NOTES

MAKING WAVES: HOW MANDATED ARBITRATION COULD BETTER ADDRESS CULTURAL HERITAGE AND BRING TREASURE SALVAGE LAW INTO THE TWENTY-FIRST CENTURY

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INTRODUCTION

The lore of pirate ships, mermaids, and the Bermuda Triangle have long captivated the public and garnered the attention of imaginative storytellers spinning tales of shipwrecks fathoms below the ocean's surface untouched for centuries.[1] But what if these mysterious wrecks and valuable trunks full of gold are no longer fantasy, but rather realities of the contemporary world? Developments in modern technology have brought these mysterious wrecks out of their watery graves and within the realm of scientific discovery.[2] This new reality has motivated private treasure hunters, resulting in complex litigation surrounding their quests for gold and glory.[3] Unfortunately, these modern technological advancements have not been matched by developments in the law of treasure salvage. Rather, treasure salvage law is based on dated legal principles governed by the familiar phrase "finders, keepers" and an archaic understanding of modern technology.[4]

The discovery of the S.S. *Central America* shipwreck was a direct result of this type of modern technological innovation.[5] The litigation surrounding this monumental shipwreck's discovery is demonstrative of the flaws of treasure salvage law and the inability of

1. *See, e.g.*, PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003); TITANIC (Paramount Pictures 1997); EXPEDITION UNKNOWN: MYSTERIES OF THE BERMUDA TRIANGLE (Ping Pong Productions 2020); Jessica Victoria Hidalgo, *A Study in Salvage*, 18 LOY. MAR. L.J. 49, 50 & nn.1-3 (2019) (detailing salvage law's reputation in popular culture).

2. Daria Merkusheva, *7 New Technologies to Find Sunken Ships*, AM. SOC'Y OF MECH. ENG'RS (Feb. 26, 2020), https://www.asme.org/topics-resources/content/7-new-technologies-to-find-sunken-ships [https://perma.cc/NSD5-RYK6]; Tanya Lewis, *Incredible Technology: How to Salvage Shipwrecks*, LIVESCIENCE (Sept. 24, 2013), https://www.livescience.com/39872-incredible-technology-salvaging-shipwrecks.html [https://perma.cc/7KKG-J3EJ].

3. *See* Great Lakes Expl. Grp., LLC v. Unidentified Wrecked & Abandoned Sailing Vessel, 522 F.3d 682, 685 (6th Cir. 2008); R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 531 F. Supp. 2d 691, 691-92 (E.D. Va. 2007).

4. Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 196-97 (1999).

5. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 563 (4th Cir. 1995); Erik Lacitis, *Seattle Group Helped Find 15 Tons of Gold Lost on Sunken Ship. It Took 30 Years to Get Their Shares*, SEATTLE TIMES (Apr. 5, 2019, 11:24 AM), https://www.seattletimes.com/seattle-news/the-ss-central-america-ship-of-gold-and-lost-lives/ [https://perma.cc/NY3X-XX6N].

courts to properly address cultural heritage in modern salvage operations.[6] While the case of the S.S. *Central America* has been litigated and title to the treasure awarded,[7] the fight over real-life treasure lost to the sea is still unsettled and is indicative of how the current state of treasure salvage law does not utilize an adequate forum to satisfactorily resolve these disputes.

This Note argues that American treasure salvage law should implement the modern legal techniques of Alternative Dispute Resolution—specifically arbitration—to address the modern problems surrounding treasure salvage law. Part I of this Note provides an overview of the law governing treasure salvage law. This includes common law principles called the law of finds and the law of salvage as well as the governing United States law and international treaties. Part II will outline the problems with the current standing of treasure salvage law, particularly how it fails to address modern cultural heritage considerations such as scientific advancement and the proliferation of commercial salvors. Part III outlines a proposal suggesting that the United States adopt a policy of mandatory prelitigation arbitration among all interested parties for each salvaged shipwreck. This Note argues that mandated arbitration will resolve issues with cultural heritage, commercial salvage, and the rights of all key stakeholders in a more efficient manner than litigation.

I. BACKGROUND OF THE LAW OF SALVAGE

While most people have only heard of shipwrecks in stories, in reality there are historically rooted legal principles that govern ownership of these real-world discoveries.[8] Treasure salvage law,

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6. *See generally Columbus-Am. Discovery Grp.*, 56 F.3d at 556; Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992). Both decisions were highly contested, and many stakeholders were involved in the litigation process. *See also Treasure Hunter Stuck in Jail for 5 Years Because He Still Won't Disclose Whereabouts of 500 Gold Coins*, CBS NEWS (Dec. 17, 2020, 7:11 AM), https://www.cbsnews.com/news/treature-hunter-tommy-thompson-jail-5-years-missing-gold-coins/ [https://perma.cc/B9C6-JQ7P].

