

FINDING A MIDDLE GROUND IN THE PROTECTION OF UNDERWATER
CULTURAL HERITAGE

A Thesis

by

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ABSTRACT

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage bans the commercial exploitation of underwater cultural heritage. Despite this ban, “commercial exploitation” is not formally defined in the Convention and the only legally binding guidance on what constitutes commercial exploitation is the two exceptions to commercial exploitation in rule 2 of the Annex Rules to the Convention. As a result, the determination of whether underwater cultural heritage has been commercially exploited must be made on a case-by-case basis. The inquiry is of particular importance because the Convention also indirectly bans exhibitions of commercially exploited underwater cultural heritage.

The salvage of the Belitung shipwreck and the ensuing controversy over the exhibition of the Belitung artifact collection provides an instructive analysis of the Convention’s ban on commercial exploitation. Seabed Explorations, a commercial salvage company, contracted with the government of Indonesia to salvage the Belitung wreck, a ninth-century Arabian vessel that provides unprecedented information about the maritime component of the land-based Silk Road. Although analysis of the salvage operation establishes that the Belitung wreck was commercially exploited, there is much about the Belitung wreck that suggests that an outright ban on its exhibition and study would violate the spirit of the Convention.

The salvage of RMS TITANIC provides another interesting case study, particularly as it applies to article 4’s limitation on the application of the law of salvage

and law of finds. Both the law of salvage and the law of finds are inherently commercial in nature, and as such, many believe that the law of salvage and law of finds should not be applied to underwater cultural heritage. The salvage of TITANIC establishes that salvage does not result in per se commercial exploitation and that courts can apply the law of salvage in a way that ensures protection.

Although the ban on commercial exploitation is an important part of the 2001 UNESCO Convention, the Belitung wreck and TITANIC prove that a ban on commercially exploited underwater cultural heritage, or heritage believed-to-be commercially exploited, violates the spirit of the Convention, because such a ban does not take into account what is best for the resource itself. A middle ground must be reached through a less conservative reading of the Convention.

DEDICATION

I would like to dedicate this thesis to Tino and Melky. Without them, I never would have made it through graduate school and law school.

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CHAPTER I

INTRODUCTION*

Although cultural heritage located on land receives extensive legal protection in almost every country in the world, cultural heritage located underwater, known as underwater cultural heritage, receives little, if any, protection. For underwater archaeologists, this difference in protection is perplexing because historic shipwrecks, a subcategory of underwater cultural heritage, are unique time capsules. Whereas most land-based archaeological sites are composed of several settlements built one on top of the other, each historic shipwreck is representative of one moment in history and provides a unique glimpse into ancient maritime trade and transportation. Therefore, one shipwreck can tell archaeologists more about cross-cultural interactions than several land sites put together. As a result, historic shipwrecks are invaluable underwater cultural resources that deserve to be protected and studied carefully.

Unfortunately, many historic shipwrecks sank carrying monetarily valuable cargo and are, therefore, highly sought after by treasure salvors looking to exploit these wrecks commercially. In their search for monetarily valuable cargo, treasure salvors often destroy the nonmonetarily valuable aspects of a historic ship, thus destroying each artifact's provenience. Provenience is "[t]he three-dimensional context (including geographical

* Portions of this chapter were originally printed as Laura Gongaware, *To Exhibit or Not To Exhibit?: Establishing a Middle Ground for Commercially Exploited Underwater Cultural Heritage Under the 2001 UNESCO Convention*, 37 TUL. MAR. L.J. 203 (2013).

location) of an archaeological find, giving information about its function and date.”¹

Provenience is important in the field of archaeology because the provenience of an artifact provides more information about the artifact and the culture that created it than just the artifact itself. For example, a bowl with an unknown provenience will only allow an archaeologist to determine in what general region and in which general time period the bowl was made. A bowl that is taken from the stern section of a shipwreck and found next to a hearth will allow an archaeologist to determine that the crew of the vessel was using this bowl and will provide information about what life was like for sailors during that time period. Additionally, this bowl and the other artifacts on board the vessel will allow an archaeologist to determine the vessel’s route, the nationality of the crew, the place in which the ship was built, and the extent of foreign contact typical during that time period.

There are two types of legal regimes that protect underwater cultural heritage: the domestic regime and the international regime. The domestic regime is the regime under which each country, known internationally as states, regulates underwater cultural heritage located in its inland waterways and its coastal waters. The extent of each state’s control over its coastal waters depends on the maritime zone in question (for example, the territorial sea, contiguous zone, and exclusive economic zone) and the seaward limits of that state’s control. The international regime is the regime that regulates underwater cultural heritage located in the high seas, the area beyond state control, and underwater cultural heritage located in the inland and coastal waters of state parties to any applicable international

¹ *Introduction to Archaeology: Glossary*, ARCHAEOLOGICAL INST. AM., <http://www.archaeological.org/education/glossary#p> (last visited Nov. 21, 2012).

convention. Under the international regime, there are currently two conventions that protect underwater cultural heritage: the 2001 United Nations Educational, Scientific, and Cultural Organization's (UNESCO) Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Convention)² and the Law of the Sea Convention (UNCLOS).

Before the 2001 UNESCO Convention was drafted, the United Nations Convention on the Law of the Sea (UNCLOS) was the only widely adopted international legal instrument that discussed the protection of underwater cultural heritage. Under article 303 of UNCLOS, "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for [that] purpose."³ This general duty of protection applies regardless of the maritime zone in which the archaeological or historic object is found. The duty of protection is somewhat more specific for "objects of an archaeological and historical nature found in the Area," and UNCLOS states that those objects "shall be preserved or disposed of for the benefit of mankind as a whole."⁴ Besides these two articles, UNCLOS provides little additional guidance on how that duty of protection should be executed. As such, each state party has been left with the task of establishing its own legal regime for the protection of underwater cultural heritage and how to cooperate on its protection with other nations. Some state parties, such as the United Kingdom, have enacted legislation protecting some underwater cultural heritage based on the location or type of

² Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 3 (entered into force Jan. 2, 2009) [hereinafter 2001 UNESCO Convention].

³ United Nations Convention on the Law of the Sea art. 303(1), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

⁴ *Id.* art. 149.

heritage, such as sunken military craft. Other state parties have ignored this duty to protect underwater cultural heritage, and some state parties have actively sought to exploit their underwater cultural heritage by hiring commercial salvors to salvage that heritage and sell it.

In order to ensure better protection for underwater cultural heritage, representatives from interested nations formed a “Meeting of Experts” to draft what would become the 2001 UNESCO Convention. Unlike the general duty of protection established in UNCLOS, the Convention contains specific guidelines and standards for the protection of underwater cultural heritage and establishes a detailed system for the cooperation of state parties.⁵ In particular, the text of the Convention includes the Rules Concerning Activities Directed at Underwater Cultural Heritage (Annex Rules), which are legally binding and therefore enforceable. The purpose of the Annex Rules is to provide state parties with a list of standards that assist them in implementing the Convention. The Annex Rules detail the minimum standards and requirements for how an underwater excavation must be designed, the qualifications required for those overseeing the excavation, the documentation necessary to ensure adequate protection of the resource, and the methodologies to be used for site management and conservation.⁶

The 2001 UNESCO Convention entered into force on January 2, 2009, three months after the Convention received its twentieth state party; at the time of writing this Thesis, the

⁵ See *About the Convention on the Protection of the Underwater Cultural Heritage*, UNITED NATIONS EDUC. SCI. & CULTURAL ORG. (UNESCO), <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/> (last visited Nov. 21, 2012).

⁶ 2001 UNESCO Convention, *supra* note 2, annex (Rules Concerning Activities Directed at Underwater Cultural Heritage) [hereinafter Annex Rules].

Convention has forty-one state parties.⁷ The Convention and its Annex Rules are binding only on states that have ratified, accepted, or approved it. France was the most recent state to ratify the Convention, having done so on February 7, 2013. Although the United States and the United Kingdom are not state parties to the Convention, they comply with the terms of the Annex Rules and, therefore, have arguably accepted the terms of the Annex Rules as a matter of custom.⁸ Although the states discussed in this Thesis are not state parties to the Convention, states that are party to the Convention could be in violation of the Convention if they were to allow underwater cultural heritage from these wrecks to enter their territorial boundaries.

Even among states that are party to the Convention, enforcement is a concern. Because underwater cultural heritage is often traded or displayed internationally, effective enforcement requires cooperation between several states. The situation is further complicated when only some of those states are party to the Convention. Enforcement is also a very expensive undertaking, thus further encouraging noncompliance. Additionally, the International Court of Justice has yet to rule on a case involving a violation of the 2001 UNESCO Convention. Therefore, it is unclear how adjudication would proceed.

⁷ *Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Nov. 21, 2012).

⁸ Interview with Ole Varmer, Att’y-Advisor, Nat’l Oceanic & Atmospheric Admin., in D.C. (Aug. 5, 2011).

In 2011, UNESCO published the *UNESCO Manual for Activities Directed at Underwater Cultural Heritage (UNESCO Manual)*.⁹ Although not binding on state parties, the *UNESCO Manual* provides additional guidance on how to interpret the Annex Rules and attempts to clarify some of the gray areas in the Annex and the Convention.

This Thesis will analyze the 2001 UNESCO Convention, particularly the Convention's ban on the commercial exploitation of underwater cultural heritage. The scope of this ban is problematic because commercial exploitation is not defined in the Convention and determining what constitutes commercial exploitation has been more difficult in practice than the drafters of the Convention seem to have anticipated. This ban also prohibits the exhibition of underwater cultural heritage that has been commercially exploited in a state that is party to the 2001 UNESCO Convention.¹⁰ The prohibition on the exhibition of commercially exploited underwater cultural heritage can bar academics from studying these valuable resources and prevent the public from enjoying them. Chapter 2 of this Thesis will discuss the specific language of the Convention's ban on commercial exploitation, with a particular focusing on rule 2 of the Convention's Annex, which contains two exceptions to the ban. Like the definition of commercial exploitation, these exceptions leave room for interpretation, and those possible interpretations and their impact on underwater cultural heritage are discussed.

⁹ UNESCO, *UNESCO MANUAL FOR ACTIVITIES DIRECTED AT UNDERWATER CULTURAL HERITAGE* (Thijs J. Maarleveld et al. eds., 2011) [hereinafter *UNESCO MANUAL*], available at <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/unesco-manual-for-activities-directed-at-underwater-cultural-heritage/unesco-manual/>.

¹⁰ *See id.* arts. 2(4), 14.

Because commercial exploitation is determined on case-by-case basis, Chapter 3 and Chapter 4 discuss specific shipwrecks that commercial salvage companies have salvaged. Although the salvage of these wrecks occurred before the Convention entered into force, these wrecks provide interesting case studies because of the recent controversies surrounding either the display of underwater cultural heritage from these wrecks or the potential sale of that underwater cultural heritage. Chapter 3 looks at the salvage of the Belitung shipwreck, a ninth-century Arabian vessel that sank off the coast of Indonesia, and analyzes whether that salvage violates the Convention's ban on commercial exploitation. Chapter 4 analyzes the salvage of the R.M.S. TITANIC by commercial salvor R.M.S. Titanic, Inc. with a particular focus on article four of the Convention, which states that the law of salvage and law of finds do not apply to underwater cultural heritage subject to the Convention unless three conditions are met. Because of the inherent commercial nature of the law of salvage and the law of finds, article 4 has important implications on the commercial-exploitation ban. And finally, Chapter 5 will conclude this Thesis, summarizing the current status of the ban on commercial exploitation and what this ban means for commercially exploited underwater cultural heritage.

CHAPTER II
THE PROHIBITION OF COMMERCIAL EXPLOITATION IN THE 2001 UNESCO
CONVENTION *

The commercial exploitation of underwater cultural heritage is banned under article 2 of the 2001 UNESCO Convention.¹¹ Although commercial exploitation is not defined in article 2 (the definitions section of the Convention), rule 2 of the Annex Rules provides additional information about the ban: “The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”¹² Thus, while “commercial exploitation” is not formally defined in article 2, rule 2 of the Annex Rules serves as the source of interpretive guidance for the ban. The Convention and Annex Rules also leave “commercial goods” undefined, and therefore the term has the potential to be interpreted rather subjectively and inconsistently.

Although the *UNESCO Manual* states that commercial exploitation is, in fact, defined in rule 2 of the Annex Rules,¹³ the rule instead provides general guidance on the type of behaviors that are prohibited under the Convention (that is, trading, selling, buying, or

* Portions of this chapter were originally printed as Laura Gongaware, *To Exhibit or Not To Exhibit?: Establishing a Middle Ground for Commercially Exploited Underwater Cultural Heritage Under the 2001 UNESCO Convention*, 37 TUL. MAR. L.J. 203 (2013).

¹¹ 2001 UNESCO Convention, *supra* note 2, art. 2(7).

¹² Annex Rules, *supra* note 6, r. 2.

¹³ UNESCO MANUAL, *supra* note 9, at 15.

bartering underwater cultural heritage as commercial goods). The drafters of the Convention were careful to prohibit behavior on both sides of a potential transaction and explicitly mentioned trading and bartering because not all cultural-heritage transactions involve the exchange of money.¹⁴ The *UNESCO Manual* suggests that by prohibiting bartering, rule 2 of the Annex Rules also prohibits bribing museum officials and politicians.¹⁵ Although this rule would prohibit any transactions involving underwater cultural heritage that resulted from these bribes, it may be a stretch to argue that bribes are within a reasonable scope of the meaning of bartering prohibited under rule 2 of the Annex Rules.

To help define the scope and application of rule 2 of the Annex Rules and ensure that the rule is not misapplied to commercially related activities that may be necessary or appropriate, rule 2 lists two activities that its drafters did not intend to prevent with the rule:

- (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;
- (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice

¹⁴ *See id.* at 14.

¹⁵ *Id.*

the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.¹⁶

Paying for professional archaeological services is of course a commercial activity. The exemption in rule 2(a) of the Annex Rules makes clear that the contracting of archaeological services is not prohibited, provided the services are carried out in a manner that is consistent with the Convention. The *UNESCO Manual* expressly clarifies that archaeological services may be outsourced and contracted without violating the ban on commercial exploitation in rule 2 of the Annex Rules.¹⁷ This explanation was necessary because cultural-heritage management is conducted in a variety of ways; in many countries, like the United States, this includes contracting archaeological services to private companies. As long as private companies conduct their archaeological services in full conformity with the Convention, they are not engaging in commercial exploitation that violates article 2. Thus the focus of any analysis for compliance with rule 2 of the Annex Rules is not so much whether the service is a commercial activity or even whether a private company is involved, but rather, whether the activity exploits the resource. Compliance is primarily determined by the later disposition of the recovered artifacts.

¹⁶ Annex Rules, *supra* note 6, r. 2.

¹⁷ UNESCO MANUAL, *supra* note 9, at 14.

Not addressed in the 2001 UNESCO Convention, Annex Rules, or *UNESCO Manual* is whether a private company must always conduct itself in conformity with the Convention, or whether conformity is limited to a private company's actions at a particular underwater-cultural-heritage site. The text of the Annex Rules does state that archaeological and incidental services must be of a nature and purpose that is in full conformity with the Convention. This language suggests that the drafters were concerned with more than just the immediate activities of a private company; however, the text discusses the archaeological services provided by a company, not the company itself. This construction suggests that only a company's actions related to a specific underwater cultural resource must be in conformity with the Convention.¹⁸ Legally, there may be enough ambiguity in the wording of the text to argue for either interpretation, and no cases have been decided to provide further clarification. The solution to this problem, therefore, is one for the implementing state party to decide. As such, the state party may choose to require higher standards than those outlined in the Convention and Annex Rules. The state party may also decide to factor in ethical considerations and the impact that a salvage company's reputation may have on the specific resource at issue.

In the United States and in some other countries, archaeological codes of ethics prohibit archaeologists from engaging in any activity that will attach a commercial value to cultural heritage and from taking actions "that may lead to their destruction, dispersal, or

¹⁸ Although not legally binding, it is this interpretation that the current Secretary of the 2001 UNESCO Convention feels is most in line with the meaning of rule 2 of the Annex Rules. E-mail from Ulrike Guérin, Secretariat of the 2001 UNESCO Convention, UNESCO, to author (Mar. 28, 2012, 04:09 CDT) (on file with author).

exploitation.”¹⁹ As a result, archaeologists almost always refuse to work with private companies that have salvaged underwater cultural heritage in a manner inconsistent with these codes of ethics or the 2001 UNESCO Convention, even a company that no longer commercially exploits underwater cultural heritage. Working with such a company could give credibility to its previous salvage operations that violated the Convention, thereby possibly increasing the value of those commercially exploited artifacts in the art market. In order to avoid this result, most archaeologists will refuse to study artifacts salvaged in a manner inconsistent with the Convention and, in some instances, actively campaign against others who do.

