

Underwater Cultural Heritage

By Jim Shirley



Salvage and recovery, whether of modern vessels and cargoes or of treasure and artifacts from ancient shipwrecks, must always be performed with due care exercised to protect values. That is an obligation of the salvor in the law, serving to increase the reward to which he is entitled. However, to avoid unintended consequences that result in greater harm than benefit, due care must also be exercised by those in a position to impose specific performance requirements on salvors.

ANCIENT HISTORY

During the 1970's, tugs and small survey vessels in Caribbean sea-ports commonly employed propeller wash nozzles on their after decks. These funnel shaped devices were usually hinged in such a way that they could be lowered and locked over the vessel's propeller to concentrate the wash, angling it to scour an area of the seafloor. This method of excavating imbedded shipwrecks and treasures was also destructive, because the propeller wash could not distinguish soft structural members of the imbedded vessel, artifacts or other objects of possible historical and cultural significance from the medium it was intended to disperse. It could, however, distinguish items of greater density, such as metal cannons and fittings, and those of greatest importance to the treasure salvors of the day, gold and silver items of sufficient mass.

As these were uncovered, greater care was used in further excavation, usually by divers using small air lifts or jet nozzles, or excavating by hand. It is impossible to tell how much antiquity has been lost over the years to this and similarly destructive processes. The need to change the situation – incentivizing treasure salvors to preserve more of the cultural artifacts, irrespective of commercial value – became clear. Much in the same way that the law of salvage has for more than 3,000 years served to prevent salvors from plundering vessels and cargoes in peril at sea, something was required to afford the same protection to ancient shipwrecks. As technology has enabled reliable location of sunken relics of history at greater water depths as well as embedded deeper beneath the seafloor, these problems and the need to resolve them also became more pronounced.

LAWS, TREATIES AND POLITICS, TOO

Under U.S. law, the rights of a salvor who recovers property at sea that has been abandoned by its owner would be governed by the “law of finds” and the salvor would, after a proper court proceeding, become the rightful owner of the property. However, if the owner of the recovered property stepped in and was found by the court not to have abandoned the property, the salvor would have

only a lien against the recovered property for the amount of the award the court determined was appropriate pursuant to the “law of salvage.” This distinction is usually of greatest importance when dealing with ancient, or at least older, shipwrecks and their cargoes that have long been on or embedded in the seafloor with no effort at recovery having been made by any putative owner.

The salvor's rights under either “finds” or “salvage” may, of course, be affected by court decisions, legislation, or international treaty. For example, courts may especially reward a salvor who has exercised special care in preserving the archeological value of the wreck site and the recovered property, and courts have done this in several modern cases. Coastal states may also use legislation to protect treasure and artifacts that lie within their territorial waters. The countries that border on the archaeologically rich waters of the Mediterranean Sea provide such legislative protection, as do many other countries, including U.S. Treaties that may also impose on the salvors of signatory states the duty to employ special care when handling artifacts wherever they may be found, as well as limitations on the use that can be made of such recoveries. The United Nations Law of the Sea Convention (UNCLOS) imposes a duty to protect “objects of archaeological and historical nature,” and the 1989 Salvage Convention enables similar protection by reservation.

Then, there is the “UNESCO Convention on the Protection of Underwater Cultural Heritage” (the UCH Convention). While “a rose by any other name would smell as sweet,” the same is not true of legislation or treaties urged on us by lawmakers or diplomats. No person of good will can be against protecting underwater cultural heritage. Therefore, busy lawmakers whose advice and consent may be required for a nation's ratification of this treaty may be advised by their aides (who may or may not have read the treaty and understood its ramifications) to agree for purposes of political expediency, if for no other reason because it would be difficult to explain negative votes to their constituencies.

On the other side of the spectrum, some professional salvors have looked at the title from which they inferred that the treaty applies only to treasure salvors, and then do not bother reading the treaty at all. What about the diplomats who drafted and finalized the language of the treaty? Did they fully understand the science with which they were dealing, or even the politics, and if they did, how much of that understanding or advice from experts had to be compromised in the diplomatic process of reaching agreement?

Some persons whose activities may be directly affected have questioned the wisdom behind a treaty that has the effect of leaving some items of “cultural heritage” in a destructive and damaging environment rather than encouraging their recovery and preservation. Professional salvors should have other concerns.

There are a number of provisions in the UCH Convention that

could have adverse impacts on the operations of professional salvors. To start with, the definition of “underwater cultural heritage” (UCH) includes, among other things, “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.” Further, the treaty applies not only to “activities directed at UCH” but also to “activities incidentally affecting UCH” – or activities that may “physically disturb or otherwise damage UCH.” There is enough ambiguity and subjectivity in that language to keep litigators busy for years.

The lack of clarity could result in delays or even prevent a timely salvage response to a recent vessel casualty that had the further misfortune of having occurred in a location where salvage efforts may arguably affect what someone believes to be UCH. There appears to be no room for proportionality except where that may be decided by a court or a panel of “specialists” set up for that purpose, and under the best of circumstances that might take until long after the salvage opportunity on the recent casualty has been lost. It gets worse – with greater ambiguity.

The UCH also provides that, “any activity relating to UCH to which this Convention applies shall not be subject to the law of salvage or law of finds,” unless certain conditions are met over which the professional salvor may have no control. The term “activity relating to UCH” appears to include “activities incidentally affecting UCH,” now threatening to suspend the law of salvage based on three levels of ambiguity. How can this be so? Suspension of the law of salvage would put this treaty in conflict with both the 1989 Salvage Convention and UNCLOS, the latter of which specifically does not permit the salvors’ archaeological duty to affect application of the law of salvage. Furthermore, the law of marine salvage, which dates back more than 3000 years, is itself an important part of our cultural heritage that should not be trifled with by persons who must resort to layers of ambiguity to find terms to which they can agree.

COMMON SENSE SOLUTIONS

Before his death, the great salvage law scholar and author, Geoffrey Brice, drafted some very simple amendments to the 1989 Salvage Convention that would accomplish all the important points of the UCH Convention insofar as it relates to protecting and preserving UCH without the ambiguities that can get in the way. What is referred to as “The Brice Protocol” is now under consideration by the Comité Maritime Internationale (CMI) for recommendation, with the idea of eliminating any “need” for the UCH Convention.

CMI has collected recommendations of maritime law associations from around the world, as well as others interested in the law of salvage, UNCLOS, and international law generally, including the protection of UCH. For the reasons stated above and many more not stated because of space limitations, the professional salvage community should make itself heard on this subject. The UCH Convention is law for the 37 or so countries that have ratified it, but it can be changed, and it may be denounced by some countries that have already ratified. – MN.

Jim Shirley is a Master Mariner, a former salvage master and retired maritime lawyer who specializes in maritime casualty and salvage matters. He now serves as legal counsel to the American Salvage Association and as Principal Consultant in JTS Marine LLC.