7. *See Columbus-Am. Discovery Grp.*, 56 F.3d at 576.

8. *See generally* Gregory C. Buffalow, *The Law of Salvage and the Law of Finds*, 75 ALA. LAW. 244 (2014).

which governs these shipwrecks, is a niche area of admiralty law.[9] Despite the rarity of significant shipwrecks, shipwreck salvage is a developed area of law with ancient origins.[10] However, modern cases of salvage litigation do exist, most notably the S.S. *Central America* litigation.[11]

A. The S.S. Central America

Colloquially known as the "Ship of Gold," the S.S. *Central America* has a rich history stemming from its wreck and the resulting loss of vast sums of gold aboard the ship.[12] In the nineteenth century, the California Gold Rush promised fortunes of gold to those brave enough to make the pilgrimage to the West Coast.[13] Many of the S.S. *Central America*'s passengers made this pilgrimage successfully, earning opulent wealth for themselves.[14] On September 3, 1857, several hundred passengers and their newly found wealth boarded the S.S. *Central America*, which headed first to Havana, then, less than a week later, began its final journey to New York.[15] Only two days into this journey, clear skies gave way to a violent hurricane, and the ship began to sink.[16] After fighting to remain afloat for four days, the S.S. *Central America* rapidly sank to the bottom of the Atlantic Ocean on September 12, 1857.[17] While many passengers met their demise, all the women and children, as well as around fifty men, were miraculously saved by passing ships.[18]

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9. David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIA. INTER-AM. L. REV. 99, 103 (1998).

10. *See* Hidalgo, *supra* note 1, at 62.

11. *See generally* Columbus-Am. Discovery Grp., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 742 F. Supp. 1327 (E.D. Va. 1990), *rev'd sub nom.* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992).

12. *The History of the S.S.* Central America *"Ship of Gold,"* PRO. COIN GRADING SERVS., https://www.pcgs.com/shipofgold/history-of-ss-central-america [https://perma.cc/8F5J-B2ZU] [hereinafter *History of the S.S.* Central America].

13. *See id.*

14. *See id.*

15. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 455-56 (4th Cir. 1992).

16. *See id.* at 456.

17. *See id.*

18. *See id.* A passing ship called the *Ellen* was responsible for rescuing many of the S.S. *Central America* survivors. *Id.* The *Ellen* only stumbled upon the S.S. *Central America* wreck because a bird flew into its captain's face, which he took as a sign to change route. *Id.* That

In addition to the harrowing loss of human life, there were also great economic ramifications of the shipwreck. Alongside hundreds of passengers and crew, some estimates suggest that the S.S. *Central America* carried over fifteen tons of gold aboard.[19] An unknown but large sum of this gold was the cargo of passengers who boarded the ship.[20] In addition, historians are certain that bankers shipped more than $1 million in commercial gold on the S.S. *Central America*.[21] Some believe that the ship also bore a secret fifteen-ton shipment of gold for the federal government.[22] While there are conflicting tales about exactly how much gold sank that night, the gold aboard the ship was estimated at $2 million in 1857, which today would be valued at approximately $300 million.[23] The overnight loss of gold resulting from the catastrophe was disastrous to the U.S. economy and helped ignite the Panic of 1857.[24] While government officials rushed to tame public alarm, the news of the economic loss spread rapidly, and the nation's banks began to collapse from an influx of withdrawals.[25] The economic impacts from this event lasted over a year, with the United States only recovering at the onset of the Civil War.[26]

The vast sum of gold lost to the sea and the glory of making such a historically rooted discovery has undoubtedly lured many treasure hunters who hoped to discover the S.S. *Central America*. However, it was not until the 1970s that technological advancements allowed for pragmatic discussions of how to successfully recover the ship.[27] However, modern salvors still faced the dilemma of determining the precise location of the vessel, as no one knew where it sunk over one hundred years earlier.[28]

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new route led the *Ellen* to the sinking S.S. *Central America*. *Id.* Several other passengers were also miraculously rescued nine days later on a life raft some 450 miles away. *Id.*

19. *See Today in History—August 24*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/august-24/ [https://perma.cc/KTC6-BT6V].

20. *See id.*

21. *See id.*

22. *See id.*

23. *See History of the S.S.* Central America, *supra* note 12.

24. *See Today in History—August 24*, *supra* note 19.

25. *See id.*

26. *See id.*

27. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 457 (4th Cir. 1992).