For the same reasons, many archaeologists are very hesitant to work with archaeologists who have worked with private salvage companies, even if the archaeologist has not worked with that company for a long time. For example, every archaeologist who helped Barry Clifford find and salvage WHYDAH (a pirate ship that sank off the coast of Cape Cod, Massachusetts, in 1717)²⁰ faced serious academic repercussions because of their involvement with the project. One of the archaeologists was able to rebuild his career, but even after twenty-five years, he refused to present at an academic conference session that

¹⁹ *Ethics Statement*, SOC’Y FOR HIST. ARCHAEOLOGY (June 21, 2003), <http://www.sha.org/about/ethics.cfm>. See *Archaeological Ethics Codes, Charters & Principles*, SOC’Y FOR AM. ARCHAEOLOGY, <http://www.saa.org/AbouttheSociety/AnnualMeeting/EthicsBowl/EthicsResources/CodesChartersPrinciples/tabid/199/Default.aspx> (last visited Nov. 24, 2012), for a list and links to the codes of ethics of other organizations around the world.

²⁰ BARRY CLIFFORD ET AL., *REAL PIRATES* 7 (2007).

included archaeologists who had worked with treasure salvors, because he did not want to reassociate himself with treasure salvage.

Because of these ethical issues and the stigma attached to archaeologists who have worked with treasure salvors, it is very difficult for private companies to hire archaeologists who are both qualified and satisfy professional ethics and the standards of the 2001 UNESCO Convention. These private companies sometimes find an archaeologist who does the work regardless of the risk to his reputation, and others are forced to hire people without appropriate credentials to qualify as a professional archaeologist. Private companies can also train their own archaeologists. Although Odyssey Marine Exploration (Odyssey Marine), the Florida-based treasure salvage company involved in a lawsuit against Spain over title to NUESTRA SENORA DE LAS MERCEDES,²¹ prefers to hire qualified professional archaeologists, it has, until recently, had a very difficult time finding archaeologists willing to work for the company. The archaeologists whom Odyssey Marine has employed have been excluded from professional archaeological conferences, and professional archaeologists will not study the artifacts Odyssey Marine discovered during projects because Odyssey Marine engages in what many perceive as commercial exploitation in violation of professional ethics and the 2001 UNESCO Convention.²² This situation would likely be the same even if Odyssey Marine changed its business model and no longer sold underwater cultural heritage. Therefore, even if a private company has been

²¹ See *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 2011 AMC 2409 (11th Cir. 2011).

²² E-mail from Gregory Stemm, Dir., Odyssey Marine Exploration, to author (Mar. 28, 2012, 12:36 CDT) (on file with author).

legally contracted to perform archaeological services and those services are in full conformity with the Convention, the fact that the company has engaged in activities inconsistent with the Convention in the past will likely be considered detrimental to the underwater cultural resource as a whole.

The *UNESCO Manual* argues that visitor centers, museums, and museum shops are included in “necessary services incidental thereto.”²³ Therefore, profits or proceeds derived from these visitor centers, museums, or museum shops are not considered commercial exploitation of underwater cultural heritage.²⁴ The museum practice of deaccessioning, “[t]he process by which an archives, museum, or library permanently removes accessioned materials from its holdings,”²⁵ is also permitted as long as that deaccessioning “does not imply feeding the antiquities market with finds.”²⁶ Museums typically deaccession cultural property by selling that property, exchanging it, donating it, or repatriating it (that is, returning the cultural property to its country of origin). Although each museum establishes its own specific deaccessioning policies, those policies are typically guided by the laws of the country in which the museum is located and the ethics statements of organizations to which the museum is a member. For example, the Metropolitan Museum of Art (Met) is required to comply with the deaccessioning laws of New York State and the rules established by the New York State Board of Regents, which require all deaccessioning to be

²³ UNESCO MANUAL, *supra* note 9, at 15 (quoting Annex Rules, *supra* note 6, r. 2(a) (internal quotation marks omitted)).

²⁴ *Id.*

²⁵ Richard Pearce-Moses, *Deaccessioning*, SOC’Y AM. ARCHIVISTS, <http://www2.archivists.org/glossary/terms/d/deaccessioning> (last visited Nov. 24, 2012).

²⁶ UNESCO MANUAL, *supra* note 9, at 15.

consistent with the mission of the museum and all proceeds to “be used only for the acquisition of property for the collection or for the preservation, protection and care of the collection.”²⁷ The Met, along with several other U.S. museums, is frequently criticized for its deaccessioning policy because many of the museum’s sales are conducted through auction houses like Sotheby’s and Christie’s, thus establishing a direct connection to the art market.²⁸

In practice, deaccessioning is complex and controversial. It may be difficult to determine when deaccessioning moves away from proper curation in the public interest and crosses the line such that the sale is tantamount to commercial exploitation—for example, whether deaccession is proper when an auction house sells all or most of the deaccessioned artifacts and an antiquities collector buys them. This deaccessioned cultural property, therefore, becomes part of, and could potentially be interpreted as feeding, the antiquities market. Because many nations with cultural resource programs recognize it, the International Council of Museum’s Code of Ethics for Museums (ICOM Code) provides useful guidance on the best practices to observe when deaccessioning cultural property.²⁹ Under the ICOM Code, the sale of cultural property is permitted as long as (1) the museum has a full understanding of the significance of the item, its character, and the loss to the public that arises from removing that property from public access; (2) the sale is in

²⁷ N.Y. EDUC. LAW § 233-a.5(a) (McKinney 2009).

²⁸ See, e.g., Robin Pogrebin, *The Permanent Collection May Not Be So Permanent*, N.Y. TIMES, Jan. 27, 2011, at C1.

²⁹ INT’L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2006).

accordance with the museum's deaccessioning policies; and (3) the proceeds of that sale are used for the benefit of the collection.³⁰

It is less clear why the rule 2(b) exemption was included in rule 2 of the Annex Rules, because the deposition of underwater cultural heritage is not per se commercial exploitation. The collection of artifacts is a necessary part of archaeological excavation. These artifacts must be placed somewhere; therefore, the deposition of those artifacts is a necessary part of archaeology. It is important to note that rule 1 of the Annex Rules does express a preference for *in situ* preservation³¹—in other words, a preference that the underwater cultural heritage be left where it was discovered and preserved either through the natural processes that protected the wreck until its discovery or through the addition of onsite conservation techniques, such as structures that would prevent damage to the site. In practice, *in situ* preservation is rarely possible underwater because of the threat of looting and destruction from divers visiting the site. As a result, the owner of the wreck makes the decision not to leave the wreck *in situ* or to recover a portion of the wreck and its artifacts and leave the rest *in situ*. Therefore, even though *in situ* preservation is preferable, the salvor or excavator almost always recovers some artifacts, and deposition of the recovered artifacts is necessary.

The *UNESCO Manual* states that in order for deposition to be permitted under the Convention, the deposition cannot “prejudice the scientific or cultural interest” of the artifacts and the integrity of the collection (which includes the artifacts, samples, and

³⁰ See *id.* §§ 2.13-16.

³¹ Annex Rules, *supra* note 6, r. 1.

documentation) must be guaranteed.³² The *UNESCO Manual* expresses that the best way to ensure the integrity of a collection is to keep that collection intact. However, it also admits that this may not always be practical and suggests that deposition between multiple institutions should be allowed as long as such a deposition does not result in the irretrievable dispersal of the collection.³³

The *UNESCO Manual* also expresses a preference for depositing a collection as close to the place where it was discovered as possible and for keeping the collection within the country in which it was discovered.³⁴ This preference is not always practical or justified, especially for older wrecks that predate the establishment of the country in whose territorial waters the wreck was discovered or for ships that sank far from their country of origin or destination. It is not clear from the *UNESCO Manual* whether deposition outside of the country of discovery would violate the 2001 UNESCO Convention. In addition, the *UNESCO Manual* states that the drafters intended rule 2(b) of the Annex Rules to permit the transfer of ownership of artifacts as long as that transfer is conducted in conformity with the Convention and the new owner protects the scientific and cultural value of the artifacts and ensures the integrity of the collection.³⁵

The Convention is silent as to whether the owner of the collection must be a state government; a public institution, such as a museum or university; or a private organization or private individual. Whoever owns a collection must do so in conformity with the

³² UNESCO MANUAL, *supra* note 9, at 15 (quoting Annex Rules, *supra* note 6, r. 2(b)).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Convention. To begin with, the owner must own the collection legally. For a private organization or individual to own a collection, the private entity must own the collection in accordance with the applicable domestic law of the flag state of the vessel or the coastal state (that is, with the permission of the government in whose waters the wreck was discovered). In practice, private ownership would most likely occur only with wrecks discovered within a state's territorial waters or contiguous zone because the state has sovereignty over those wrecks.³⁶ In the contiguous zone, that sovereignty would need to be exercised in accordance with UNCLOS.³⁷

³⁶ 2001 UNESCO Convention, *supra* note 2, art. 7.

³⁷ *Id.* art. 8.

CHAPTER III
THE BELITUNG SHIPWRECK: DEPOSITION OF COMMERCIALY EXPLOITED
RESOURCES*

Because of its geography, Southeast Asia has always had a significant connection to the sea and maritime travel. Its waters are filled with shipwrecks of great historic value—the value of which is heightened by the fact that very little is known about the maritime history of this region. Despite the historic value of these wrecks, many southeast Asian countries have not established laws to protect their underwater cultural heritage. Looting of wrecks in this region is almost guaranteed once they are discovered because so many of these wrecks sank carrying monetarily valuable cargo and the region’s countries lack protection laws or an ability to enforce existing laws that prohibit the looting of underwater cultural heritage. The weak economies of these countries are also an issue because many looters are poor fishermen who need money to feed their families and therefore have little incentive to protect these wrecks.³⁸

In addition to ensuring that their work does not commercialize the archaeological record by attaching an economic value to cultural heritage, archaeologists are also ethically bound to consider the rights of all groups with an interest in that cultural heritage, including

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³⁸See Michael Flecker, *The Ethics, Politics, and Realities of Maritime Archaeology in Southeast Asia*, 31 INT’L J. NAUTICAL ARCHAEOLOGY 12 (2002).

descendants of the people who generated that heritage.³⁹ Therefore, as possible descendants of the underwater cultural heritage, these fishermen arguably have a right to use that heritage as they please, especially if selling that heritage helps their families survive. Because of their economic situation, however, these fishermen are likely to be taken advantage of by those with greater knowledge about the actual value of the cultural heritage, and these fishermen will likely receive only a small fraction of the heritage's actual value in the art market.⁴⁰

Indonesia is one of the many countries in Southeast Asia that contracts with private companies for the salvage of historic shipwrecks. These private companies are required to pay a large deposit before beginning work and are required to pay fees to the twenty-two government departments that oversee the survey and salvage of these wrecks. The companies must also agree to give the Indonesian government fifty percent of the salvaged cargo, which is usually recalculated as fifty percent of the gross sales proceeds from an auction of the artifacts.⁴¹ In addition, salvaged artifacts must be sold as an intact collection, as opposed to being sold piece by piece. This requirement that the collection be kept intact is consistent with rule 2 of the Annex Rules and professional ethics. However, it may also be a reflection of commercial considerations. The sale of an intact collection may result in a

³⁹ See *Principles of Archaeological Ethics*, SOC'Y FOR AM. ARCHAEOLOGY, <http://www.saa.org/AbouttheSociety/PrinciplesofArchaeologicalEthics/tabid/203/Default.aspx> (last visited Nov. 27, 2012).

⁴⁰ See PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY* (2006), for a discussion of the looting of cultural heritage and the role looters, like these fishermen, play in the international world of artifact smuggling.

⁴¹ Flecker, *supra* note 38, at 20.

higher profit than the sale of artifacts in piecemeal fashion, particularly if the market is flooded with a large number of similar artifacts. For example, many wrecks sank carrying thousands of similar porcelain bowls. If these bowls were sold individually, the price would drop because the price is a reflection of the age of the artifact and its rareness in the art market. If these bowls were sold as a collection, however, the collection would be one of a kind and would receive a higher price than the total value of all of the individual bowls sold separately. Indonesian law also requires that the salvage be conducted in accordance with international standards; therefore, any salvaged cultural property must be properly excavated and conserved. Unfortunately, this aspect of the law is rarely enforced.⁴²

Discovery, Salvage, and Exhibition of the Belitung Wreck

In 1998, a ninth-century Arabian vessel carrying a cargo of Tang Dynasty ceramics, bronze mirrors, gold dishes, silver dishes, and lead ingots was discovered just north of Belitung Island within Indonesian territorial waters.⁴³ The wreck provides some of the first evidence of a maritime component to the well-documented Silk Road, which allowed westerners unprecedented access to the exotic goods of the Far East. The wreck also shows that Arabs were trading and interacting directly with China, as opposed to trading with other

⁴² *See id.*

⁴³ Michael Flecker, *A 9th-Century Arab or Indian Shipwreck in Indonesian Waters: Addendum*, 37 INT'L J. NAUTICAL ARCHAEOLOGY 384, 384, 386 (2008) [hereinafter Flecker, *Addendum*]; Michael Flecker, *A Ninth-Century AD Arab or Indian Shipwreck in Indonesia: First Evidence for Direct Trade with China*, 32 WORLD ARCHAEOLOGY 335, 339-42 (2001) [hereinafter Flecker, *First Evidence*]; Michael Flecker, *A 9th-Century Arab or Indian Shipwreck in Indonesian Waters*, 29 INT'L J. NAUTICAL ARCHAEOLOGY 199, 199 (2000) [hereinafter Flecker, *Shipwreck in Indonesian Waters*].

regions for Chinese goods, at a much earlier date than previously hypothesized.⁴⁴ In short, the discovery of the Belitung wreck has changed the way archaeologists and historians view trade during the ninth century.

There are two different reports as to who discovered the Belitung wreck and how it was discovered. The Smithsonian and Michael Flecker, the archaeologist employed during the second salvage season, have stated that an Indonesian cucumber diver discovered the Belitung wreck when he found a mound of ceramics while diving.⁴⁵ This account differs slightly from that of Tilman Walterfang, the director of the company that salvaged the Belitung wreck, who has stated that the wreck was an accidental discovery when his company was surveying a different vessel located nearby.⁴⁶ It is not uncommon in situations such as this one for the facts to be difficult to determine, especially when the wreck and its discovery become a source of controversy, as is true in the present case. Of course, it is also possible that both accounts are true because more than one person can discover a wreck. Because the site was reportedly looted, there is a question as to whether there were other discoverers or whether coordinates were shared.

On April 8, 1998, shortly after the vessel's discovery, the Indonesian government granted Seabed Explorations (Seabed), working in conjunction with PT Sulung Segarajaya,

⁴⁴ See Flecker, *First Evidence*, *supra* note 43, at 345; Freer Sackler, *Trade and Travel by Land and Sea*, SHIPWRECKED: TANG TREASURES & MONSOON WINDS, <http://www.asia.si.edu/Shipwrecked/trade.asp> (last visited Sept. 21, 2012).

⁴⁵ Flecker, *Shipwreck in Indonesian Waters*, *supra* 43, at 199; Freer Sackler, *supra* note 46.

⁴⁶ E-mail from Tilman Walterfang, Dir., Seabed Explorations, to Tess Davis, Dir., Lawyers' Comm. for Cultural Heritage Pres. (Dec. 11, 2011, 16:02 EST) (on file with author).

a five-year permit to document and salvage the wreck site.⁴⁷ In accordance with Indonesian Presidential Decree No. 25 of 1992 article 2(2), the permit required Seabed to sell any salvaged cargo and to split the gross sales proceeds from the auction fifty-fifty with the Indonesian government.⁴⁸ According to Tilman Walterfang, the director of Seabed, the Indonesian government initially asked his company to finance and conduct a quick two-week recovery project to protect the site from looters; it is unclear at what point the Indonesian government changed its strategy.⁴⁹ Seabed began its salvage of the site in September 1998 and was forced to suspend the salvage project at the end of October because of the monsoon season. Although Indonesian law requires historic shipwrecks to be salvaged in accordance with international standards, which would include hiring an archaeologist and carefully documenting and excavating the site, this permit did not expressly incorporate these standards as requirements. Also, there is little or no evidence that Indonesia routinely enforces these laws. In any case, Seabed did not hire an archaeologist for the first season of the salvage project.⁵⁰ According to Walterfang, the company's surveyor had a degree in oceanography and was trained in underwater excavation. In addition, the company tried to hire an archaeologist right away but had

⁴⁷ NAT'L COMM. ON THE EXPLORATION & USE OF TREASURES, PERMIT NO. SI-39/PN/BMKT/4/1998 (1998) [hereinafter PERMIT] (on file with author); E-mail from Tilman Walterfang to Tess Davis, *supra* note 46.

