1989 Salvage Convention*, 65 Wash L Rev 639, 646 (1990).
⁴ The Court must first determine that the law of salvage applies to the matter. Under US law, following closely the law of England, there are three threshold requirements for a salvage claim: (1) there must be property at risk due to a marine peril; (2) the party rescuing the property must do so voluntarily with no contractual or other duty to act; and (3) the salvage effort must be at least partially successful. *The Sabine*, 101 US 384 (11 Otto) (1897).
⁵ (1) The labour expended by the salvors in rendering the salvage service;
 (2) The promptitude, skill, and energy displayed in rendering the service and saving the property;
 (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
 (4) The risk incurred by the salvors in securing the property from the impending peril;
 (5) The value of the property saved; and
 (6) The degree of danger from which the property was rescued. *The Blackwall*, 77 U.S. (10 Wall) 1, 14 (1869).
⁶ *The Lamington*, 86 F.675, 684 (2d Cir 1898).
⁷ *Allseas Maritime v Mimosa*, 820 F.2d 129, 1987 AMC 2515 (5th Cir 1987); *Markakis v SS Veendam*, 1981 AMC 2275 (SDNY 1981).
⁸ *Columbus America Discovery Group v Atlantic Mutual Insurance*, 1974 F.2d 450, 468 (4th Cir 1992); *MDM Salvage, Inc v the Unidentified, Wrecked and Abandoned Sinking Vessel*, 631 F. Supp 308 (SD Fla 1986).
⁹ Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, IMO 1910.
¹⁰ The International Convention on Salvage, IMO 1989.
¹¹ *Semco Salvage & Marine Pte Ltd v Lancer Nav Co Ltd (The Nagasaki Spirit)* [1997] 1 Lloyd's L Rep 323, 1997 AMC 1989.

The UCH Convention is based on an effort to assist in archaeological study and preservation of artefacts recording our historical development. The idea is noble, but extreme, bringing a rigid devaluation of the existing law of salvage to the extent of abolishing its up-to-date application to underwater maritime property. This approach seems to underestimate the contribution of salvors guided by their enlightened self-interest as has been done for three millennia. It totally ignores the broader implications of its effect on traditional commercial salvage operations.

Conclusion

All countries have the sovereign right to protect as they wish whatever cultural heritage lies within their jurisdiction. They have the power to enforce their laws in ways that those politically charged will find to be in the best interest of their citizens. This may, in a proper case, involve carving out an exception to a preservation mandate where the exception may serve a greater good, eg save lives or protect the health, welfare, economic, and environmental interests of their citizens. Each nation must also decide whether relinquishing some portion of that sovereignty by signing on to the UCH Convention will result in a greater good to mankind.

Salvors already find their operations hampered by national and local officials due to legitimate environmental concerns (even when the resultant delay may worsen the risk sought to be prevented). The UCH Convention provides the potential for far worse interference because its ambiguity leaves so much to the discretion of those charged with its enforcement.

All this begs the question whether the UCH

Convention can achieve its objectives without considering its practical impact on commercial salvors' operations. For example, if a ship is in danger of sinking in an area where UCH lies beneath, will salvors be estopped from carrying out the operation in a way that may render the UCH less valuable? May the salvor instead be required to take other measures that may lead to loss of the object of salvage? Must the salvor decide at that moment whether the property lying beneath is UCH? What if there is doubt? What if the salvor makes the 'wrong' decision? Will this be criminalised?

UCH Convention issues will force on salvors the task of determining whether or not to go ahead with an otherwise straightforward salvage operation, knowing they will be open to second guessing whatever the outcome of their efforts. These issues will affect all members of the maritime industry, including owners, cargo interests and insurers. If this over-reaching treaty is to be blocked – or even sent back to the drawing board – it is essential that commercial salvors call upon their industry constituency to assist them in taking the action necessary for all interests.

Socially responsible courts should protect underwater cultural heritage by preventing plunder and rewarding preservation. Legislators should step in where the courts do not act in a timely manner, or sufficiently. There is room thereafter for an international treaty, so long as discreet, unambiguous, and not fraught with the peril of disastrous, unexpected consequences. The professional marine salvage community may have relatively little control over any of these processes, but it should make itself heard.