28. *See id.*

A private salvage company called Santa Fe Communications, owned by Harry G. John and Jack R. Grimm, contacted Columbia University offering to pay the university $300,000 to use sonar technology to search a 400-square-mile area of the Atlantic Ocean.[29] This technology eventually uncovered one prospective target along the bottom of the ocean floor.[30] Santa Fe Communications did not further explore this target due to harsh surrounding conditions, but today it is known to be the final resting place of the S.S. *Central America*.[31]

Shortly after the sonar survey, Columbus-America President Thomas "Tommy" Thompson contacted Columbia University, hoping to learn the results.[32] Columbia, which was legally bound to not publish the results, gave Thompson the data under the condition that he would not share it with others.[33] Despite agreeing to these terms, Thompson shared the files with Columbus-America, and in 1987, they believed they finally discovered the remains of the S.S. *Central America*.[34] On May 27, 1987, in accordance with admiralty law principles, Columbus-America filed an in rem action against the wreck to be declared its rightful salvor and requested an injunction to prevent other salvors from investigating the area.[35] The United States District Court for the Eastern District of Virginia granted the injunction.[36] In reality, this area was not actually the location of the S.S. *Central America*, which was approximately thirty miles from the actual wreck.[37]

Eventually, Columbus-America determined that the exact location of the S.S. *Central America* was approximately 160 miles off the coast of South Carolina.[38] In 1989, the recovered gold was

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29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.* at 458.
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.* Underwriter litigants alleged Columbus-America intentionally manufactured this ruse to keep others from discovering the actual location of the wreck first. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 570 (4th Cir. 1995).
38. *See Columbus-Am. Discovery Grp.*, 974 F.2d at 455.

brought to court, where it was placed in a vault during litigation.[39] The United States Court of Appeals for the Fourth Circuit weighed the claims of Columbus-America, Jack F. Grimm and Harry G. John, Columbia University, and British and American insurers (and their successors in interest) who had paid out claims on the gold at the time of the wreck.[40] After years of extensive litigation, the Fourth Circuit held that Columbus-America was entitled to a salvage award of 90 percent of the gold, with the other 10 percent to be divided among the underwriters as proportionate to their claims.[41] Clearly unsatisfied with the judgment, Tommy Thompson, the President of Columbus-America, has been imprisoned since 2015 for refusing to share the location of some 500 coins missing from the S.S. *Central America*'s recovered gold.[42] While the tragedy of the S.S. *Central America* is fascinating as a story, it is also an example of how U.S. courts litigate shipwreck salvages such as the S.S. *Central America*.

B. The Existing Statutory Landscape

In reality, only certain salvaged shipwrecks are within the jurisdiction of U.S. courts. The Abandoned Shipwreck Act of 1987 limits the rights of treasure salvors in litigating title to their discoveries.[43] This law grants the United States title to three different categories of shipwreck discoveries, effectively precluding salvors from claiming title to such wrecks.[44] These categories include (1) abandoned shipwrecks embedded in any state's submerged lands, (2) abandoned shipwrecks embedded in coralline

39. Paul Gilkes, *SS* Central America *Treasure Closer to Market*, COIN WORLD (Nov. 10, 2017, 7:00 AM), https://www.coinworld.com/news/us-coins/ss-central-america-treasure-closer-to-market.html [https://perma.cc/JS9N-UYL4].

40. *See generally Columbus-Am. Discovery Grp.*, 56 F.3d 556.

41. *See id.* at 562. It was settled that Columbus-America would market and sell the gold and the profits would be divided proportionately. *Id.*

42. *See Treasure Hunter Marks Five Years in Jail for Refusing to Give Up His Gold*, THE GUARDIAN (Dec. 14, 2020, 7:07 PM), https://www.theguardian.com/us-news/2020/dec/14/tommy-thompson-treasure-jail-ship-of-gold [https://perma.cc/J4QV-MMG2] [hereinafter *Treasure Hunter Marks Five Years in Jail*].

43. Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (codified as amended at 43 U.S.C. §§ 2101-2106).

44. *See* 43 U.S.C. § 2105(a).

formations protected by a state on its submerged lands, and (3) abandoned shipwrecks located on a state's submerged lands and included in or determined eligible for inclusion in the National Register of Historic Places.[45] The S.S. *Central America*, which was found 160 miles off the coast of South Carolina in a nonprotected area, does not fall within the parameters of the Abandoned Shipwreck Act.[46]

Salvors are also limited by international agreements in their quest to find shipwrecks.[47] In 2001, the United Nations enacted the Convention on Protection of the Underwater Cultural Heritage, which requires that countries meet to discuss disputes they are unable to resolve independently through United Nations supervised mediation.[48] While the Convention addresses and creatively resolves many of the concerns this Note will elaborate upon in future Parts, it has no teeth because the United States is not a party to the Convention.[49] This means that the United States is not bound to adhere to the Convention.[50] Further, even for nations that are parties to the Convention, the treaty only governs state actors, not independent commercial salvors, insurance companies, or any other stakeholders.[51]

The Abandoned Shipwreck Act and the United Nations Convention on Protection of the Underwater Cultural Heritage leave a gap in determining title to shipwrecks and safeguarding underwater cultural heritage in the context of the proliferation of salvage

45. *See id.* The federal government then transfers title of these territorial shipwreck discoveries either to the respective state or Native American territory they were discovered within. *See id.* § 2105(c).

46. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 561 (4th Cir. 1995).

47. *See generally* I Gusti Agung Putra Trisnajaya, *Convention on the Protection of the Underwater Cultural Heritage*, 9 INDON. J. INT'L L. 165 (2011).

48. U.N. Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 51, 62-63; Trisnajaya, *supra* note 47, at 168-69.

49. *See generally* Ole Varmer, Jefferson Gray & David Alberg, *United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 5 J. MAR. ARCHAEOLOGY 129 (2010) (outlining the United States' response to the United Nations Convention on the Protection of the Underwater Cultural Heritage).

50. Trisnajaya, *supra* note 47, at 168-69.

51. U.N. Convention on the Protection of the Underwater Cultural Heritage, *supra* note 48, at 62-63.

projects.[52] The question remains, how does one litigate discoveries, such as the S.S. *Central America*, that fall outside the existing statutory framework? Article III, Section 2, Clause 1 of the United States Constitution grants federal courts the ability to adjudicate "all Cases of admiralty and maritime Jurisdiction."[53] Therefore, United States courts are able to litigate title to these wrecks through constitutional grant and have developed common law principles to adjudicate such claims.[54]

C. The Common Law: Law of Finds Versus Law of Salvage

Once jurisdiction is established, courts apply common law legal principles to a treasure salvage. When a shipwreck is discovered outside of the territorial United States, there is a race by those who made the discovery to claim possession over the wreckage.[55] To award title to a wreck, courts must first establish whether the law of finds or the law of salvage governs.[56]

To determine which legal doctrine governs the title determination, the primary consideration is whether the property has been abandoned or whether the previous owner retains a possessory interest.[57] Plaintiffs hoping to establish title will assert that their discovery is abandoned to get the application of the law of finds, which is more favorable to salvors.[58] In the maritime salvage context, abandonment has been defined as the "act of leaving or deserting such property by those who were in charge of it, without hope on their part of recovering it and without the intention of returning to it."[59] The amount of time the wreck has been on the ocean floor is important to this analysis.[60] Admiralty courts generally prefer applying the law of salvage, typically only applying

52. *See id.*; 43 U.S.C. §§ 2101-2106.

53. U.S. CONST. art. III, § 2, cl. 1.

54. *See* Hidalgo, *supra* note 1, at 62; 28 U.S.C. § 1333(1).

55. *See* Hidalgo, *supra* note 1, at 55.

56. *See id.* at 55-56.

57. *See* Mark A. Wilder, *Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries*, 67 DEF. COUNS. J. 92, 93-94 (2000).

58. *See id.*; Hidalgo, *supra* note 1, at 60.

59. Wilder, *supra* note 57, at 94 (quoting 3A MARTIN J. NORRIS, BENEDICT ON ADMIRALTY: THE LAW OF SALVAGE § 134, at 9-10 (7th ed. 1991)).

60. *See* Hidalgo, *supra* note 1, at 56.

the law of finds when the owners expressly abandoned their property or where items are recovered from an ancient shipwreck.[61] The Fourth Circuit adhered to this preference in the S.S. *Central America* litigation and applied the law of salvage to the dispute.[62]

The law of salvage is an ancient doctrine dating back to 900 BC.[63] While it is remarkable that this legal tradition has governed successfully for so long, the rapid expansion of modern technology suggests that developing greater protections for cultural heritage is necessary.[64]

Three essential elements must be met for a salvor to recover a salvage award under pure salvage.[65] In *The Blackwall*, the Supreme Court held that to recover a salvage award, (1) the wreck rescued must be in some maritime peril; (2) the recovery must be intentional, voluntarily rendered, and not owed to the property as a matter of duty; and (3) the salvage must have been successful.[66] If these elements are satisfied, then the court must determine the compensation value that the successful salvor will receive, which is also a determination made by a factored test.[67] In determining the amount of a salvage award, a court considers: (1) the labor expended by the salvors in the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued.[68] Underlying this analysis is the goal of compensating the successful salvor and

61. *See id.* at 55-56; Wilder, *supra* note 57, at 94.

62. Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992).

63. *See* Hidalgo, *supra* note 1, at 62; Wilder, *supra* note 57, at 92.

64. *See* Wilder, *supra* note 57, at 92.