⁴⁸ See NAT'L COMM. ON THE EXPLORATION & USE OF TREASURES, DECLARATION NO. 65/SET-PN/BMKT/IX/2003: OWNERSHIP OF BELITUNG WRECK 2 (2003) [hereinafter OWNERSHIP OF BELITUNG WRECK] (on file with author).

⁴⁹ E-mail from Tilman Walterfang to Tess Davis, *supra* note 46.

⁵⁰ Flecker, *Shipwreck in Indonesian Waters*, *supra* note 43, at 199.

difficulty because of the volatile political situation in Indonesia at the time.⁵¹ Seabed resumed its salvage operation in April 1999 under the guidance of archaeologist Michael Flecker, who had previously worked with Seabed on its salvage of the Intan wreck, a tenth-century ship of Indonesian origin that sank southwest of the Belitung wreck, also in Indonesian territorial waters.⁵² The majority of the ceramics on board the Belitung wreck had been recovered during the first two months of the salvage before Flecker was hired as the project's archaeologist.⁵³ According to Flecker, the site was divided into grids (as is common in an underwater archaeological excavation), and Seabed had maintained records to show from which grid it recovered ceramics.⁵⁴ It is unclear from the articles published on the project how detailed these recordings were and whether Seabed created a site map; however, some archaeologists have suggested that it would have been impossible for Seabed to record and recover that amount of ceramics adequately in just two months.⁵⁵ When Seabed resumed its salvage operation in April 1999, Flecker excavated the remaining ceramics and other cargo, including the lead ingots. He also partially excavated a portion of the hull that had been preserved under the cargo.⁵⁶ It is not common for wood to survive

⁵¹ E-mail from Tilman Walterfang to Tess Davis, *supra* note 46.

⁵² *The Intan Shipwreck (10th C.)*, MAR. EXPLORATIONS, <http://maritime-explorations.com/intan.htm> (last visited Nov. 27, 2012); Flecker, *Shipwreck in Indonesian Waters*, *supra* note 43, at 199; E-mail from Michael Flecker to author (July 19, 2011, 04:54 EST) (on file with author).

⁵³ Flecker, *Shipwreck in Indonesian Waters*, *supra* note 43, at 199.

⁵⁴ *Id.*

⁵⁵ See, e.g., Elizabeth S. Greene et al., *Archaeology vs. Commercial Exploitation: How the Smithsonian Could Display Objects from the Belitung Shipwreck*, LAW. COMMITTEE FOR CULTURAL HERITAGE PRESERVATION (Dec. 14, 2011, 9:58 AM), <http://culturalheritagelaw.org/blog?mode=Postview&bmi=773188>.

⁵⁶ Flecker, *Shipwreck in Indonesian Waters*, *supra* note 43, at 199-200.

underwater for very long unless the vessel sank in an anaerobic environment, such as the Black Sea. The oceans are full of wood-eating worms, known as teredo worms, that quickly eat these wooden vessels.⁵⁷ While the ceramics and other cargo were raised, the permit required Seabed to leave the hull *in situ* with the hope that the hull would become a tourist attraction for scuba divers.⁵⁸ Unfortunately, Indonesia did not take any measures to protect the hull once it had been exposed. Even during the recording of the hull, teredo worms had begun to eat away at the wood, and as a result, very little of the hull survives today.⁵⁹

After the salvage of the Belitung wreck was complete, Seabed transported many of the recovered artifacts to New Zealand to begin the six-year-long conservation process that cost the company several million dollars to complete.⁶⁰ Artifacts that are removed from under water require extensive conservation to ensure that the water removal process does not occur too quickly. In the case of waterlogged wood or other organic remains, failure to take proper conservative measures will result in the destruction of the artifacts: as water leaves the cells, the cells shrink causing the artifact's shape to distort. The water must, therefore, be replaced with a bulking agent, or the artifact must be freeze dried to allow the cells to retain their size. Glass, ceramics, and most metal remains also require treatment to remove chlorides and in

⁵⁷ James Owen, *Viking Shipwrecks Face Ruin as Odd "Worms" Invade*, NAT'L GEOGRAPHIC, <http://news.nationalgeographic.com/news/2010/01/100119-viking-shipwrecks-worms-shipworms-global-warming/> (last visited Dec. 14, 2012).

⁵⁸ PERMIT, *supra* note 47; E-mail from Michael Flecker to author (July 26, 2011, 16:14 EST) (on file with author).

⁵⁹ E-mail from Michael Flecker to author, *supra* 58.

⁶⁰ *Conservation*, SEABED EXPLORATIONS, <http://seabedexplorations.com/discoveries/> (follow "The Wrecks" hyperlink; then follow "Tang Wreck" hyperlink; then follow "Conservation" hyperlink) (last visited Nov. 27, 2012); *Conserve*, SEABED EXPLORATIONS, <http://seabedexplorations.com/methods/conserve/> (last visited Dec. 13, 2012).

the case of metals, reverse the corrosion process. These treatments allow the artifact to regain the stability that it lost from being waterlogged for so long. The amount of time conservation will take and the type of conservation methods employed depends on the artifact's material composition.⁶¹ In 2003, Seabed had yet to find a suitable buyer for the collection and, as a result, Seabed and the Indonesian government decided to renegotiate the terms of their contract. Under the new contract, the Indonesian government waived its right to fifty percent of the gross sales proceeds from the future sale of the Belitung wreck cargo. In exchange, Seabed agreed to pay the Indonesian government \$2.5 million and agreed to return the Intan cargo to Indonesia.⁶² Unfortunately, its whereabouts are unknown even to Flecker, who worked not only as the archaeologist on the salvage, but also wrote his Ph.D. dissertation on the wreck.⁶³ In 2005, Seabed sold the entire Belitung cargo to the Sentosa Leisure Group, a company owned by Singapore's Ministry of Trade and Industry, for \$32 million. Singapore purchased the collection with the hope of building a museum to house the collection permanently. After the purchase of the collection, Singapore's National Heritage Board, Singapore's Tourism Board, and the Smithsonian's Freer Sackler Gallery organized a five-year traveling exhibit with stops at museums in the United States, Europe, the Middle East, and Australia. The exhibit "Shipwrecked: Tang Treasures and Monsoon

⁶¹ See Donny L. Hamilton, *Methods of Conserving Archaeological Material from Underwater Sites*, CONSERVATION RES. LABORATORY, <http://nautarch.tamu.edu/CRL/conservationmanual/ConservationManual.pdf> (last visited Nov. 27, 2012).

⁶² OWNERSHIP OF BELITUNG WRECK, *supra* note 48, at 2. The Intan cargo was returned to Indonesia in November 2004. Letter from Safri Burhanuddin, Head of Secretariat, Nat'l Comm. on the Exploration & Use of Treasures, to Tilman Walterfang, Dir., Seabed Explorations (Nov. 5, 2004) (on file with author).

⁶³ E-mail from Michael Flecker to author, *supra* note 52.

Winds” opened on February 19, 2011, and was scheduled to conclude at the end of July that same year.⁶⁴ The Smithsonian’s Arthur M. Sackler Gallery in Washington D.C. was intended to be the exhibit’s second stop, but the Smithsonian decided to postpone the exhibit because the salvage of the Belitung wreck became a source of increasing controversy that many professional organizations said would damage the Smithsonian’s reputation.⁶⁵ As of now, the Smithsonian has yet to announce if it will eventually display the Belitung cargo at the Sackler Gallery. If the exhibit does go forward, it will be altered from the original design and will likely include a section explaining the importance of archaeological excavation and the loss of information that occurs during hurried commercial salvage operations.

A Case of Commercial Exploitation?

The Belitung wreck was not excavated as carefully as it would have been if the wreck had been archaeologically excavated over the course of several years. Such prolonged archaeological excavations are common with underwater archaeology projects. But was the Belitung wreck commercially exploited as defined in the 2001 UNESCO Convention? While neither Indonesia nor Singapore is a party to the 2001 UNESCO Convention, and both are legally free to utilize the underwater cultural heritage located within their territorial waters in whatever manner they like, plans to exhibit the collection have already been adversely impacted by the perception that Seabed undertook the salvage for commercial

⁶⁴ *Shipwrecked: Tang Treasures and Monsoon Winds*, FREER SACKLER (Mar. 16, 2011), <http://www.asia.si.edu/press/2011/prShipwreckedBackground.asp>.

⁶⁵ See Letter from Richard Kurin, Under Sec’y for History, Art, & Culture, Smithsonian Inst., to Ole Varmer, Att’y-Advisor, Nat’l Oceanic & Atmospheric Admin. (June 24, 2011) (on file with author). See generally Kate Taylor, *Treasures Pose Ethics Issue for Smithsonian*, N.Y. TIMES, Apr. 25, 2011, at C1; Greene et al., *supra* note 55.

profit, thereby violating the Convention and professional ethics. Moreover, under article 14 of the Convention, “States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention.”⁶⁶ A plain reading of this article suggests that the underwater cultural heritage must have been illicitly exported or recovered, and its recovery must have been conducted in a manner inconsistent with the terms of the Convention. However, under article 18, “Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.”⁶⁷ The requirement that the underwater cultural heritage be illicitly exported or recovered is absent from article 18; seizure under article 18 requires only the recovery of underwater cultural heritage in a manner contrary to the Convention. Therefore, if one takes article 18 into consideration when interpreting article 14, it appears that the important factor in article 14 is that the underwater cultural heritage was recovered contrary to the Convention. Support for this interpretation of article 14 stems from article 18’s requirement that the state party seize the underwater cultural heritage, even if it was not illicitly exported or recovered. One of the reasons that the Convention requires seizure is to prevent underwater cultural heritage from entering the state party’s territory. In addition to the requirements imposed by articles 14 and 18, article 17 requires state parties to “impose sanctions for violations of measures it has

⁶⁶ 2001 UNESCO Convention, *supra* note 2, art. 14.

⁶⁷ *Id.* art. 18(1).

taken to implement this Convention.’⁶⁸ Therefore, if the Convention requires seizures and sanctions in instances when underwater cultural heritage is recovered contrary to its provisions, a state party should take measures to keep underwater cultural heritage from entering its territory if it was recovered contrary to the Convention, even if the export and recovery was legal in the country where it was salvaged. Under this interpretation of articles 14, 17, and 18, the Convention makes it impossible for any country that is a party to the Convention, or that has customarily accepted the terms of the Convention, to exhibit underwater cultural heritage that has been commercially exploited.

In order for the Belitung wreck not to be considered commercially exploited, the services provided by Seabed must fall within an exception listed in rule 2(a) or rule 2(b) of the Annex Rules. As a threshold issue, it is important to point out that international conventions do not typically extend to private actors; in order to hold a private actor responsible, the state party typically enacts a domestic counterpart to the international convention. In the case of the 2001 UNESCO Convention, the fact that a state party is contracting for services imputes any violation on the state party.

Rule 2(a) of the Annex Rules does allow for the provisioning of archaeological and other necessary services,⁶⁹ and the *UNESCO Manual* states that these services can be outsourced or contracted.⁷⁰ Therefore, while Indonesia could legally contract with private companies to salvage its underwater cultural heritage, those contracted services must fully

⁶⁸ *Id.* art. 17(1).

⁶⁹ Annex Rules, *supra* note 6, r. 2(a).

⁷⁰ UNESCO MANUAL, *supra* note 9, at 14.

conform with the Convention—that is, the work must be conducted archaeologically with the proper personnel, preliminary work, and reporting before, during, and after the salvage. Seabed’s spotty compliance with the Convention while salvaging the Belitung wreck raises concerns of commercial exploitation: the project did not have a qualified and competent archaeologist overseeing the first two months of salvage, the timetable for the salvage was too short, and the documentation and reporting for the project appeared to be inadequate.

Rule 22 of the Annex Rules requires, “Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.”⁷¹ The *UNESCO Manual* provides further guidance on what it means to be a qualified and competent underwater archaeologist:

To be deemed qualified and competent an archaeologist must therefore demonstrate: thorough understanding of the way in which scientific knowledge is produced; ability in a range of field techniques from pre-disturbance surveys to complex excavations; training in artefact recovery; familiarity with at the least basic artefact handling and conservation techniques; skills in research and laboratory analysis; and ability and

⁷¹ Annex Rules, *supra* note 6, r. 22.

commitment to report and publish the detailed results of investigations and analysis.⁷²

In addition to meeting these general qualifications, the archaeologist must also display competence appropriate for the specific project. This requires that the archaeologist have a background in the time period associated with the underwater cultural heritage (that is, a background in eighteenth-century British naval history if the wreck is an eighteenth-century British naval vessel), experience in conducting underwater excavations of the type necessary for the specific project, access to other archaeologists who specialize in the field of underwater cultural heritage, and the ability to use contemporary marine technologies suitable for the project.⁷³

Under rule 22 of the Annex Rules and the *UNESCO Manual's* guidance on that rule, Flecker was both a qualified and competent archaeologist for the Belitung wreck salvage. Flecker received his Ph.D. from the National University of Singapore in Marine Studies and Southeast Asian Studies, and he has been involved in the excavation of numerous shipwrecks in Southeast Asia, including the tenth-century Intan wreck.⁷⁴ He speaks Indonesian, which is particularly important because many of the people involved in the excavation likely only spoke Indonesian, and he was familiar with Seabed's salvage equipment from prior work with the company. Additionally, Flecker was working for a private company with resources far exceeding those of a typical academic underwater

⁷² UNESCO MANUAL, *supra* note 9, at 79.

⁷³ *Id.* at 81-82.

⁷⁴ See *Michael Flecker Resume*, MAR. EXPLORATIONS, <http://www.maritime-explorations.com/resume.htm> (last visited Nov. 27, 2012).

excavation. Unfortunately, Seabed only employed Flecker for the second half of the salvage project and did not have a qualified and competent archaeologist working during the first two months of the salvage operation when the majority of the ceramic cargo was raised. Seabed's director claims that the company was trying to hire an archaeologist from the very beginning but was having trouble.⁷⁵

If the Belitung wreck were truly in danger of being looted, then Seabed and the Indonesian government may have been justified in undertaking emergency rescue salvage and arguing that they did the best they could given the situation. Although the 2001 UNESCO Convention does not discuss emergency salvage in circumstances when a wreck is in great danger of being looted, the first objective of the Convention is “the protection of underwater cultural heritage.”⁷⁶ The Convention also states that parties should use “the best practicable means at their disposal,”⁷⁷ which suggests that emergency salvage overseen by the best available “archaeologist” would satisfy the requirements of the Convention if such a solution best protected the underwater cultural heritage given the circumstances. Here, however, the wreck was discovered sometime before April in 1998, and the salvage project did not begin until September 1998. If Seabed was able to wait five months before beginning its salvage operation, it likely could have waited a few months longer until it found a qualified and competent archaeologist for the project. Furthermore, Flecker was originally hired as the project's excavation manager; it was not until Seabed realized that the

⁷⁵ E-mail from Tilman Walterfang to Tess Davis, *supra* note 46.

⁷⁶ 2001 UNESCO Convention, *supra* note 2, art. 2(1).

⁷⁷ *Id.* art. 2(4).

vessel was of Indian or Arabian origin and of great archaeological significance that Seabed contracted with Flecker to write an archaeological report.⁷⁸ Therefore, Seabed conducted the first two months of the project in noncompliance with the Convention.

