

murky waters

the policy on *sunken treasure* used to be “*finders keepers.*” now *shipwreck salvagers* must navigate *complex laws* to avoid being *marooned* in court

By Thomas & Charles Danziger

A faithful, long-time reader (OK, our sister Susan) once posed a very interesting question: "Who owns cultural artifacts located in ancient shipwrecks?" Since Susan was 5 years old at the time and busy building a sand castle on the beach, those may not have been her exact words, but we got her drift.

According to Unesco, some three million sunken ships remain undiscovered in the ocean. Based on our research, there seem to be almost as many laws, treaties and conventions governing the ownership of artifacts on these wrecks. This may explain why it took us nearly 35 years to answer Susan's question.

Historically, the general rule on abandoned shipwrecks—wherever they lie—has been "finders keepers." But recent years have seen a sea change in this highly complex area of domestic and international law. The trend now, both in the U.S. and internationally, is to limit private-sector exploration of sunken ships and to compel collectors of artifacts from wrecks to relinquish title to governmental authorities.

Auction houses understand the romance of artifacts from shipwrecks. Their popularity has been amply demonstrated by sales results. The important 1986 auction by Christie's Amsterdam of 18th-century Chinese porcelain and gold from the Nanking—one of the most famous sales of sunken treasure ever—brought some F137 million (\$14.9 million), more than triple the presale estimate. And in 2000, the German auctioneer Nagel offered the trove of precious porcelain from the Tek Sing, a Chinese junk that sank off the coast of Indonesia in 1822. All 16,100 lots sold for a total of DM22.4 million (\$9.8 million).

Despite their allure, shipwreck artifacts can involve many legal complexities—not to mention the occasional questionable provenance—so we advise clients who are considering a purchase to do their homework.

The seminal U.S. case in this area is *Sea Hunt, Inc. v. Juno*, and as our little sister is now a grown-up attorney (don't ask—it's probably a genetic flaw), she was interested to hear about it. *Sea Hunt*, decided in July 2000, involved two separate Spanish ships, *La Galga* and the *Juno*, that went down off the coast of Virginia

in 1750 and 1802. La Galga was carrying slaves and gold when it was caught in a hurricane near the Bermuda Triangle. Although the crew tried to save the ship by throwing a heavy cannon overboard and bailing water for a week, their efforts were fruitless. Afterward the captain—he and most of the crew survived—asked the colony of Maryland to grant Spain time to salvage the ship's cargo by keeping away looters. The salvage attempts failed, however, when storms dispersed the wreck.

The Juno was bringing Spanish soldiers home when it also sank in a storm in the Bermuda Triangle. Over 400 people perished. The ship reportedly carried 22 tons of silver coins and bars, worth some \$400 million today. Spain searched for the wreck, without success.

In 1996 a shipwreck salvage company called Sea Hunt located both wrecks. The Commonwealth of Virginia awarded Sea Hunt a salvage permit, and claimed ownership of the wrecks under the federal Abandoned Shipwreck Act of 1987, which law provides that states own "abandoned historic shipwrecks that are buried in State lands." Like many other states, Virginia grants permits to salvagers in exchange for title to some of the recovered artifacts and a percentage of the profits from the sale of others. To protect its operations, Sea Hunt sought a legal judgment that would declare the ships were abandoned by Spain.

Sea Hunt was the first case in which that country, with many ships lost in international waters, contested such salvage operations. Spain had made no claim even in the 1985 discovery of the Nuestra Senora de Atocha wreck, in which the salvager Mel Fisher located some \$400 million in Spanish treasure. Instead, it allowed artifacts from its sunken ships to be sold in the open market without objection, as it did when Madrid's naval museum reportedly bought approximately 1,000 objects from the 17th-century ship San Diego at Sotheby's in 1999 for over \$5 million.

Britain, France and the U.S. supported Spain's position in Sea Hunt. The U.S. argued in a "friend of the court" brief that like Spain, it has many lost ships and "seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea."

The U.S. Court of Appeals for the Fourth Circuit ultimately ruled that Spain never expressly abandoned either ship, and therefore still owned them. Consequently Virginia had no right to the shipwrecks under the Abandoned Shipwreck Act and was not entitled to issue salvage permits to Sea Hunt.