65. *See* Hidalgo, *supra* note 1, at 63. While there are two types of salvage, contract salvage and pure salvage, this Note will examine the more relevant elements of pure salvage. *See id.* Contract salvage is another type of salvage, which occurs when a party is contractually obligated to perform salvage operations for another party who is obligated to pay their compensation. *Id.* This type of salvage is less applicable to our considerations, and as a result, this Note focuses on pure salvage.

66. *See id.* at 63-64; Wilder, *supra* note 57, at 92-93.

67. *See* Hidalgo, *supra* note 1, at 64-66; Wilder, *supra* note 57, at 93.

68. *See* Hidalgo, *supra* note 1, at 65; Wilder, *supra* note 57, at 93.

incentivizing the recovery of property that is in peril.[69] However, this means that title is still vested in the original owner, rather than an effective title change like the law of finds.[70] Nonetheless, because of the great expense, risk, and value in recovering these lost archaeological treasures, salvage awards can handsomely reward successful salvors and are therefore favored over a grant of title through the law of finds.[71]

In the case of the S.S. *Central America*, there were challenges in determining whether the property had been abandoned.[72] The main point of contention was whether the underwriting insurance companies that had paid out claims to the insured gold remained in possession.[73] If they remained in possession, then the S.S. *Central America* was not abandoned and the law of salvage would apply, the opposite of what Columbus-America was alleging.[74] The federal district court determined that the S.S. *Central America* had been abandoned, as the underwriters had made no efforts to locate the ship since 1858 and destroyed all documents supporting their claim of ownership.[75]

However, the underwriters appealed this decision, and the United States Court of Appeals for the Fourth Circuit reversed, holding that the law of salvage should apply because the law of finds may only be applied in the specific instances outlined above—when the owners have expressly abandoned the vessel or when no owner appears to claim the items recovered.[76] The Fourth Circuit remanded the case to the district court to apply the law of salvage; however, after the district court's salvage award analysis, the case was once again appealed to the Fourth Circuit.[77] The Fourth Circuit affirmed the 90 percent salvage award to Columbus-America, applying the

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69. *See* Hidalgo, *supra* note 1, at 62. While there are policy goals underlying the application of salvage law, they are aimed at recovering property to the rightful owner rather than ensuring cultural preservation of these artifacts.

70. *See* Wilder, *supra* note 57, at 93; Hidalgo, *supra* note 1, at 66-67.

71. *See* Hidalgo, *supra* note 1, at 65-66.

72. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 455 (4th Cir. 1992).

73. Wilder, *supra* note 57, at 99.

74. *See id.* at 99-100; *Columbus-Am. Discovery Grp.*, 974 F.2d at 465.

75. *See* Wilder, *supra* note 57, at 99-100.

76. *See id.*

77. *See Columbus-Am. Discovery Grp.*, 974 F.2d at 468; Wilder, *supra* note 57, at 100.

Blackwall factors in making this determination.[78] In short, while the underwriters maintained title to the shipwreck, Columbus-America was granted a handsome salvage award, greater than half the value of the wreck.[79] Further, the Fourth Circuit found that an *in specie* award was appropriate because of the "unique[ ] and intrinsic[ ]" value of the wreck.[80] It is also important to note that in this decision, the Fourth Circuit emphasized an additional *Blackwall* factor: that the salvor agrees to preserve the historical and archaeological value of the shipwreck.[81]

While it is rare, courts sometimes apply the law of finds to wrecks.[82] The law of finds is governed by the ancient and colloquial expression "finders, keepers."[83] To successfully gain ownership under the law of finds, one must (1) show they have an intent to reduce the property to their possession, (2) prove actual or constructive possession of the property in an exercise of a high degree of control, and (3) prove that the property was either unowned or abandoned prior to the moment they found it.[84] Once a salvor establishes a successful claim under the law of finds, they are granted title to the property at issue exclusive against the entire world.[85] However, the law of finds is problematic relative to the law of salvage, as it imposes no duties upon a successful claimant to preserve the property; the claimant is the sole owner of the property and may use it as they see fit.[86]

In the S.S. *Central America* litigation, the law of salvage was applied; however, this was not a decision without contention. The district court initially found that the vessel had been abandoned by

78. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 571-74 (4th Cir. 1995).

79. *See* Columbus-Am. Discovery Grp., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, Its Engines, Tackle, Apparel, Appurtenances, Cargo, Etc., No. 87-363-N, 1993 WL 580900, at *31-32 (E.D. Va. Nov. 18, 1993).

80. *See Columbus-Am. Discovery Grp.*, 974 F.2d at 469 (quoting Cobb Coin, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 198 (S.D. Fla. 1981)).

81. *Id.* at 468.