Under rule 20 of the Annex Rules, “An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.”⁷⁹ Here, the issue is not whether Seabed had established a timetable for each of these activities, but instead that the time Seabed allotted for the salvage of the artifacts was too short. In regard to project length, the *UNESCO Manual* makes it clear that archaeological projects vary in length depending on “their nature, scope, methodology, and budget” and that it is appropriate to take these constraints into consideration when setting project objectives.⁸⁰ In two short field seasons, Seabed raised over 60,000 artifacts. The majority of those artifacts were fragile ceramics, most of which Seabed raised during the first two months of salvage. It is likely that the artifacts that had the greatest risk of being looted were also raised during the first two months. The Belitung wreck was also carrying over ten tons of lead ballast in the form of 4.5 kilogram ingots.⁸¹ In addition to the large number of artifacts on board the Belitung wreck, a large portion of the wreck’s hull survived, including a 15.3-meter-long portion of the ship’s keel (the central timber of a vessel that serves as the vessel’s backbone).

⁷⁸ E-mail from Michael Flecker to author, *supra* note 58.

⁷⁹ Annex Rules, *supra* note 6, r. 20.

⁸⁰ UNESCO MANUAL, *supra* note 9, at 73.

⁸¹ Flecker, *Shipwreck in Indonesian Waters*, *supra* note 43, at 209-10.

In addition to the vessel's frames, stem post, keelson, and ceiling timber, several planks survived on the port and starboard sides.⁸² Seabed mapped and drew the entire hull of the vessel and the lead ingots during the second salvage season, which was also its final season.

As stated in the *UNESCO Manual*, all archaeological projects are different and vary in length; however, when compared to other archaeological projects involving roughly the same amount of archaeological material, two short field seasons are not nearly enough time to professionally excavate and document a vessel the size of the Belitung wreck with so many artifacts on board. For instance, the Kizilburun Column wreck took five three-to-five month seasons to complete, and the wreck had just over 3000 artifacts on board and only a very small portion of the hull survived.⁸³ The length of time it took Seabed to salvage the Belitung wreck is, however, consistent with the time it typically takes for a treasure salvor to salvage a wreck. For example, GELDERMALSEN, a Dutch East India vessel that sank in Indonesian waters in 1752, was discovered in the spring of 1985, and by December 1985, the vessel's cargo was on sale in a Christie's winter catalog.⁸⁴ The wreck was carrying \$15 million worth of Chinese blue-and-white porcelain and gold.⁸⁵

⁸² *Id.* at 200-09. See *id.* at 203 for a drawing of a small portion of the hull remains.

⁸³ See *A Final Destination for the Kizilburun Column Ship?*, INST. NAUTICAL ARCHAEOLOGY, http://www.inadiscover.com/projects/all/southern_europe_mediterranean_aegean/kizilburun_turkey/introduction/ (last visited Nov. 28, 2012). There is, however, a significant difference in depth between the Kizilburun wreck, 150 feet deep, and the Belitung wreck, less than 30 feet deep, that could account for some of the difference in excavation time.

⁸⁴ George L. Miller, *The Second Destruction of the Geldermalsen*, 26 HIST. ARCHAEOLOGY 124, 124 (1992).

⁸⁵ Flecker, *supra* note 38, at 12.

It would take a much more detailed analysis of the salvage of the Belitung wreck and the constraints Seabed faced to determine conclusively whether the length of the salvage operation was adequate. However, two short salvage seasons is an unusually short period to excavate and record the amount of cargo and large portion of hull that was preserved at the Belitung wreck site. In addition, the hurried salvage operation appears to have unnecessarily skirted the careful excavation and study that a wreck as historically significant as the Belitung merited. Although there was no definite statement from Indonesia describing how long it believed the salvage should have taken, Indonesia did grant Seabed a five-year permit to salvage the vessel, thus raising the question of why Seabed did not undertake a more careful excavation of the wreck.

Seabed may also be in violation of the Convention's rules on documentation, reporting, and dissemination. Rule 27 of the Annex Rules requires, "Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media."⁸⁶ Articles concerning the Belitung wreck are unclear as to whether Seabed made a comprehensive record of the site during the first two months of salvage. Seabed did not employ an archaeologist during that time period; therefore, it is unlikely that Seabed ever created such a record. According to Seabed's director, the oceanographer overseeing the project during the first two months did record some information during that time, but the

⁸⁶ Annex Rules, *supra* note 6, r. 27.

details of the information recorded are unknown.⁸⁷ It is also unclear how much information Seabed recorded during the second season under the direction of Flecker because he was not contracted to write an archaeological report until the significance of the wreck was discovered. In addition, rule 30 of the Annex Rules requires that “[i]nterim and final reports . . . be made available according to the timetable set out in the project design, and deposited in relevant public records.”⁸⁸ The purpose of these interim reports is to inform other professionals about the project’s progress; this allows for the exchange of advice and assistance, especially when a particularly difficult situation arises in the course of a project.⁸⁹ Seabed created no such reports during the salvage or conservation of the Belitung wreck. However, Flecker has published on the wreck several times since the salvage. In these articles, Flecker mostly discusses the hull construction of the wreck, where the vessel was likely built, and the possible route the vessel traveled. Although these articles do fulfill the final report requirement (defined in the *UNESCO Manual* as “original observations and evidence together with analysis and interpretation of project results”)⁹⁰ for the hull, they do not fulfill the interim reports requirement that Seabed “register all data, describe the course of activities, give an up-to-date account of all progress that is made and outline the results.”⁹¹ Since the controversy over the Belitung wreck began at the Smithsonian, the Smithsonian has posted additional information on its Web site that is similar in nature to Flecker’s

⁸⁷ E-mail from Tilman Walterfang to Tess Davis, *supra* note 46.

⁸⁸ Annex Rules, *supra* note 6, r. 30.

⁸⁹ UNESCO MANUAL, *supra* note 9, at 130.

⁹⁰ *Id.*

⁹¹ *Id.*

articles.⁹² In addition, it appears as though Seabed had two extensive publications ready to go to press when Singapore purchased the collection and that Seabed sold Singapore the publishing rights to those books in addition to the Belitung cargo.⁹³ Until those reports are published, however, it appears that Seabed is, at the very least, in violation of rule 36 of the Annex Rules, which states, “A final synthesis of a project shall be: (a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and (b) deposited in relevant public records.”⁹⁴

In regard to the 2001 UNESCO Convention’s rules on documentation, reporting, and dissemination, even the most respected academic archaeologists have a difficult time fulfilling these standards. For instance, no site plan exists for the 1554 Wrecks, which sank just off the coast of Padre Island, Texas. Treasure salvors first discovered the wrecks, and they destroyed what was left of two of the four vessels. When state archaeologists took over the project, they documented the site;⁹⁵ unfortunately, that documentation either did not include the drawing of a detailed site plan or the site plan was lost. Similarly, nineteen years after completing the excavation, the archaeologists that excavated the Uluburun shipwreck, one of only two discovered Late Bronze Age shipwrecks, have yet to publish a final

⁹² See, e.g., *The Belitung Excavation*, FREER SACKLER, <http://www.asia.si.edu/exhibitions/SW-CulturalHeritage/excavation.asp> (last visited Nov. 28, 2012).

⁹³ E-mail from Tilman Walterfang to Tess Davis, *supra* note 46.

⁹⁴ Annex Rules, *supra* note 6, r. 36.

⁹⁵ J. BARTO ARNOLD III & ROBERT WEDDLE, *THE NAUTICAL ARCHAEOLOGY OF PADRE ISLAND: THE SPANISH SHIPWRECKS OF 1554* xiii-xiv (1978).

synthesis of the wreck.⁹⁶ If these documentation and publication standards are difficult for academic archaeologists to uphold, how can private companies be expected to uphold them? More important, what is best for the resource in circumstances like these? Should a state party to the Convention ban the resource's entry into the country even if the collection is valuable for research, education, or the public's enjoyment?

A Violation of the Spirit of the 2001 UNESCO Convention?

Because Seabed failed to employ a qualified and competent archaeologist during its entire salvage operation and salvaged the Belitung wreck too quickly, thereby raising doubts about the adequacy of Seabed's recording of the site, Seabed cannot argue that its salvage operation was in full conformity with the 2001 UNESCO Convention. Even if its actions were in conformity with the Convention, one has to wonder whether Indonesia's salvage requirements and the eventual sale of the artifacts to Singapore for \$32 million violate the spirit of the Convention. Rule 2(a) of the Annex Rules does allow for the contracting of archaeological services, and rule 2(b) allows for "the deposition of underwater cultural heritage . . . provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal."⁹⁷ The Convention, Annex Rules, and *UNESCO Manual* do not require that the archaeological services be contracted for at a fair price or that the contracted price reflect the cost of services rendered, as opposed to the market value of the artifacts. Because the Convention allows for the

⁹⁶ See *Introduction: Uluburun, Turkey*, INST. NAUTICAL ARCHAEOLOGY, http://www.ina-discover.com/projects/all/southern_europe_mediterranean_aegean/uluburun_turkey/introduction/ (last visited Nov. 28, 2012).

⁹⁷ Annex Rules, *supra* note 6, r. 2(b).

deaccessioning of artifacts, and deaccessioned artifacts are sold or traded according to their market value, the cost of contracted archaeological services may reflect the market value of a collection, even if such a valuation seems contrary to the spirit of the Convention's ban on commercial exploitation.

Seabed paid an undetermined amount in fees to Indonesia's many government departments to receive its salvage permit. In addition, it paid all of its own salvage costs, including its workers' salaries, it paid several million dollars to conserve the artifacts, and finally, it paid Indonesia \$2.5 million and returned the Intan cargo in exchange for Indonesia's waiver of its right to fifty percent of the gross sales proceeds of the Belitung cargo. Although the \$32 million that Singapore paid for the collection does appear to reflect the market value of the artifacts, Seabed did not make a \$32 million profit from the salvage of the Belitung wreck. Therefore, the contracting aspects of Seabed's permit and the sale of the artifacts to Singapore do not violate any of the legal requirements of the 2001 UNESCO Convention.

The ultimate deposition of the Belitung artifacts appears consistent with the legal requirements of the Convention and should fall under the rule 2(b) exemption from commercial exploitation. Singapore purchased the collection, not to return it to the stream of commerce or sell at auction, which are the uses that rule 2 of the Annex Rules bans, but rather with the intention of building a museum to permanently house the collection. Such a plan fulfills a primary purpose of the Convention. Singapore organized a worldwide traveling exhibit to ensure that people all over the world would view the exhibit. Therefore, it would be difficult to argue that the deposition of the collection prejudiced the collection in

any way. Similarly, the sale of a collection so that it can remain intact and be used for the public's benefit, should not be treated the same as an auction or sale that results in a collection being broken up and no longer available to the public for research, education, and viewing enjoyment. The Convention and professional ethics do express a preference for housing a collection in a location near where it was discovered; in the case of the Belitung wreck, the hull is still *in situ* in Indonesia. However, the cargo on board the vessel and the vessel itself were not Indonesian and were apparently of greater interest to Singapore. Both nations are representative of the international trade that was occurring in Southeast Asia during the ninth century; therefore, the deposition of the cargo in a different southeast Asian country than the one in which the vessel was discovered still conforms with the Convention. In addition, the sale of the entire collection to Singapore prevented the collection from being irretrievably dispersed. The purpose of the Convention is to protect underwater cultural heritage, and Seabed's sale of the Belitung wreck to Singapore satisfied this purpose. Therefore, had Seabed undertaken the salvage in conformity with the Convention, Indonesia's salvage requirements would not have violated the Convention.

Because of Indonesia's contract with Seabed and the sale of the Belitung wreck, two shipwreck cargos may have been saved from irretrievable dispersal. In exchange for waiving its claim to half of the Belitung wreck, the Indonesian government required Seabed to return the Intan cargo. Before this exchange, if Seabed had been trying to sell the Intan cargo piece by piece, the return of the Intan cargo would have prevented Seabed from selling the cargo and resulted in the return of a historic Indonesian vessel to its country of origin. Unlike the Belitung wreck, whose only connection to Indonesia may have been that the

vessel stopped in Indonesia to have its lashings replaced,⁹⁸ the Intan wreck and most of its cargo appear to be of Indonesian origin.⁹⁹ Although Seabed turned over the Intan cargo to Indonesia, the cargo's current location is unknown. No records exist of its sale, or attempted sale, in the art market; therefore, it seems likely that the Intan cargo is still in Indonesia. If the cargo is still safely housed in Indonesia, the contract between Seabed and Indonesia saved two shipwreck cargos, and one cannot overlook this positive result when determining whether the Belitung salvage violated the spirit of the 2001 UNESCO Convention.

⁹⁸ Flecker, *Addendum*, *supra* note 43, at 386.

⁹⁹ Michael Flecker, *Treasure from the Java Sea*, 2 MAR. EXPLORATIONS 4 (2004-2005), <http://www.maritime-explorations.com/Intan.pdf>.

CHAPTER IV
THE ROLE OF SALVAGE AND FINDS *

The law of salvage and the law of finds have a commercial aspect to them that makes their potential application to underwater cultural heritage problematic. Under the 2001 UNESCO Convention, the application of the law of salvage or the law of finds is not per se in violation of the Convention. Article 4 states,

Any activity relating to underwater cultural heritage to which th[e] Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with th[e] Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.¹⁰⁰

Neither the Annex Rules nor the *UNESCO Manual* discuss the application of the law of salvage or law of finds in more detail. Therefore, it is unclear who qualifies as a competent authority. Does the competent authority have to be a representative from UNESCO or from a state party to the Convention, or could the competent authority be a U.S. court sitting in admiralty jurisdiction? It is also unclear who decides whether

* Portions of this section were originally published as Laura Gongaware, *The Day Historic Preservation Principles Saved the TITANIC from a Second Maritime Disaster*, 36 TUL. MAR. L.J. 817 (2012).

¹⁰⁰ 2001 UNESCO Convention, *supra* note 2, art. 4.

recovery efforts have achieved maximum protection. The Convention does not define “maximum protection.” This is not surprising because determining whether maximum protection has been achieved is a fact-specific inquiry, and as such, the standard for maximum protection will change from site to site. The real issue is whether state parties are allowed to make individual determinations about whether maximum protection has been achieved or whether state parties must abide by a single determination. And if so, what happens if the first state to make a determination is not a state party to the Convention?

Law of Salvage and Law of Finds

The law of salvage and the law of finds are two ancient doctrines that have been adopted into general maritime law in the United States. The law of finds is applied when property has been permanently abandoned.¹⁰¹ Under the law of finds, the finder acquires title to the property. The law of salvage is applied when permanent abandonment of the property cannot be established. Under the law of salvage, the salvor does not acquire title to the property because title remains with the owner. The salvor does, however, acquire a salvage lien on the salvaged property. The salvor may also be entitled to a salvage award, but in order to get that award, the salvor must first prove that he has a valid salvage claim.¹⁰²

In *The “Sabine,”* the United States Supreme Court determined: “Three elements are necessary to a valid salvage claim: 1. A marine peril. 2. Service voluntarily rendered when

¹⁰¹ ROBERT FORCE, *ADMIRALTY AND MARITIME LAW* 156 (2004).

¹⁰² *Id.* at 156-57.

not required as an existing duty or from a special contract. 3. Success in whole or in part, or that the service rendered contributed to such success.”¹⁰³ After determining that a valid salvage claim exists, a court must then determine the extent of the salvage award by applying the six factors established by the Court in *The Blackwall*:

- (1.) The labor 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.
- (6.) The degree of danger from which the property was rescued.¹⁰⁴

As advancements in scuba technology have made diving more accessible to the general public, interest in locating lost treasure ships—older shipwrecks that sank carrying a cargo of gold, silver, or other valuable items—has increased dramatically. In addition to being monetarily valuable, these treasure ships are almost always of great historic significance. Unfortunately, most salvors have been concerned with removing the monetarily valuable cargo as quickly as possible and have frequently destroyed much of the historic value of the

¹⁰³ 101 U.S. 384, 384 (1879).

¹⁰⁴ 77 U.S. (10 Wall.) 1, 13-14, 2002 AMC 1808, 1815 (1869).

ship in the process. Typically, each time one of these ships is discovered, a lengthy court battle ensues as archaeologists fight to protect the ship from destruction.

In 1992, the Fourth Circuit, in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, added a seventh *Blackwall* factor to be considered when dealing with the salvage of a historic vessel.¹⁰⁵ In that case, the members of the Columbus-America Discovery Group (Columbus-America) discovered the SS CENTRAL AMERICA, a U.S. mail ship that sank off the coast of South Carolina in 1857. The ship was carrying a large cargo of gold, recently discovered in the California Gold Rush, and its sinking brought about a national economic panic.¹⁰⁶ The Fourth Circuit felt that a seventh factor taking into account the historic significance of the wreck should be considered when granting a salvage award.¹⁰⁷ As such, “the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salvaged” was added to the six *Blackwall* factors. The Fourth Circuit then remanded the case to determine the appropriate salvage award taking this new factor into consideration.¹⁰⁸ On remand, the lower court awarded Columbus-America a salvage award of 90% of the cargo recovered from SS CENTRAL AMERICA.¹⁰⁹

¹⁰⁵ 974 F.2d 450, 468, 1992 AMC 2705, 2728 (4th Cir. 1992).