In support of its finding that Spain never abandoned La Galga, the court relied in part on international treaties dating back to the 18th century. It noted that the ship

remained on Spain's naval registry after Spain tried to salvage it, and that the technology to salvage La Galga became available only recently. The court held that "under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts." The decision has made proving abandonment of a ship—which lies at the heart of salvagers' claims to legal title to a wreck—much more difficult.

After *Sea Hunt* made an unsuccessful appeal to the U.S. Supreme Court, Spain decided to leave the wrecks undisturbed as memorials to the dead, and not to grant any salvage awards. The case set the precedent for countries to assert ownership of sunken ships and to challenge salvagers' claims that they own the ships by virtue of having found them. Critics of the decision say that it may also discourage future salvage operations because many salvagers no longer view them as profitable.

Not surprisingly, the U.S. government now takes the position that legal title to a sunken American or foreign government ship, "wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea."

Similar statements affirming the rights of sovereigns to their sunken ships were recently released by Spain, Britain, France, Germany, Japan and several other countries.

Spain announced that the salvage of vessels in which it has interests "is not authorized and may not be conducted without express consent by an authorized representative of the Kingdom of Spain." France and Britain declared that "no intrusive action" may be taken in relation to sunken State vessels. And Japan stated that such vessels "should be respected as maritime graves."

This trend was reflected in the 2001 Unesco Convention on the Protection of the Underwater Cultural Heritage. Although vague in parts, the treaty suggests that underwater cultural heritage should not be subject to commercialization. It obligates coastal nations to preserve underwater cultural sites, and calls for the preservation of such sites in international waters. Fifteen of the 188 member nations, including Britain, France and the Netherlands, declined to sign on, ostensibly because the treaty was politically undesirable and difficult to enforce.

Despite efforts to restrict commercial salvage operations, artifacts found on sunken wrecks are still being legally sold, often at auction. We advise clients who are considering the purchase of such items to determine where and when objects were recovered, to confirm the chain of title, and to request a certificate of authenticity to ensure that the goods were acquired legally by the consignor. On occasion, consignors at auction have falsely claimed that an object came from a sunken ship in order to conceal

problems of provenance or even legal ownership.

Commercial salvagers—who are mainly located in the U.S.—say that countries with strict laws regarding ownership of sunken artifacts only succeed in fostering a thriving underground market in these items. They note that much of what is found in shipwrecks is actually redundant, such as large quantities of indistinguishable coins or porcelain, with substantial economic—but little cultural—value.

Archaeologists, on the other hand, typically consider sunken ships important time capsules that must be preserved. They have criticized salvagers for using unscientific excavation techniques, destroying significant archaeological information, disturbing artifacts and failing to keep collections together. In the 1985 salvage of the *De Braak* off the coast of Delaware, for example, salvagers reportedly threw important cultural artifacts back into the sea—including a rare, 18th-century Royal Navy stove—and used a rock sorter intended for road construction to sift through the mud.

Archaeologists and their supporters also argue that artifacts should be preserved in museums rather than sold. They note that salvagers can profit through activities that do not involve selling the artifacts themselves, such as books and replicas, exhibitions of the objects and even fees from tourists who wish to join in the expeditions.

Some salvagers insist that the debate is not over archaeology or legal principles at all, but simply about who gets to keep the spoils. They point out that any responsible salvager has a strong incentive to adhere to archaeological standards. Such standards are, they say, an essential tool for mapping out and authenticating a find, as well as (at least in the case of a scattered wreck) for locating the rest of the wreck—which may include the mother lode.

In an effort to balance the interest of archaeological purists and commercial salvagers, the U.S., Britain, France and South Africa, among others, have enacted laws requiring salvagers to cooperate with professional archaeologists when recovering historic shipwrecks.

As we brought our sister up to date on the murky law in this area, we were amused to see Susan's three small children playing with a shovel and bucket on the shoreline, eagerly digging up sand.

In the wake of the *Sea Hunt* case and other recent legislation, we could only hope they would not find anything.