82. *See* Eads v. Brazelton, 22 Ark. 499, 507-08 (1861); Moyer v. Wrecked & Abandoned Vessel, 836 F. Supp. 1099, 1106 (D.N.J. 1993).

83. *See* Hidalgo, *supra* note 1, at 66.

84. *See id.* at 66-67.

85. *See id.* at 67.

86. *See id.*

the underwriters, applying the law of finds.[87] Even when the Fourth Circuit reversed the decision and applied the law of salvage, however, there was a dissenting opinion.[88] Judge Widener opposed the application of the law of salvage, stating the court had been "clearly erroneous ... in applying the law of salvage to a long lost wreck; in making factual findings as an appellate court; and in erroneously stating the issue to be decided by the district court on remand."[89] Judge Widener's opinion was that the facts of the case supported a finding of abandonment and that the district court opinion should not have been overturned.[90]

The litigation surrounding the S.S. *Central America* is an interesting tale about a fight over historical treasure, but it also depicts the current inadequacies of treasure salvage law in the United States. While these common law doctrines have long governed, the S.S. *Central America* litigation demonstrates the difficulties in applying these principles to modern wrecks and how that frustrates cultural heritage concerns.[91]

II. THE INADEQUACY OF SALVAGE LAW IN ADDRESSING CULTURAL HERITAGE

The jurisdictional gap between the Abandoned Shipwreck Act of 1987 and the United Nations Convention on the Protection of the Underwater Cultural Heritage leaves the door open to messy litigation over shipwrecks found in international waters by those who are not parties to the Convention. While there is are a plethora of issues with current treasure salvage law, this Part will focus on the issue of cultural heritage and the law's failure to adequately address it in the context of commercial salvage.

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87. Marilyn L. Lytle, Case Note, Columbus-American Discovery Group v. Atlantic Mutual Ins. Co., *974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992)*, 24 J. MAR. L. & COM. 403, 406-07 (1993).

88. Wilder, *supra* note 57, at 100.

89. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 471 (4th Cir. 1992) (Widener, J., dissenting).

90. *See id.*

91. *See generally* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556 (4th Cir. 1995); *Columbus-Am. Discovery Grp.*, 974 F.2d at 450.

A. Cultural Heritage Defined

Cultural heritage is an evolving and evasive concept.[92] While the definition has changed over time, and will likely continue to change, for the purposes of this discussion, cultural heritage can be defined as anything with cultural importance.[93] This broad definition is not without its critics, some limiting its scope dramatically and others taking different perspectives altogether.[94] The United Nations Convention Concerning the Protection of the World Cultural and Natural Heritage takes a more specific approach, listing specific examples of cultural heritage such as architectural works, sculptures, cave dwellings, structures of archaeological nature, groups of buildings, or archeological sites of outstanding universal value.[95] No matter how one defines cultural heritage, it is apparent that the law of salvage is not adequately tailored to preserve artifacts and cultural heritage for future generations to appreciate.

B. Maritime Peril and Preservation

One of the primary features of treasure salvage law is its misunderstanding of the science of preservation. As noted above, salvage law requires that a shipwreck be in "maritime peril" to grant a salvage award to a salvor litigant.[96] Often, courts simply acknowledge that a ship is in peril; in fact, it is quite rare for a court to conclude that a shipwreck is not in peril.[97] However, this salvage law tradition is contrary to the scientific realities that modern preservation science has revealed about shipwrecks.[98] Scientists

92. Evangelos I. Gegas, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129, 152 (1997).

93. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 297 (1999) (listing art, archaeological sites, and historical artifacts as examples).

94. *See id.* at 297-304 (discussing rationales behind different definitions of cultural heritage).

95. U.N. Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, Nov. 16, 1972, 27 U.S.T. 37.

96. *See* Hidalgo, *supra* note 1, at 63; Wilder, *supra* note 57, at 93.

97. *See* Ole Varmer, *The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 281 (1999).

98. *Id.* at 280-81.

have determined that when a ship sinks into the ocean, it quickly begins to acclimate to its new underwater environment, and over a brief time, becomes stable there.[99] In fact, the rate of deterioration for ships settled underwater is actually very slow due to the lack of oxygen exposure.[100] This means the ship is well-preserved in this underwater time capsule, effectively protecting any cultural value aboard.[101] However, upon salvage, the wreck is exposed to oxygen and changing water composition as it is elevated out of its submerged state through the water column to the surface, initiating a more rapid deterioration rate.[102] The law's presumption of maritime peril is contrary to these scientific realities of treasure salvage, remaining in the dark on the definitive scientific determinations that could better inform the law to support cultural heritage.[103] This disregard for science by presuming maritime peril makes salvage claims less burdensome and incentivizes the disruption of safely preserved shipwrecks, putting them in the peril that salvage law purports to avoid.[104] This outcome is somewhat cyclical—the presumption of peril is what actually creates the peril and harms cultural heritage preservation. Salvage law, while acting under the guise of saving cultural heritage from peril, actually has the opposite effect, demonstrating how ill-equipped salvage law is to address cultural heritage.