¹⁰⁶ *Id.* at 454-55, 1992 AMC at 2706-08.

¹⁰⁷ *Id.* at 468, 1992 AMC at 2728.

¹⁰⁸ *Id.* at 468-69, 1992 AMC at 2728-29.

¹⁰⁹ *Columbus-Am. Discovery Grp. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, No. 87-363-N, 1993 WL 580900, at *32 (E.D. Va. 1993).

Three years later, the Fourth Circuit affirmed the lower court’s salvage award of 90% of the recovered cargo.¹¹⁰ The court determined that Columbus-America expended a significant amount of labor at great risk to themselves and their property in recovering the wreck’s cargo from marine peril. In regard to the seventh, archaeology-related factor, the Fourth Circuit recognized the lower court’s determination “that Columbus-America had taken extraordinary care in preserving the CENTRAL AMERICA.”¹¹¹ Columbus-America also published a book about their discovery, participated in the filming of a documentary about their work, and provided educational materials to schools about the ship and its history.¹¹² The Fourth Circuit held that, though it was generous, the 90% salvage award was not excessive.¹¹³ Although the Fourth Circuit felt the salvors’ efforts to protect the wreck’s historic significance during salvage should affect the amount of a salvage award, the court was unconcerned with whether the salvors continued to preserve the wreck’s historic value after its salvage. CENTRAL AMERICA’s coins were allowed to be sold in whatever manner maximized profit, and the remainder of the wreck’s cargo—including passengers’ personal luggage and ship’s supplies, such as plates and candlesticks—was disposed at the complete discretion of Columbus-America. As a result, much of the ship’s historic value was lost forever.¹¹⁴

¹¹⁰ Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 573, 1995 AMC 1985, 2009 (4th Cir. 1995).

¹¹¹ *Id.* at 571-73, 1995 AMC at 2005-08.

¹¹² *Id.* at 573, 1995 AMC at 2008.

¹¹³ *Id.*, 1995 AMC at 2009.

¹¹⁴ See Mark Tatge & Miriam Gottfried, *Ship of Fools*, FORBES.COM (June 19, 2006), <http://www.forbes.com/forbes/2006/0619/158.html>.

RMS TITANIC

The salvage of RMS TITANIC provides a good case study to analyze article 4 in more detail. The story of TITANIC has fascinated the public ever since the fateful night of April 15, 1912, when she hit an iceberg and sank, causing the death of over 1500 passengers and crewmen. Since then, TITANIC has been the subject of numerous movies, television documentaries, print stories, academic conferences, and museum exhibits. Although the wreck's general location, approximately 400 nautical miles (740 km) southeast of Newfoundland, Canada, was well known, it was not until 1985 that a joint American-French team lead by Robert Ballard discovered the wreck's actual location.¹¹⁵ In 1986, Ballard and the Woods Hole Oceanographic Institution (WHOI) returned to the site to photograph and film the wreck.¹¹⁶ Shortly after its discovery, Ballard began petitioning Congress to enact legislation to protect TITANIC as a maritime memorial. His efforts were successful, and on October 21, 1986, Congress passed the R.M.S. Titanic Maritime Memorial Act (Titanic Memorial Act), which designated TITANIC as an international maritime memorial to those who lost their lives during the tragedy.¹¹⁷ In addition, the Act provided that, as an international maritime memorial, TITANIC merited international protection and until an agreement was entered

¹¹⁵ *Titanic 100 Years Later: Previous Missions to Titanic*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: OFF. NAT'L MARINE SANCTUARIES, http://sanctuaries.noaa.gov/maritime/titanic/past_expeditions.html (last visited Mar. 3, 2013).

¹¹⁶ *Id.*

¹¹⁷ R.M.S. Titanic Maritime Memorial Act of 1986, Pub. L. No. 99-513, § 2(a)(1), 10 Stat. 2082, 2082 (codified at 16 U.S.C. § 450rr(a)(1) (2006)).

into by all interested nations, “no person should physically alter, disturb, or salvage the R.M.S. Titanic in any research or exploratory activities which are conducted.”¹¹⁸

Salvage of TITANIC

Shortly after TITANIC’s discovery, the Institut Français de Recherché pour l’Exploitation de la Mer (IFREMER) joined forces with Titanic Ventures Limited Partnership (Titanic Ventures), a Connecticut-based company, to conduct the first salvage operation at the TITANIC wreck site.¹¹⁹ Under their agreement, IFREMER was responsible for providing the technical support for the salvage, and Titanic Ventures provided the funding.¹²⁰ The first salvage was conducted in 1987. During the 1987 season, IFREMER and Titanic Ventures made 32 dives to the site and recovered approximately 1800 artifacts. IFREMER then took those artifacts to France for conservation and restoration at Electricité de France, a government-owned conservation laboratory, and LP3, a privately owned conservation laboratory.¹²¹ At some point before the next salvage operation, RMS Titanic, Inc. (RMST) acquired Titanic Venture’s interests in the salvage operation and the 1800 artifacts raised during the 1987 season.¹²² Although RMST had acquired Titanic Ventures interests, Titanic Ventures maintained a degree of control over RMST as RMST’s largest shareholder.¹²³ Other major

¹¹⁸ *Id.* § 2(b)(4), 10 Stat. at 2082 (codified at 16 U.S.C. § 450rr(b)(4)).

¹¹⁹ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 323 F. Supp. 2d 724, 727, 2004 AMC 1817, 1819 (E.D. Va. 2004).

¹²⁰ *Titanic 100 Years Later: Previous Missions to Titanic*, *supra* note 120.

¹²¹ *R.M.S. Titanic, Inc.*, 323 F. Supp. 2d at 727, 2004 AMC at 1819.

¹²² *Id.*

¹²³ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 924 F. Supp. 714, 716, 1996 AMC 2481, 2483 (E.D. Va. 1996).

shareholders included Arnold Gellar, future president of RMST, and William Gasparrini.¹²⁴

In June 1993, RMST conducted its first salvage operation in conjunction with IFREMER. Over the course of 15 dives, RMST and IFREMER recovered 500 artifacts. Instead of bringing these artifacts back to France, they were taken to Norfolk, Virginia. This allowed RMST to file its August 26, 1993 complaint, in which RMST requested that it be awarded exclusive salvage rights over TITANIC, in the United States District Court for the Eastern District of Virginia.¹²⁵ In order to file an in rem action (i.e., an action against the vessel itself, which is allowed under the legal fiction of personification of the vessel), the vessel must be arrested. This is accomplished either by seizing the entire vessel or by bringing part of the vessel into the jurisdiction of the court.¹²⁶ By bringing the artifacts from the 1993 season to Norfolk, which is located within the jurisdiction of the district court for the Eastern District of Virginia, RMST was able to commence legal action against TITANIC. By establishing exclusive salvage rights to TITANIC, RMST would be able to exclude other potential salvors from salvaging artifacts from the site. And in fact, on August 7, 1992, a competing salvor, Marex Titanic, Inc. (Marex), had filed a complaint in the Eastern District of Virginia seeking “possessory and ownership claims, salvage claims, and claims for injunctive relief.”¹²⁷

¹²⁴ *Id.*

¹²⁵ *R.M.S. Titanic, Inc.*, 323 F. Supp. 2d at 727, 2004 AMC at 1819.

¹²⁶ FORCE, *supra* note 101, at 28-30.

¹²⁷ *Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 805 F. Supp. 375, 376, 1993 AMC 1258, 1259 (E.D. Va. 1992), *rev'd*, 2 F.3d 544, 1993 AMC 2799 (4th Cir. 1993).

Marex's claim ultimately failed because Marex had never actually conducted any salvage at the wreck site and Titanic Ventures was able to establish, through two days of testimony, its active interest in the salvage of the wreck and conservation of the recovered artifacts.¹²⁸ The hearing on Marex's complaint was held on September 29 and 30, 1992, and on October 1, 1992. Before the court made its ruling, Marex filed a notice of voluntary dismissal. A notice of voluntary dismissal allows the plaintiff to dismiss its claim without prejudice (that is, the plaintiff is allowed to file the same claim at a later date) as long as the plaintiff files the dismissal before the defendant has filed an answer to the complaint or before the court has issued a motion for summary judgment.¹²⁹ The United States Court of Appeals for the Fourth Circuit reversed the district court's ruling, granting Marex's motion for a voluntary dismissal.¹³⁰

Later in 1993, Titanic Ventures, through its then President, George Tulloch, began negotiations with France's Office of Maritime Affairs for title to the 1987 artifact collection. In a letter to M. Tricot, head of the Headquarter of Maritime Affairs in Lorient, Tulloch stated, "Titanic Ventures intends to make a respectfull [sic] use of the artifacts recovered from the Titanic in 1987 in memory of their initials owners."¹³¹ As such, "[T]he artifacts will only be used on a cultural purpose and will not, therefore, be part of any operations which would lead to their dispersion, but to the exception of

¹²⁸ *Marex Titanic, Inc.*, 2 F.3d at 545, 1993 AMC at 2800, *rev'g*, 805 F. Supp. 375, 1993 AMC 1258.

¹²⁹ *Marex Titanic, Inc.*, 805 F. Supp. at 376-78, 1993 AMC at 1259-61.

¹³⁰ *Marex Titanic, Inc.*, 2 F.3d at 544, 1993 AMC at 2799.

¹³¹ Letter from George Tulloch, Gen. Partner, Titanic Ventures Ltd. P'ship, to M. Tricot, Head, Headquarter of Mar. Affairs in Lorient (Sept. 22, 1993), *available at* http://www.gc.noaa.gov/documents/092293-french_award.pdf (English version).

exhibition purposes, and none of the artifacts will be sold.” Tricot agreed, on October 12, 1993, to deliver the 1987 artifact collection to Titanic Ventures, stating,

Concerning this delivery of ownership, I have duly noted your intentioned . . . by which you agreed to make use of such objects in conformity with the respect due to the memory of their initial owners and to not carry out any commercial transaction concerning such objects nor any sale of any one of them nor any transaction entailing their dispersion, if not for the purposes of an exhibition.¹³²

On October 20, 1993, the transfer was finalized when M. Chapalain, the Administrator of the Office of Maritime Affairs, issued the Proces-Verbal (that is, the Minutes of Delivery to the Salvagor of the Artifacts Recovered from the Titanic Wreck in 1987) to Titanic Ventures.¹³³ The Proces-Verbal incorporated by reference the terms of the October 12 letter from M. Tricot to Tulloch,¹³⁴ thus binding Titanic Ventures to its agreement “to not carry out any commercial transactions concerning [the 1987 collection].”¹³⁵

¹³² Letter from M. Tricot, Head, Headquarter of Mar. Affairs in Lorient, to George Tulloch, Gen. Partner, Titanic Ventures Ltd. P’ship (Oct. 12, 1993), *available at* http://www.gc.noaa.gov/documents/092293-french_award.pdf (English version).

¹³³ Memorandum from M. Chapalain, Mar. Affairs Adm’r, to Titanic Ventures Ltd. P’ship on Minutes of Delivery to the Salvagor of the Artifacts Recovered from the Titanic Wreck in 1987 (Oct. 20, 1993), *available at* http://www.gc.noaa.gov/documents/092293-french_award.pdf.

¹³⁴ *Id.*

¹³⁵ Letter from M. Tricot to George Tulloch, *supra* note 132.

On June 7, 1994, the Fourth Circuit named RMST exclusive salvor-in-possession of TITANIC, thus excluding all other salvors from salvaging TITANIC.¹³⁶ In order to be awarded exclusive salvor-in-possession status, RMST had to give public notice of its motion to be declared salvor-in-possession to all other interested parties. Liverpool and London Steamship Protection and Indemnity Association filed a claim challenging RMST's motion. RMST and Liverpool and London subsequently entered into a settlement agreement, and Liverpool and London withdrew its claim.¹³⁷ The order stated,

The Court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor-in-possession of the wreck . . . and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights¹³⁸

Although the order appeared to grant RMST title to the artifacts already salvaged from the wreck through the language “exclusive owner of any items salvaged from the wreck,” the court later clarified this statement in 2002.¹³⁹ Because the court had applied the law of

¹³⁶ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 286 F.3d 194, 196-97, 2002 AMC 1136, 1137 (4th Cir. 2002).

¹³⁷ *R.M.S. Titanic, Inc., v. The Wrecked & Abandoned Vessel*, 924 F. Supp. 714, 716, 1996 AMC 2481, 2482 (E.D. Va. 1996).

¹³⁸ *R.M.S. Titanic, Inc.*, 286 F.3d at 197, 2002 AMC at 1137-38.

¹³⁹ *Id.* at 206-207, 2002 AMC at 1151.

salvage, and not the law of finds, RMST could only obtain possession of the artifacts, not actual title to the artifacts.¹⁴⁰ During the hearing held before the 1994 order, RMST again stated its intentions to exhibit the TITANIC artifacts, and not sell them: “[T]he process [of] going forward with the exhibition of the artifacts and not sell[ing them] continues and . . . that is the position of [RMST] in this case, that the 1987 artifacts and the 1993 artifacts will not be sold, but rather will be exhibited.”¹⁴¹ To further its intentions as a responsible salvor, RMST helped to establish an International Advisory Committee, composed of representatives from European and American maritime museums, TITANIC historical societies, and RMST, in 1994. The goal of the Committee was to discuss the future of the wreck site and the TITANIC artifact collection, particularly the establishment of an international maritime museum to house the collection.¹⁴²

Later in the summer of 1994, RMST returned to the wreck site with IFREMER and recovered another 1000 artifacts. After completing the salvage, RMST filed a report on the 1994 salvage operation with the court. RMST was unable to return to the site in 1995 because of poor weather conditions during the three summer months available for salvage.¹⁴³ RMST did, however, lend 150 of the TITANIC artifacts to Greenwich, England’s National Maritime Museum of Great Britain for a six-month exhibit that, because of its success, was extended through October 1995.¹⁴⁴

¹⁴⁰ *Id.* at 207, 2002 AMC at 1151.

¹⁴¹ *Id.* at 197, 2002 AMC at 1138 (second, third, and fourth alteration in original).

¹⁴² *R.M.S. Titanic, Inc.*, 924 F. Supp. at 718, 1996 AMC at 2486.

¹⁴³ *Id.* at 722, 1996 AMC at 2493.

¹⁴⁴ *Id.* at 718, 1996 AMC at 2485-86.

In 1995, pursuant to Congress's recommendation in the Titanic Memorial Act, the United States, United Kingdom, France, and Canada began negotiating the terms of the Agreement Concerning the Shipwrecked Vessel RMS Titanic (International Agreement).¹⁴⁵ Under the International Agreement, all artifacts to be recovered from TITANIC were to be kept together as an intact collection, and each party was responsible for the proper conservation and curation of all artifacts within its jurisdiction.¹⁴⁶ The International Agreement also allowed parties to grant permits for recovery and excavation, as long as those activities were "justified by educational, scientific, or cultural interests."¹⁴⁷ The International Agreement required the ratification of two parties to enter into effect.¹⁴⁸ The United Kingdom was the first to sign the International Agreement in 2003. The United States was the second to sign in 2004; however, the United States signed with the stipulation that Congress must enact implementing legislation for ratification to be complete.¹⁴⁹

¹⁴⁵ Agreement Concerning the Shipwrecked Vessel RMS Titanic, *opened for signature* Nov. 6, 2003, available at <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>.

¹⁴⁶ *Id.* art. 3.

¹⁴⁷ *Id.* art. 4(2).

¹⁴⁸ *Id.* art. 11.