¹² CF Newton, *Finders Keepers? The Titanic and the 1982 Law of the Sea Convention*, 10 Hastings Int'l, and Comparative Law Review 159, 194 (1986).
¹³ *Columbus America Discovery Group v Atlantic Mutual Ins*, 974 F.2d 450 (4th Cir 1992).
¹⁴ S Dromgoole, *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, p. 352, Ole Varmer, US (2d Ed 2006).
¹⁵ Three months after the 20th State Party to the Convention deposits its instrument of ratification [Article 27]. At the time of this writing, 16 nations have ratified.
¹⁶ Article 5 in effect implements the prefatory concern of the UCH Convention expressed as "the need to respond appropriately to the possible negative impact on underwater cultural heritage of legitimate activities that may incidentally affect it". (Emphasis added)
¹⁷ UCH Convention (emphasis added). "The Rules" referred to in Article 33 are included in an Annex entitled "Rules concerning activities directed at underwater cultural heritage".
¹⁸ UCH Convention Art. 1(a).
¹⁹ UCH Convention Art 4.
²⁰ The 1989 Salvage Convention has been ratified by 46 nations.
²¹ 1989 Salvage Convention, Art 30(1)(d).
²² UNCLOS Articles 149 and 303.
²³ UNCLOS Art 149.
²⁴ *Ibid* Art 303 (3).
²⁵ Christopher R Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks*, 65 Alb.L.Rev. 97, 2001-2002, p133.
²⁶ See eg, *Platoro Ltd v The Unidentified Remains of a Vessel*, 518 F.Supp. 816, 822 (WD Tex 1981).
²⁷ *Columbus-America Discovery Group v Atlantic Mutual Ins Co (The Central America I)* 974 F.2d. 450, 1992 AMC 2705.
²⁸ *RMS Titanic, Inc v The Wrecked and Abandoned Vessel Titanic*, 924 F.Supp. 714, 1996 AMC 2481 (ED Va 1996).
²⁹ 43 USC §§ 2101-06 (1988).
³⁰ 43 USC 2105 (a).
³¹ 43 USC section 2106 (a).
³² The ASA has undoubtedly affected the willingness of

salvors to incur the heavy costs of research, search, and recovery necessary in this field, but it has also created opportunities for legal manoeuvring by those on both sides of the issues. It has been used to block salvors' rights to their find, *People ex rel Illinois Historic Preservation Agency v Zych*, 687 NE 141 (Ill App 1 Dist 1997) and to recognise the sovereign right of a nation not to abandon its own property, *Sea Hunt v Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000), cert Denied, 121 S. Ct. 1079 (2001), but it has also been used to limit the state's interference in the salvor's activities when the state stepped outside the bounds of the ASA, *California v Deep Sea Research, Inc (The Brother Jonathan)* 523 U.S. 491 (1998).
³³ 43 USC 2101 (b).
³⁴ Art 16, 24 of the Greek Constitution 1975/2001. Law 3028/2002 For the Protection of Antiquities and Cultural Heritage in General.
³⁵ ie in 1971 Greece proposed the inclusion of "archaeological and historical treasures on the seabed and the ocean floor beyond the limits of national jurisdiction" in the list of topics for discussion on the Sea-Bed Committee and later, in 1979 during the negotiations at the Third UN Conference on the Law of the Sea, the protection of archaeological and historical objects found on the continental shelf and the exclusive economic zone, S Dromgoole, *The Protection of UCH – National Perspectives*, p118 (Anastasia Strati, Greece).
³⁶ Art 1(2) of Greek Law 3028/2002. For the Protection of Antiquities and Cultural Heritage in General.
³⁷ S Dromgoole, *The Protection of UCH, National Perspectives*, p. 123 (Anastasia Strati, Greece).
³⁸ Ministerial decision No. 48604/3385 referring to Law No. 2881/2001 "on the law of salvage and other provisions".
³⁹ Indeed, Spain was one of the first countries to ratify the UCH Convention.
⁴⁰ S Dromgoole, *The Protection of UCH – National Perspectives*, p275 (Mariano J Aztar-Gomez, Spain).
⁴¹ Art 46 of the Spanish Constitution refers to the duties of public authorities to protect the cultural heritage. It should be noted that Spain is divided into autonomous regions, which have their own laws in addition to national law.
⁴² Spanish Historical Heritage Act 16/1985, June 1985.
⁴³ Spanish Law 60/1962, Art 22(3).