This cycle is particularly problematic for underwater cultural heritage. Unlike terrestrial cultural heritage sites, which are a mixture of relics from various time periods overlapping in a single excavation site, underwater sites are time capsules isolating one specific moment in time.[105] In a site like this, every artifact and piece of information recovered is relevant to piecing together the story of the cultural heritage site.[106] For example, if Christopher Columbus's *La Santa María* is found, navigation tools aboard may provide insights about Columbus's journey to the Americas and

99. *Id.* at 280.
100. *Id.*
101. *See id.*
102. *Id.* at 280-81, 288-89.
103. *Id.*
104. *Id.*
105. *Id.* at 288.
106. *Id.* at 288-89.

how his crew met its demise.[107] Under current salvage law, there is no requirement to salvage an entire wreck, nor is there a uniform policy to record contextual information that could be important to the greater historical discovery.[108] A finding of maritime peril presumes that these artifacts need to be saved, but in doing so, important contextual discoveries can be left behind or are out of the ability of current technology to discover.[109] In fact, many archaeologists actually prefer to leave cultural heritage sites untouched so that future generations with more advanced technology may better study and preserve them.[110]

Some may argue that while the maritime peril element is not scientifically accurate, the S.S. *Central America* holding added a new *Blackwall* factor of preservation to the consideration of a salvage award, correcting the flaws in the peril calculation.[111] While the addition of this factor was a step in the right direction, it is a symbolic step rather than a de facto win for cultural heritage preservation. This is just one factor among six others that are more persuasive due to their application and a wider breadth of supporting case law.[112] Further, none of these factors are dispositive to destroy one's salvage award.[113] Consequently, commercial salvors will weigh the costs of preservation techniques against the potential loss to their ultimate salvage award. This will likely discourage preservationist salvage techniques because preservation is an incredibly expensive undertaking.[114]

Even if one presumes that the new *Blackwall* factor of preservation is effective in regulating salvage, courts are not adequately equipped to apply it because they are not experts in preservation

107. For background on this potential discovery, see *Christopher Columbus's Santa Maria Wreck 'Found,'* BBC NEWS (May 13, 2014), https://www.bbc.com/news/world-us-canada-27397579 [https://perma.cc/K56D-8SUF].

108. *See* Varmer, *supra* note 97, at 289.

109. *Id.*

110. *See id.* at 288-89.

111. *See* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992); Varmer, *supra* note 97, at 280-81.

112. *See* Hidalgo, *supra* note 1, at 65-66; Wilder, *supra* note 57, at 92-93.

113. *See* Hidalgo, *supra* note 1, at 65.

114. *The High Cost of Shipwreck Salvage Operations*, FISK MARINE INS. INT'L (Sept. 28, 2015), https://fiskusa.com/blog/general-marine/the-high-cost-of-shipwreck-salvage-operations/ [https://perma.cc/4BDF-3C2V].

and therefore cannot sufficiently evaluate preservation efforts. Further, admiralty courts have held the testimony of experts regarding the peril created by salvaging ancient shipwrecks as irrelevant.[115] Ultimately, this means that the determination of whether an operation was sufficiently preservationist lies in the hands of judges, who are unlikely to have the special knowledge necessary to make this critical determination.[116] In sum, the elements of salvage law inadequately preserve cultural heritage and fail to utilize the modern scientific insights that best preserve cultural heritage.

C. Detrimental Impacts of Commercial Treasure Salvage Operations

Another problem with salvage law is the incentive it places on commercial salvors to disturb wrecks without regard to cultural heritage preservation. While it is true that commercial salvors fund missions that lead to valuable cultural heritage discoveries, these missions are also damaging because commercial salvage operations are not adequately regulated to respect cultural heritage sites.

As noted above, archaeologists prefer to leave underwater cultural heritage sites untouched to better preserve their cultural value.[117] In contrast, the objective of commercial salvors is to recover the most valuable artifacts as quickly and inexpensively as possible in order to obtain the optimum salvage award.[118] In some instances, there are even contractual agreements with those funding the operation that instruct salvors not to bother with cost-ineffective cultural preservation measures.[119] This commercial exploitation is clearly at odds with the critical concern of preserving the cultural value of these sites for future generations.[120]

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115. *See* Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Vessel, 549 F. Supp. 540, 560-61 (S.D. Fla. 1982).