¹⁴⁹ See *R.M.S. Titanic International Agreement*, NOAA OFF. GEN. COUNSEL, http://www.gc.noaa.gov/gcil_titanic-intl.html (last updated Jan. 26, 2012). As of this writing, the United States has yet to enact legislation to implement the International Agreement. Several bills have been presented to Congress, including a bill currently before Congress that was introduced by Senator John Kerry. See S. 1426, 112th Cong. §§ 601-605 (2011). The Department of State also recently circulated draft legislation, which has yet to be introduced by a member of Congress. See *Implementing the Agreement To Protect RMS Titanic Wreck Site (August 2011), Significant Issues and Developments*, NOAA OFF. GEN. COUNSEL, http://www.gc.noaa.gov/gcil_older_sig_events-2011.html (last visited Jan. 31, 2012). Both the proposed bill and draft legislation seek to amend the Titanic Memorial Act by integrating the elements of the International Agreement. The bill and draft legislation are particularly interesting because although RMST is not directly mentioned, both seek to regulate the activities of any salvor holding a salvage permit. Because RMST is the salvor-

RMST's status as salvor-in-possession was challenged in 1996, when a competing salvor, John Joslyn, interested in conducting a photographic expedition at the TITANIC site, filed a motion asking the court to revoke RMST's status as exclusive salvor-in-possession of TITANIC, arguing that RMST had "failed to diligently salvage the TITANIC, ha[d] evidenced no intention to salvage it in the future, and, at th[at] time, is financially incapable of utilizing its rights."¹⁵⁰ After analyzing RMST's finances and its activities during the 1994 and 1995 salvage seasons, the court found that RMST's efforts were undertaken with due diligence, were ongoing, and were clothed with some prospect of success. As a result, the court reaffirmed RMST's status as exclusive salvor-in-possession.¹⁵¹

Shortly after Joslyn's motion was denied, the district court considered RMST's motion for a preliminary injunction "barring Joslyn . . . and any other person having notice of this Order, actual or otherwise from conducting search, survey, salvage operations, or obtaining any image or photography of the TITANIC wreck or wreck site."¹⁵² Although salvage rights do not traditionally include the right to exclude others from nonintrusive activities at a wreck site, such as taking photographs, the court stated:

[T]his is not the ordinary salvage case. The TITANIC has special historical significance and the Court recognizes the

in-possession of TITANIC, RMST is the only salvor allowed to salvage the wreck site. Therefore, the bill and draft legislation are necessarily intended to regulate the actions of RMST—or anyone who takes over RMST's salvor-in-possession status.

¹⁵⁰ R.M.S. Titanic, Inc., v. The Wrecked & Abandoned Vessel, 924 F. Supp. 714, 716, 1996 AMC 2481, 2483 (E.D. Va. 1996).

¹⁵¹ *Id.* at 721-724, 1996 AMC at 2493-97.

¹⁵² R.M.S. Titanic, Inc. v. The Wreck & Abandoned Vessel, No. 2:93CV902, 1996 WL 650135, at *1 (E.D. Va. Aug. 13, 1996).

efforts of R.M.S. Titanic in both preservation of the artifacts and its willingness not to sell the artifacts, thereby keeping them together in the public interest. In this “historical salvage” case, the Court finds that it is desirable to keep these artifacts together for the public display and, therefore, traditional salvage rights must be expanded for those who properly take on the responsibility of historic preservation. . . . Therefore, if R.M.S. Titanic is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. The court finds that in a case such as this, allowing another “salvor” to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.¹⁵³

As such, the court granted RMST’s injunction, thus giving RMST the exclusive right to photograph and film the TITANIC wreck site.¹⁵⁴

Meanwhile, RMST and IFREMER returned to the wreck site during the summer of 1996 to continue artifact recovery and to raise a small portion of the ship’s hull that had been detached from the vessel during its sinking.¹⁵⁵ It was also during 1996 that the court learned

¹⁵³ *Id.* *2 (citing *MDM Salvage, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 631 F. Supp. 308, 1987 AMC 537 (S.D. Fla. 1986)).

¹⁵⁴ *Id.*

¹⁵⁵ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 323 F. Supp. 2d 724, 729, 2004 AMC 1817, 1822 (E.D. Va. 2004).

that RMST had started to sell the coal it had recovered from TITANIC.¹⁵⁶ RMST argued that the sale of the coal did not violate its promise to the court not to sell any of the TITANIC artifacts because coal is not a man-made product and therefore could not be considered an artifact. Besides mentioning the sale of coal during its discussion of RMST's recent salvage activities, the district court did not explicitly state whether it agreed that the coal should not be treated as an artifact. However, the court discussed the sale of the coal in the same order in which it upheld RMST's status as salvor-in-possession, thus suggesting that the court did not believe the sale of the coal was a violation of RMST's promise not to sell the TITANIC artifacts.

In May 1998, RMST filed a similar motion for a preliminary injunction to keep Deep Ocean Expeditions (DOE) from taking tourists to visit and photograph the TITANIC wreck site.¹⁵⁷ At the same time, Christopher Haver, who had signed up for one of DOE's expeditions to TITANIC, filed a separation action against RMST. RMST then moved to amend its preliminary injunction against DOE to include Haver. The district court consolidated the preliminary injunction actions with Haver's action, and using the same reasoning that it had relied on in granting the injunction against Joslyn, the court granted the injunctions against DOE and Haver.¹⁵⁸ On appeal, the Fourth Circuit found, "[T]he district

¹⁵⁶ *R.M.S. Titanic, Inc.*, 924 F. Supp. at 718, 1996 AMC at 2486.

¹⁵⁷ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 9 F. Supp. 2d 624, 629-30, 1998 AMC 2421, 2428 (E.D. Va. 1998), *rev'd sub nom.* *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 1999 AMC 1359 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999).

¹⁵⁸ *Id.* at 630, 640, 1998 AMC at 2428, 2437.

court erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site,”¹⁵⁹ because the law of salvage

does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value” and to give a salvor “the exclusive right to photograph a shipwreck, would . . . also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvor.”¹⁶⁰

RMST returned to the wreck site in 1998 with IFREMER and continued artifact recovery. In November 1999, only a few months after the Fourth Circuit determined that RMST’s salvage rights did not include exclusive right to photograph and visit the wreck site, RMST underwent a change in management. Arnold Gellar, one of RMST’s major shareholders, had replaced George Tulloch as president of RMST. The new management brought with it a new business plan, “designed to maximize shareholder value while still protecting the archaeological and historical value of the wreck” through “the possible deposition of artifacts to increase revenues.”¹⁶¹ Although Gellar had testified that “RMST had no plans to sell any portion of the collection” at a hearing in March 2000, the district court was concerned, and on July 28, 2000, the district court issued an order prohibiting

¹⁵⁹ R.M.S. Titanic, Inc., 171 F.3d at 970, 1999 AMC at 1359.

¹⁶⁰ *Id.*, 1999 AMC at 1358.

¹⁶¹ R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 286 F.3d 194, 197-98, 2002 AMC 1136, 1139 (4th Cir. 2002) (internal quotation marks omitted).

RMST from selling any of the TITANIC artifacts.¹⁶² The court ordered RMST “not [to] sell or otherwise dispose of any artifacts or any object recovered from the wreck site and further that is must continue to treat and preserve any such artifacts and objects recovered from the wreck site.”¹⁶³ And perhaps more importantly, the court noted, “[T]his court has continued R.M.S. Titanic, Inc. as salvor-in-possession of the wreck of the *Titanic* from year to year on the understanding that R.M.S. Titanic, Inc. would treat and preserve all artifacts recovered and would exhibit them to the public and would not sell or dispose of any of said artifacts.”¹⁶⁴

In the summer of 2000, RMST returned to the TITANIC wreck site this time in conjunction with P.P. Shirshov Institute of Oceanology, based out of Moscow, Russia. Shirshov Institute provided two deep manned submersibles. During the course of 28 dives, RMST raised over 900 artifacts.¹⁶⁵

RMST did not appeal the July 2000 court order, but instead, asked for clarification in April 2001. RMST wished to continue its sale of the TITANIC coal and wanted to make sure that the July 2000 court order did not prohibit them from doing so. During the hearing on the sale of the coal, RMST introduced its plan to form a foundation that would eventually purchase the entire TITANIC artifact collection. Although the district court did not rule on the foundation, both the court and RMST restated their understanding that RMST was not going to sell any of the TITANIC artifacts. In a hearing on September 24, 2001, RMST

¹⁶² *Id.* at 198, 2002 AMC at 1139 (internal quotation marks omitted).

¹⁶³ *Id.* (internal quotation marks omitted).

¹⁶⁴ *Id.* (internal quotation marks omitted).

¹⁶⁵ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 790, 2010 AMC 1817, 1822 (E.D. Va. 2010).

presented more information about its formation of the Titanic Foundation. The court was skeptical of the Foundation because the same people would be controlling both RMST and the Foundation, thus leading to a potential conflict of interest in their duties to each organization. The underlying issue at the hearing was whether RMST could sell the TITANIC artifact collection as a whole and whether such a sale could only occur with the approval of the court. The court did not decide the issue because they were still speaking in abstractions (that is, no one had made an offer to buy the collection).¹⁶⁶ Two days later, the district court entered another order: “The Court FINDS after the September 24, 2001 hearing that is previous Orders entered in this case, designed to prevent sales of individual artifacts recovered from the Wreck of R.M.S. Titanic, were proper and were necessary when entered.”¹⁶⁷ RMST appealed the September 2001 court order and the court’s subsequent clarification order of October 19, 2001.¹⁶⁸

Meanwhile, in 2001, in the absence of legislation, the National Ocean and Atmospheric Administration (NOAA) developed the NOAA Guidelines for Research, Exploration and Salvage of RMS TITANIC (NOAA Guidelines) to regulate activities directed at the TITANIC wreck site.¹⁶⁹ Like the International Agreement, these guidelines were developed in consultation with the United Kingdom, France, and Canada.¹⁷⁰ Using the 1970 International Council of Monuments and Sites Charter and the 2001 UNESCO Convention

¹⁶⁶ *R.M.S. Titanic, Inc.*, 286 F.3d at 198-99, 2002 AMC at 1140-41.

¹⁶⁷ *Id.* at 199, 2002 AMC at 1141.

¹⁶⁸ *Id.* at 199-200, 2002 AMC at 1141.

¹⁶⁹ NOAA Guidelines for Research, Exploration and Salvage of RMS Titanic, 66 Fed. Reg. 18,905, 18,906, 18,912 (Apr. 12, 2001).

¹⁷⁰ *Id.* at 18,905.

for the Protection of the Underwater Cultural Heritage as models, the NOAA Guidelines establish a set of standards for any work conducted at the TITANIC wreck site, including a preference for *in situ* preservation and nonintrusive research methods.¹⁷¹ Additionally, any work conducted at the site must meet international archaeological standards, and any artifacts removed from the site must be conserved and curated in conformity with international standards.¹⁷²

In February 2002, the Fourth Circuit heard oral argument on RMST's appeal of the September 2001 and October 2001 district court orders. RMST argued that the orders were improper because in 1994, the Fourth Circuit had named RMST the "true, sole and exclusive owner of any items salvaged from [TITANIC]."¹⁷³ The Fourth Circuit ultimately held that the court orders were proper because RMST had been declared salvor-in-possession of TITANIC, not finder. As a salvor, RMST did not possess absolute title to the artifacts, but instead possessed a salvage lien in the event the court determined that RMST was entitled to a salvage award. Only when RMST was granted a salvage award and that award was an *in specie* award could RMST possess the absolute title to the artifacts. The court had, however, granted RMST exclusive possession of the TITANIC artifacts in order to profit from the exhibition of those artifacts while RMST conducted its salvage operation. That grant of exclusive possession came with the caveat that RMST could not sell the artifacts—a caveat

¹⁷¹ *Id.* at 18,906, 18,912.

¹⁷² *Id.* at 18,912.

¹⁷³ *R.M.S. Titanic, Inc.*, 286 F.3d at 196, 201, 2002 AMC at 1137, 1144.

that RMST had agreed to throughout its course of dealings with the court.¹⁷⁴ RMST appealed the decision, but the Supreme Court denied certiorari.¹⁷⁵

Although RMST did not have title to the TITANIC artifact collection, RMST did have a salvage lien that RMST could enforce at anytime, even before salvage operations at the site were complete. If RMST chose to enforce the lien before completing salvage, the court would consider RMST's salvage up to the point of enforcement. The court would decide first whether RMST was entitled to a salvage award and second, the amount of that award. On February 12, 2004, RMST filed a motion requesting title to the TITANIC artifact collection under the law finds or, alternatively, a salvage award of \$225 million. In its motion, RMST also asked that the court recognize the 1993 Proces-Verbal, thus declaring RMST owner of the 1987 artifact collection.¹⁷⁶ In 2003, RMST had filed a motion for a trial to determine whether the law of salvage or finds should apply, whether TITANIC was abandoned, and/or whether a salvage award due. Because there were no adverse parties, the court could not set a trial, but instead told RMST that it could file a motion for a change in its status or for a salvage award. Thus RMST filed the present motion.¹⁷⁷ After a preliminary hearing on May 17, 2004, the district court held that it would not recognize the

¹⁷⁴ *Id.* at 207, 209, 2002 AMC at 1151-52, 1154.

¹⁷⁵ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 537 U.S. 885 (2002).

¹⁷⁶ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 435 F.3d 521, 524, 2006 AMC 305, 306 (4th Cir. 2006).

¹⁷⁷ *Id.* at 525, 2006 AMC at 308.

Proces-Verbal and that RMST could not argue title through the law of finds because it had raised the artifacts under its status as salvor-in-possession of TITANIC.¹⁷⁸

During the summer of 2004, RMST returned to the TITANIC wreck site to continue salvage.¹⁷⁹ Seventy-five artifacts were raised, and RMST discovered an addition debris field. Meanwhile, RMST appealed the district court's decision. Although the Fourth Circuit agreed with the district court that RMST's status as salvor-in-possession made it impossible for the court to award RMST title to the artifacts through the law of finds, the court held that it did not have jurisdiction over the 1987 artifact collection and therefore could not rule on title to those artifacts.¹⁸⁰ The case was then remanded back to the district court with instructions to apply the law of salvage to determine whether RMST was entitled to a salvage award and if so, the quantity of that award.¹⁸¹

It was at this point that the district court began to express its displeasure with RMST as a result of RMST's "attempt[] to readdress settled matters involving final orders and the law of this case, matters which are actually contrary to these orders and law."¹⁸² For example, after the Fourth Circuit upheld the district court's ruling that RMST could not change its status from salvor-in-possession to finder, RMST signed an agreement with Liverpool and London in which RMST "acquired all rights, title, and

¹⁷⁸ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 323 F. Supp. 2d 724, 2004 AMC 1817 (E.D. Va. 2004), *rev'd*, 435 F.3d 521, 2006 AMC 305.

¹⁷⁹ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 791, 2010 AMC 1817, 1824 (E.D. Va. 2010).

¹⁸⁰ *R.M.S. Titanic, Inc.*, 435 F.3d 521, 2006 AMC 305.

¹⁸¹ *Id.*

¹⁸² *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 531 F. Supp. 2d 691, 692 (E.D. Va. 2007).

interests to [Liverpool and London's] subrogation rights for certain objects removed from the wreck of the *R.M.S. Titanic*.”¹⁸³ However, Liverpool and London had already given up its rights in 1993 when it signed an agreement with RMST and withdrew its claim.¹⁸⁴ “RMST could not have acquired any rights from Liverpool and London, because Liverpool and London did not have any rights to give.” The court described RMST’s 2007 agreement with Liverpool and London as “yet another attempt to circumvent this court’s (and the Fourth Circuit’s repeated declarations that RMST is the salvor, and not the owner.”¹⁸⁵ The court then ordered RMST to file its motion for a salvage award and supporting documentation within 60 days of the October 15, 2007 court order, or RMST would give up its right to a salvage award for anything salvaged before December 31, 2006.¹⁸⁶

RMST took heed of the district court’s warning and filed its motion for a salvage award along with its supporting documentation on November 30, 2007.¹⁸⁷ In its motion, RMST estimated the fair market value of the TITANIC artifact collection, excluding the 1987 artifacts, at \$110,859,200. RMST was seeking a salvage award of 90% to 100% of the collection’s fair market value. On March 25, 2008, the district court, with the consent of RMST, granted the United States’ request to participate in the salvage proceedings as amicus. It was at this time that the United States and RMST began

¹⁸³ *Id.* (internal quotation marks omitted).

¹⁸⁴ *Id.* at 692-93.

¹⁸⁵ *Id.* at 693 (emphasis omitted).

¹⁸⁶ *Id.*

¹⁸⁷ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 792, 2010 AMC 1817, 1825 (E.D. Va. 2010).

drafting a list of restrictions on how the TITANIC artifact collection could be handled, later named the Covenants and Conditions. The idea was that the court would grant RMST an in specie award, but only if RMST agreed to abide by the Covenants and Conditions. RMST and the United States spent the next several months negotiating the terms of the Covenants and Conditions, and at the November 18, 2008 hearing, the court oversaw the final revisions.¹⁸⁸

RMST'S Salvage Award

On August 12, 2010, the Eastern District of Virginia granted RMST a salvage award of 100% of the fair market value of the TITANIC artifacts raised between 1993 and 2004, to be paid by conveying title of those artifacts to RMST, as decided in its subsequent August 15, 2011 court order.¹⁸⁹ However, the conveyance of title required RMST to abide by the covenants and conditions previously drafted and agreed upon by the U.S. government and RMST.¹⁹⁰

The court began its analysis by determining whether RMST was entitled to a salvage award.¹⁹¹ Using the three elements established in *The "Sabine,"* the court determined that RMST was entitled to a salvage award because (1) TITANIC was in threat of being lost forever as a result of its location 12,500 feet underwater, (2) RMST

¹⁸⁸ *Id.* at 792-93, 2010 AMC at 1825-27.

¹⁸⁹ *R.M.S. Titanic, Inc.*, 742 F. Supp. 2d at 808, 784, 792, 2010 AMC at 1851.

¹⁹⁰ *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 804 F. Supp. 2d 508, 508, 2011 AMC 1817, 1818 (E.D. Va. 2011).

¹⁹¹ *R.M.S. Titanic*, 742 F. Supp. 2d at 793, 2010 AMC at 1828.

had no contractual obligation to salvage the wreck, and (3) RMST had successfully raised several thousand artifacts from the wreck site.¹⁹²

After determining that RMST was entitled to a salvage award, the court needed to determine the amount of the salvage award. Because there is no specific formula for determining a salvage award, the court needed to consider “the particular circumstances of the case at hand” by applying the six *Blackwall* factors and the additional *Columbus-America* factor.¹⁹³ The court accepted RMST’s determination that the artifact collection was worth over \$110 million; concluded that RMST expended a significant amount of time, labor, and skill to salvage the artifacts; and determined that RMST had worked to protect the historic and cultural value of the salvaged artifacts.¹⁹⁴ Although RMST did not risk their own property (they were not liable for damage to the equipment used in the salvage operations), they risked their own lives to salvage the artifacts from impending peril.¹⁹⁵

Because “a salvor must come to the court with clean hands, acting ‘in entire good faith and with honesty of purpose,’” the court also needed to consider potential deductions such as salvor misconduct, contributions of cosalvors, and revenues from past possession of the artifacts.¹⁹⁶ The court determined that although RMST’s actions had been less than desirable (because RMST had attempted several times to circumvent

¹⁹² *Id.* at 794, 2010 AMC at 1828-29.

¹⁹³ *See id.* at 794-803, 2010 AMC at 1829-43.

¹⁹⁴ *Id.* at 795, 797-98, 803, 2010 AMC at 1831, 1834-35, 1843.

¹⁹⁵ *Id.* at 800-01, 2010 AMC at 1840.

¹⁹⁶ *Id.* at 803-07, 2010 AMC at 1844-50 (quoting *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 569, 1995 AMC 1985, 2001 (4th Cir. 1995)).

previous court rulings and establish itself as the wreck’s “finder” rather than its “salvor”), RMST did not sell any of the artifacts and, therefore, had not acted in bad faith.¹⁹⁷ The court found that RMST acted as sole salvor of the artifacts and determined that no deduction was warranted in regard to revenues from past possession.¹⁹⁸

After considering all of these factors, the Eastern District of Virginia awarded RMST a salvage award of 100% of the fair market value of the artifacts.¹⁹⁹ Although RMST had requested an *in specie* award of the artifacts, the court was reluctant to determine the form of the award, afraid it would find itself in the middle of “a perpetual legal battle . . . over the meaning and scope of the covenants and conditions.”²⁰⁰ Therefore, the court reserved the right to conduct a judicial sale sometime within the next year.²⁰¹

On August 15, 2011, one year after granting the salvage award, the Eastern District of Virginia granted title of the TITANIC artifacts raised between 1993 and 2004 to RMST. Because no buyer had come forward with an interest in purchasing the collection, a judicial sale of the artifacts could not provide RMST with an adequate salvage award.²⁰² The court reasoned that an adequate award could, however, be provided by granting RMST title to the TITANIC artifacts as RMST would receive an artifact collection valued at over \$110 million and could continue to profit from display

¹⁹⁷ *Id.* at 803-04, 2010 AMC at 1844-45.

¹⁹⁸ *See id.* at 804, 807, 2010 AMC at 1846, 1850.

¹⁹⁹ *Id.* at 808, 2010 AMC at 1851.

²⁰⁰ *Id.*, 2010 AMC at 1852.

²⁰¹ *Id.*

²⁰² *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 804 F. Supp. 2d 508, 508 (E.D. Va. 2011).

of that collection.²⁰³ The conveyance, however, requires RMST to abide by the covenants and conditions that had been drafted to ensure the continued protection of the TITANIC artifacts.²⁰⁴ This stipulation ensures that the court could continue to monitor the status of the TITANIC artifacts.²⁰⁵

Is this Application of the Law of Salvage Proper Under Article 4?

Under the 2001 UNESCO Convention, the law of salvage or the law of finds cannot be applied to underwater cultural heritage unless three conditions are met. First, the competent authorities must authorize the application of the law of salvage or the law of finds. Second, any activities conducted under the law of salvage or the law of finds must be undertaken in conformity with the Convention. And third, any recovery undertaken under the law of salvage or the law of finds must be conducted to ensure that maximum protection is achieved.

IV.A. Competent Authorities

With regards to TITANIC, the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth authorized the application of the law of salvage, and through that application, the court named RMST salvor-in-possession of TITANIC and granted RMST a salvage award. In the United States, federal courts, as opposed to state courts, have original jurisdiction over civil cases arising under admiralty and maritime jurisdiction.²⁰⁶ The law of salvage and the law of finds both fall

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ 28 U.S.C. § 1333 (2006).

under admiralty and maritime jurisdiction. The District Court for the Eastern District of Virginia and the Fourth Circuit Court of Appeals are both federal courts. Because this was an in rem action (an action against the personified vessel), RMST was able to bring its claim in any district court as long as RMST brought the vessel within that court's jurisdiction. RMST did that by bringing part of the TITANIC artifact collection within the jurisdiction of the Eastern District of Virginia. Therefore, it was proper for the Eastern District of Virginia, and the Fourth Circuit as the court of appeals for the Eastern District of Virginia, to apply the law of salvage, or law of finds had the court deemed it appropriate, in this case. As such, as far as the United States is concerned, the competent authorities authorized the application of the law of salvage.

The United States is not, however, a party to the 2001 UNESCO Convention.²⁰⁷ Because it is not clear from article 4 who qualifies as a competent authority, it is not clear whether an authority from a nonstate party to the Convention could qualify, even if that authority is the competent authority in that particular state. From a policy standpoint, it is unlikely that a state party to the Convention would deny the authority of the courts of the United States. And once a state party has accepted the authority of the U.S. courts to apply the law of salvage or the law of finds under the Convention, it would be difficult for that state party to go back on that acceptance of authority. However, if the underwater cultural heritage in question is particularly controversial, a state party may deny the authority of a nonstate party. In regards to TITANIC, RMST has been involved in legal proceedings for

²⁰⁷ *Convention on the Protection of the Underwater Cultural Heritage*, U.N. TREATY COLLECTION, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002802198d9> (last visited Mar. 7, 2013).

so long without challenge from other states that it seems unlikely that a state party would deny the United States' authority to apply the law of salvage in this particular case.

IV.B. Conformity with the Convention

This provision is the typical catchall provision that is present throughout the 2001 Convention to ensure that underwater cultural heritage is being protected in accordance with the standards set out in the Convention and its Annex Rules. Under article 33 of the 2001 Convention, "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 Rules."²⁰⁸ Therefore, the salvor or finder must also conduct its activities in conformity with the Annex Rules.

In the law-of-salvage/law-of-finds context, this provision means that the salvor or the finder must conduct all activities directed at the underwater cultural heritage in conformity with the Convention. For example, the salvor or finder cannot commercially exploit the underwater cultural heritage, the salvor must avoid the unnecessary disturbance of human remains, the salvor must employ a qualified underwater archaeologist to direct (or at the very least be regularly involved in) the salvage activities, the salvor must properly document its activities, and the salvor must properly conserve the site and any recovered artifacts.²⁰⁹

In order for the application of the law of salvage to be proper in the case of TITANIC, RMST and its predecessor-in-interest, Titanic Ventures, must have conducted themselves in conformity with the Convention. It is unclear whether RMST's actions must have been in

²⁰⁸ 2001 UNESCO Convention, *supra* note 2, art. 33.

²⁰⁹ Annex Rules, *supra* note 6, r. 2, 5, 22, 24-27.

conformity with the Convention from the start of their salvage operations in 1987 or from the first time the court applied the law of salvage to TITANIC. If the latter, one has to then question whether conformity begins when RMST was awarded its status as salvor-in-possession in 1994 or when Marex filed its salvage claim in 1992. With TITANIC, this is likely a nonissue, because of IFREMER's connection with all salvage conducted at the site before 1994. The start of conformity may, however, be an issue with other underwater cultural heritage subject to the law of salvage or the law of finds, and as such, it should be noted as a potential issue.

IV.B.1. Commercial Exploitation

The average archaeologist would likely argue that RMST has commercial exploited TITANIC. For example, at the January 2012 annual conference for the Society for Historical Archaeology (SHA), RMST's former president, Chris Davino, was not allowed to present at the conference as a speaker. In order to be allowed to speak, Davino could only be a member of a panel discussion and the entire panel was not allowed to digitally project pictures of TITANIC or any of the TITANIC artifact collection. After RMST's announcement in December 2011 of its intention to auction off the entire collection as one lot, the SHA added additional restrictions that ultimately led the organizers of the panel to decide to cancel rather than meet the SHA's extreme demands. As justification for its restrictions, the SHA argued that RMST had commercially exploited TITANIC.

If RMST did commercially exploit TITANIC, its salvage of TITANIC would not be in conformity with the 2001 Convention and the application of the law of salvage would be improper. As discussed previously, the 2001 Convention does not expressly define

commercial exploitation, but instead, provides guidance as to which kind of activities constitute commercial exploitation and which do not. In regards to the prohibited activities, rule 2 states, “Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”²¹⁰ Has RMST traded, sold, bought, or bartered artifacts from TITANIC as commercial goods?

When Titanic Ventures first contracted with IFREMER for the 1987 salvage operation, IFREMER required Titanic Ventures to sign an agreement not to sell any of the salvaged artifacts. The artifacts salvaged during that season remained in France until France’s Office of Maritime Affairs issued the Proces-Verbal, in which France gave RMST title to the 1987 artifact collection on the condition that RMST not sell the artifacts. RMST also signed an agreement with IFREMER not to sell the artifacts raised during the 1993, 1994, 1996, and 1998 salvage seasons, although those artifacts all returned with RMST to the United States for conservation, not France.

Additionally, throughout its time as salvor-in-possession of TITANIC, RMST has been under strict court order not to sell the TITANIC artifacts. When RMST filed its motion to be declared salvor-in-possession of TITANIC in 1994, RMST stated its intentions to recover its salvage costs through the display of the TITANIC artifacts, not through their sale. This was an intention that the court relied on when it awarded RMST salvor-in-possession status and has continued to rely on throughout RMST’s time as salvor-in-possession: “[T]his court has continued R.M.S. Titanic, Inc. as salvor-in-possession of the wreck of the *Titanic* from year to year on the understanding that R.M.S. Titanic, Inc. would treat and preserve all

²¹⁰ *Id.* r. 2.

artifacts recovered and would exhibit them to the public and would not sell or dispose of any of said artifacts.”²¹¹ When RMST’s management changed in 1999 and the court became concerned that RMST might try to sell the TITANIC artifacts, the district court and the Fourth Circuit both made clear that any attempt to sell the artifacts would be a violation of their previous court orders. Several subsequent court orders reiterated that RMST could not sell the artifact collection. And even when the court granted RMST title to the TITANIC artifacts as RMST’s salvage award, the court granted title on the condition that the “TITANIC Artifact Collection . . . be kept together and intact forever.”²¹² Under the Convents and Conditions, “[i]ndividual objects or artifacts, or group of objects or artifacts, as well as all supporting documentation, shall not be dispersed through sale or other deposition (including pledge, collateralization, or similar treatment), except as through a process of deaccessioning.”²¹³

It is important to note that the intention to sell underwater cultural heritage as commercial goods is not in itself a violation of the 2001 UNESCO. In order for the Convention to be violated, an actual sale of the underwater cultural heritage as commercial goods must occur. Therefore, RMST would not have violated the Convention (assuming the Convention was in effect at the time) when its new management announced its intention to sell some of the TITANIC artifact collection. The court stepped in and ordered RMST not

²¹¹ R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 286 F.3d 194, 198, 2002 AMC 1136, 1139 (4th Cir. 2002).

²¹² R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 742 F. Supp. 2d 784, 812, 2010 AMC 1817, 1859 (E.D. Va. 2010).

²¹³ *Id.* at 813, 2010 AMC at 1859.

to sell the artifacts. Therefore, because the sale did not actually occur, RMST did not violate the Convention.

IV.B.1.a. Sale of the Coal

Despite its agreement with IFREMER and its legal obligations under the U.S. court orders, RMST has sold some of the coal that was on board TITANIC. During the April 2001 hearing about whether the July 2000 court order allowed RMST to sell the coal, RMST argued that the coal was organic matter and not a man-made artifact.²¹⁴ Therefore, RMST stated that it had never considered the coal among the artifacts that it had agreed not to sell.²¹⁵ The Fourth Circuit ultimately authorized the sale of the coal, and as a result, the sale of the coal is considered legal under U.S. law. But does the sale of the coal violate rule 2 of the 2001 Convention? It is unquestionable that the coal was being sold as a commercial good. RMST packaged the coal in small pieces with a plaque stating that the coal was from TITANIC. It is less clear, however, whether the coal would be considered underwater cultural heritage. The 2001 Convention defines “underwater cultural heritage” as

all traces of existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for a least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any

²¹⁴ *R.M.S. Titanic, Inc.*, 286 F.3d at 198, 2002 AMC at 1139-40.

²¹⁵ *Id.*, 2002 AMC at 1140.

part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.²¹⁶

If you consider TITANIC as one collective unit, then anything on board TITANIC would be considered underwater cultural heritage. But if you look at individual objects on board TITANIC, as RMST suggested in the April 2001 hearing, it is less clear whether the coal would be considered underwater cultural heritage. Because the definition of underwater cultural heritage includes vessels, the former interpretation is likely more accurate and from a policy prospective would better promote the goals of the Convention.

Rule 2(b), which allows for “the deposition of underwater cultural heritage . . . provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal,” may provide a better argument for the sale of the coal. As previously discussed, this provision allows for deaccessioning, “as long as it does not imply feeding the antiquities market with finds.”²¹⁷ Deaccessioning is typically used for duplicative artifacts or artifacts that have been researched to the full extent possible. Although the sale of the TITANIC coal would not be considered traditional deaccessioning, the same reasoning could be used to justify the sale of the coal. There is very little information that can be derived from the coal, and thus the sale would not “prejudice the scientific or cultural interest or integrity of the recovered materials.” Additionally, there is so much coal that it would be a waste of resources to conserve and

²¹⁶ 2001 UNESCO Convention, *supra* note 2, art. 4.

²¹⁷ UNESCO MANUAL, *supra* note 9, at 15.

store all of it. The problem with this argument is that the coal was likely raised for the sole purpose of being sold. This seems to be at odds with the Convention's goal of protecting underwater cultural heritage and the Convention's preference for *in situ* preservation (that is, the coal did not need to be raised for scientific purposes, and therefore it was better to leave the coal in place on the ocean floor.) There does, however, seem to be consensus in the international community that the sale of the coal does not violate the 2001 Convention. In 2011, the Lawyers' Committee for Cultural Heritage Preservation dedicated its annual conference to the 100th anniversary of the sinking of TITANIC and the 10th anniversary of the UNESCO Convention. Legal scholars from state parties to the 2001 Convention and UNESCO officials presented at the conference. At no point during the two-day proceeding was RMST's sale of the coal discussed. Instead discussions focused on the effect the Convention would have on TITANIC now that TITANIC met the Convention's 100-year temporal requirement.²¹⁸

IV.B.1.b. Potential Sale of the Entire Collection

When RMST announced its intention to create the Titanic Foundation and then sell the entire TITANIC artifact collection to the foundation, the court reserved its judgment on whether that sale would be proper under the existing court orders because the issue was not ripe for consideration (that is, the sale was being discussed as an abstract idea and not actually occurring). The court never had to decide the issue because RMST never went through with the sale, but the court did approve of a provision in the Covenants and

²¹⁸ See *Third Annual Conference*, LAW. COMM. FOR CULTURAL HERITAGE PRESERVATION, <http://www.culturalheritagelaw.org/2011conference> (last visiting Mar. 12, 2013).

Conditions that allows RMST to sell the entire TITANIC artifact collection. And in December 2011, RMST announced its intention to auction of the TITANIC artifact collection as a single lot in April 2012.²¹⁹

Under provision VI of the Covenants and Conditions:

A. The Subject TITANIC Artifact Collection (STAC) may not be sold, transferred, assigned, or otherwise be the subject of a commercial transaction, except as approved by the Court. Such transfer or assignment will be subject to orders of the Court including the provisions of these Covenants and Conditions.

B. These Covenants and Conditions for STAC shall run in perpetuity and shall be applied to all subsequent Trustees within the scope of their terms.²²⁰

The Covenants and Conditions do provide for the sale of the TITANIC artifact collection, but the collection must be “kept together and intact and . . . available to posterity for public display and exhibition, historical review, scientific and scholarly research, and educational purposes.”²²¹ Additionally, the court must approve of the sale, and the purchaser must agree

²¹⁹ Steve Szkotak, *Thousands of Titanic Artifacts Headed to Auction*, MSNBC (Dec. 29, 2011), http://www.msnbc.msn.com/id/45821418/ns/technology_and_science-science/t/thousands-titanic-artifacts-headed-auction/#.T21J15hqNFI.

²²⁰ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 819, 2010 AMC 1817, 1869 (E.D. Va. 2010) (citations omitted).

²²¹ *Id.* at 810, 2010 AMC at 1855.

to abide by the terms of the Covenants and Conditions. The purchaser must also be a “qualified institution,” which the Covenants and Conditions define as

any entity (whether governmental, not-for-profit, corporate, or otherwise in form or character) that has demonstrated the willingness and capacity (by virtue of facilities, financial resources, personnel, accreditation and/or otherwise) to conserve, curate, manage, and generally care for the Subject TITANIC Artifact Collection, and to ensure that such is available to posterity for public display and exhibition, historical review, scientific and scholarly research, and educational purposes.²²²

Annex A to the Covenants and Conditions lists “considerations [that] are relevant to a determination whether an entity is a qualified institution within the means of the Covenants and Conditions.”²²³ These consideration include whether the entity is able to:

- (a) Accession, label, catalog, store, maintain, inventory and conserve the TITANIC Collections on a long-term basis using reasonable museum and archival practices; and
- (b) Comply with the following, as appropriate to the nature and content of the collection;

²²² *Id.* at 811, 2010 AMC at 1857.

²²³ *Id.* at 822, 2010 AMC at 1873.

(1) Maintain complete and accurate records of the Titanic Collections . . . ;

(2) Dedicate the requisite facilities, equipment and space in the physical plant to properly store, study and conserve the collection. Space used for storage, study, conservation and, if exhibited, any exhibition must not be used for non-curatorial purposes that would endanger or damage the collection;

(3) Keep the TITANIC Collections under physically secure conditions within storage, laboratory, study and any exhibition areas . . . ;

(4) Require staff and any consultants who are responsible for managing and preserving the STAC to be qualified professionals;

(5) Handle, store, clean, conserve and, if exhibited, exhibit the TITANIC Collections in a manner that:

(i) Is appropriate to the nature of the material remains and associated records . . . ;

(6) Store site forms, field notes, artifacts inventory lists, computer disks and tapes, catalog forms and a copy of the final report in a manner that will protect them from theft and fire . . . ;

(7) Inspect the collection for possible deterioration and damage, and perform those actions as are absolutely necessary to stabilize the collection and rid it of any agents of deteriorations;

(8) Conduct inventories to verify the location of the material remains, associated records and any other Federal personal property that is furnished to the repository; and

(9) Provide access to the collection by the public and researchers.²²⁴

The Covenants and Conditions also include a detailed step-by-step process for how RMST, or any subsequent trustee of the collection, goes about establishing an institution as qualified and how RMST seeks court approval for a sale. The step-by-step process also discusses the kinds of information the court may consider while making its determination and the role that NOAA plays as the representative of the public's interest in the collection.²²⁵

The real issue here is whether the 2001 Convention allows for the sale of an artifact collection. As discussed previously, rule 2(b) allows for “the deposition of underwater cultural heritage . . . provided such deposition does not prejudice the scientific or cultural interest of the recovered material or result in its irretrievable dispersal.”²²⁶ The *UNESCO Manual* describes rule 2(b) as “address[ing] the transfer of a collection to an appropriate

²²⁴ *Id.* at 823-24, 2010 AMC at 1873-76.

²²⁵ *Id.* at 820-21, 2010 AMC at 1869-71.

²²⁶ Annex Rules, *supra* note 6, r. 2.

repository. Such transfer should not be interpreted as an undesirable transaction.”²²⁷

Therefore, the Convention, when read in conjunction with the *UNESCO Manual*, suggests that the sale of an artifact collection can be proper as long as certain conditions are met.

Here, the Covenants and Conditions ensure that the purchaser of the collection will conserve and protect the integrity of the TITANIC artifact collection as well as exhibit the collection and allow for public access and scientific research. As such, as long as the purchaser abides by the Covenants and Conditions, the rule 2(b) conditions will be satisfied. The fact that the court must approve of the sale and that the purchaser must meet the requirements for a qualified institution further ensures that the rule 2(b) conditions will be satisfied.

Again, as discussed in regards to the sale of the Belitung artifact collection, the Convention does not discuss how the price of an artifact collection is to be calculated. In the 2010 court order, the district court affirmed RMST’s \$110 million valuation of the TITANIC artifact collection’s fair market value.²²⁸ The appraisers RMST hired came up with the \$110 million valuation by adding up the value of each individual artifact in the TITANIC artifact collection. That valuation does not, however, include the potential profit to be obtained from the exhibition of the collection or the intellectual property associated with the collection. Because the proposed April 2012 auction never took place and RMST has yet to sell the collection, it is unclear how much the TITANIC artifact collection is actually worth, and therefore, it is impossible to determine where proper deposition ends and commercial exploitation begins.

²²⁷ UNESCO MANUAL, *supra* note 9, at 15.

²²⁸ *R.M.S. Titanic, Inc.*, 742 F. Supp. 2d at 797, 2010 AMC at 1834-35.

IV.B.2. Other Provisions of the 2001 Convention

In regard to the other provisions of the 2001 Convention, such as whether RMST employed a qualified archaeologist and wrote appropriate interim and final reports, RMST has done as good a job as most in meeting these provisions. It is hard to do a thorough analysis of whether RMST's salvage activities were in conformity with the 2001 Convention because that information is not publically available. However, the Joint National Maritime Museum/International Congress of Maritime Museums Report written in March 1997 provides some insight. In February 1997, a team of archaeologists and museum representatives traveled to France to examine IFREMER's records from the 1987, 1993, 1994, and 1996 salvage seasons and to determine the extent and accuracy of those records.²²⁹ At the time, the United Kingdom's National Maritime Museum was considering exhibiting part of the TITANIC artifact collection at its museum, but in order to exhibit the collection, it was necessary to determine whether the salvage and conservation of the collection met the ethical and professional standards of the museum. The team found that IFREMER's records were of such a quality and accuracy that the production of a professional, scientific report was possible and that the "recording and artefact recovery was accurate and sophisticated."

Although there is no comparable report for the 1998, 2000, and 2004 seasons, the 1998 season was conducted in conjunction with IFREMER, which suggests that the 1998 season was conducted at the same level as the previous season. RMST has also continued to file

²²⁹ ROGER KNIGHT ET AL., *THE WRECK SITE OF TITANIC (1997)*, available at http://www.gc.noaa.gov/documents/0397-icmm_rpt_titanic.pdf.

interim reports with the court outlining its activities at the wreck site, and since NOAA began working with RMST in 2008 as the representative of the public's interest in TITANIC, RMST's activities have been under closer scrutiny. The Covenants and Conditions do not regulate RMST's future salvage activity, but they do ensure that the artifacts that have already been salvaged will be conserved and displayed up to professional standards. If Congress passes the TITANIC legislation that is currently in the House of Representative, RMST's future activities will be regulated based on the provisions of that legislation.

IV.C. Maximum Protection Achieved

As discussed above, the Convention is unclear about what constitutes maximum protection. The drafters of the Convention likely wanted to keep the term "maximum protection" flexible because maximum protection will vary based on each site. For example, in places with known looting problems, like Indonesia, maximum protection will be different because the threat of looting will require those working at the site to work faster in order to best protect the underwater cultural heritage. In regards to TITANIC, the District Court of Virginia and the Fourth Circuit have applied the law of salvage in a way that ensures that RMST, and any future trustees of the collection, will properly protect and conserve the TITANIC artifact collection. The courts' application of the law of salvage in this way is both unique and serves as model for how the law of salvage can be used to protect underwater cultural heritage. Because the law of salvage cannot be used to regulate how salvage operations are conducted (although indirect regulation occurs because of how the courts calculate a salvage award), achieving maximum protection during the actual

recovery process is more difficult to regulate. If Congress passes the TITANIC legislation, that legislation will help to ensure that RMST, or any future salvor-in-possession, achieves maximum protection during recovery. Once the artifacts have been recovered, the Covenants and Conditions kick in, thus ensuring maximum protection of the recovered artifacts from that point forward. At this time, the Covenants and Conditions only apply to the artifacts recovered during the 1993, 1994, 1996, 1998, 2000, and 2004 seasons. However, if RMST was to raise more artifacts, those artifacts would be subject to the same court orders that prevented RMST from selling those artifacts, and the court would likely extend the Covenants and Conditions to any artifacts that the court granted to RMST as part of a future salvage award. Thus, the TITANIC legislation, existing court orders, and the Covenants and Conditions would ensure that RMST, or any future salvor-in-possession, achieved maximum protection of the recovered artifacts.

Conformity with the Convention?

RMST's salvage of TITANIC and the subsequent court orders related to that salvage suggest that the law of salvage can be applied to underwater cultural heritage in a way that protects that heritage and not does commercially exploit the resource. Although it is difficult at this time to determine whether RMST's salvage of TITANIC has been in conformity with all of the provisions of the 2001 UNESCO Convention, RMST has not commercially exploited TITANIC, unless one argues that the sale of coal is a violation of the Convention. As such, the court's application of the law of salvage to TITANIC appears to meet the Convention's exception to the application of the law of salvage or law of finds.

CHAPTER V

CONCLUSIONS: SHOULD COMMERCIALY EXPLOITED UNDERWATER CULTURAL HERITAGE BE DISREGARDED? *

Countries interested in collecting and preserving their heritage should not have that heritage banned from being exhibited by other nations just because such a transfer would involve a commercial sales transaction or because private contracts would make a profit, particularly if the ultimate disposition of the salvaged artifacts is consistent with the Convention. According to articles 14, 17, and 18 of the 2001 UNESCO Convention, any state party to the Convention may not allow commercially exploited underwater cultural heritage within its territory.²³⁰ This prohibition would also keep countries like the United States and England, who are not parties to the Convention but comply with the Annex Rules as a matter of policy, from allowing commercially exploited underwater cultural heritage to enter their territory. Whether these restrictive policies achieve optimal outcomes for the underwater cultural resource and for the public entitled to enjoy that underwater cultural heritage is a question subject to debate.

By the standards of the Convention, Seabed commercially exploited the Belitung wreck during the first season of excavation. Although Seabed did some recording, it did not have a qualified and competent archaeologist oversee the entire salvage, and it conducted the

* Portions of this chapter were originally printed as Laura Gongaware, *To Exhibit or Not To Exhibit?: Establishing a Middle Ground for Commercially Exploited Underwater Cultural Heritage Under the 2001 UNESCO Convention*, 37 TUL. MAR. L.J. 203 (2013).

²³⁰ See discussion *supra* Chapter IV.

salvage too quickly for a vessel of such historic significance with so much cargo and hull preserved. As a result, a significant amount of priceless information was lost. This lost information would have been especially valuable because so little is known about maritime trade in Southeast Asia during the ninth century. There are, however, several factors that suggest that states, including state parties to the Convention, should not entirely disregard the Belitung wreck. Southeast Asia is known for its looting problem, and in fact, the Belitung wreck was looted sometime after its discovery.²³¹ A one-meter-high ewer with the dragon-head stopper, one of the most stunning pieces from the wreck, was looted from the site. During the second salvage season, the dragon-head stopper was discovered at the site, but the ewer bottom could not be located. Later, fishermen approached Seabed with the ewer and negotiated a deal for its return.²³² Despite this preliminary misfortune, the Belitung wreck has been kept intact in one collection and has been purchased by an organization that intends to permanently house the collection in a museum. Although Seabed did not document the entire wreck site in conformity with the standards of the Convention, it did complete some documentation, and the artifacts from the wreck have been carefully conserved and researched. Furthermore, the Belitung wreck and its artifacts remain important because they provide information about a period in which very little is known about this type of direct maritime trade.

²³¹ E-mail from Michael Flecker to author, *supra* note 52.

²³² *Id.* See SMITHSONIAN INST., SHIPWRECKED: TANG TREASURES AND MONSOON WINDS 48 (2011), for a picture of the ewer and dragon-head stopper.

The drafters of the Convention were right to take a strong stance against commercial exploitation in order to discourage treasure salvage and prevent private salvors from commercially exploiting shipwrecks like the Belitung wreck. Recently, companies like Odyssey and Arqueonautas SA have tried to publish reports of some of their salvage operations, establishing a trend that may change the way salvors work in the next decades. However, the Belitung wreck exposes the need for some middle ground that allows commercially exploited underwater cultural heritage to also be subject to archaeological research, conservation, and curation. Such a middle ground is particularly important when underwater cultural heritage is purchased by organizations that want to protect the resource as best they can through deposition consistent with rule 2 of the Annex Rules. Therefore, instead of prohibiting state parties from allowing the exhibitions of shipwrecks like the Belitung wreck, the Convention should allow exhibition of these wrecks in a way that educates the public about the dangers of commercially exploiting the archaeological record. These exhibits have the potential to do much more for these resources than banning them from exhibition ever would.

RMST's salvage of TITANIC provides one such example for how a commercial salvor can salvage underwater cultural heritage and yet remain in conformity with the Convention. RMST's success has a lot to do with the intervention of the District Court of Virginia and the Fourth Circuit and their interest in protecting TITANIC. TITANIC provides an interesting case study for the 2001 UNESCO Convention not only because of the success of the application of the law of salvage, but also because of the criticism that RMST and the government agencies involved with RMST have faced. Despite the fact that RMST's

salvage of the site appears to be in conformity with the Convention, there are many who are misinformed about the salvage of TITANIC. Perhaps because secrecy hampers the circulation of information from private ventures, perhaps because scholars have censured the publication of information from salvaged sites, most scholars are unaware of the activities of most salvors. Misinformation can be just as damaging to underwater cultural heritage as the decision to ban a collection like the Belitung artifact collection, and as such, it is important to bridge the gap of knowledge between all the parties interested in underwater cultural heritage. A better understanding of the legal implications of the 2001 UNESCO Convention is the first step in finding a solution that better protects underwater cultural heritage.

Whether or not underwater cultural heritage has been commercially exploited, the question needs to be: *what is best for the resource*. The question is not what does a particular interested party think is best for the resource--such as, what archaeologist think is best for the resource, or what does a commercial salvor think is best for the resource. And the answer to that question should never be to lock the resource away from the public because it has been commercially exploited or has not been excavated in full conformity with the 2001 UNESCO Convention. The public will be better informed about the dangers associated with commercial exploitation of underwater cultural heritage if that commercially exploited resource is displayed in way that teaches the public about those dangers. As it stands now, a strict reading of the 2001 UNESCO Convention's ban on the exhibition of the commercial exploited resources is detrimental to commercially exploited resources and detrimental to the public. We must find a middle ground through a less conservative reading of the Convention.

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