116. *Cf.* Varmer, *supra* note 97, at 301 (arguing that due to the complexity of underwater cultural heritage management, admiralty courts are not well suited for managing these resources; rather, administrative rules such as those for environmental management regimes should apply).

117. *See supra* note 110 and accompanying text.

118. *See* Varmer, *supra* note 97, at 289.

119. *See id.*

120. *See id.*

Commercial salvage is also problematic because salvage law does not consider the cultural ties of salvaged artifacts.[121] Rather, salvors are entitled to either keep their findings or sell them to the highest bidder to proportionately distribute the salvage award.[122] This approach only considers the commercial value of these discoveries, rather than their cultural significance. Further, this means that the public could be robbed of the opportunity to view culturally significant artifacts in a museum while they are instead tucked away in the private mansion of the highest bidder.

Such a commercial lens also fails to consider the impacts of colonization on cultural heritage. Envision that tomorrow there is a headline proclaiming "Dorothy's Ruby Red Slippers—Stolen from the Smithsonian Museum in Washington, D.C." Now imagine that the shoes are discovered 100 years later by a Dutch salvage crew on the shipwreck of the original thief's vessel. The Dutch salvors obtain title under Dutch law and maintain possession of the ruby slippers, which are hidden away from the American public forever in a mansion in Amsterdam.[123] *The Wizard of Oz*, a classic American film, is a beloved American tradition with great cultural significance.[124] How could the Dutch retain possession simply by declaring it as their own under their own law? This situation is the equivalent of what American salvage law allows commercial salvors to do. While international law recognizes that the countries of origin of stolen and looted objects should be able to claim these artifacts, this is not how the situation plays out in reality.[125] Laws like the Abandoned Shipwreck Act of 1987 grant the United States jurisdiction over these wrecks, and cultural ties can be ignored.[126] Again, commercial profit prevails over cultural heritage preservation.

The commercialization of treasure salvage also leaves many stakeholders at a disadvantage or completely blocked out of

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121. *See generally* Hidalgo, *supra* note 1; Wilder, *supra* note 57.

122. *See* Sweeney, *supra* note 4, at 191.

123. *See* Gegas, *supra* note 92, at 129-30.

124. *The Wizard of Oz: Treasures of American History*, NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/treasures/wizard-of-oz [https://perma.cc/NV3G-MXBE].

125. *See* Katie Sinclair, *Blood and Treasure: How Should Courts Address the Legacy of Colonialism When Resolving Ownership Disputes over Historic Shipwrecks?*, 38 BERKELEY J. INT'L L. 307, 322 (2020).

126. *See id.*

resulting litigation. Commercial salvors with deep pockets have an advantage over underfunded nonprofits and small museums, which are motivated by cultural heritage concerns, not commercial profits. Parties with less money than commercial salvors still have important arguments that are likely to be hampered by less expensive and less experienced representation. Additionally, the extensive funding of commercial salvors means that they are able to afford to litigate salvage issues for a longer duration than preservationists. In reality, this likely means that key stakeholders will be absent from salvage litigation and the interests in preserving cultural heritage for the world will go unrepresented.

III. THE SOLUTION: IMPLEMENTING ALTERNATIVE DISPUTE RESOLUTION

It is clear that there are a variety of drawbacks to the current litigation-based system of salvage law. These drawbacks have catastrophic impacts on cultural heritage—and something must be done, or critical pieces of history will be lost forever. Fortunately, alternative means of dispute resolution are better equipped to address the modern problems of treasure salvage and cultural heritage, bringing this ancient area of law into the twenty-first century.

A. Defining Alternative Dispute Resolution and Arbitration

Alternative dispute resolution (ADR) is exactly what it sounds like: any alternative to litigation.[127] This includes mediation, arbitration, negotiation, and any other mechanism of dispute resolution.[128] ADR is a rapidly expanding area of law, and today, a large number of cases are resolved outside of court by employing such

127. *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 4-5 (2d ed. Supp. 2007); Katie Shonk, *What Is Alternative Dispute Resolution?*, PROGRAM ON NEGOT. HARV. L. SCH. DAILY BLOG (Dec. 1, 2020), https://www.pon.harvard.edu/daily/dispute-resolution/what-is-alternative-dispute-resolution/ [https://perma.cc/5FUH-5R5K].

128. *See generally* Robert E. Wells, Jr., *Alternative Dispute Resolution—What Is It? Where Is It Now?*, 28 S. ILL. U. L.J. 651 (2004) (providing an overview of ADR and its mechanisms).

mechanisms.[129] Thus, ADR is not the alternative but rather the dominating norm of dispute resolution.[130] Arbitrations, one subset of ADR, are overseen by one or more arbitrators who are the decision-making authority.[131] Typically, each stakeholder is given time to outline their argument and time to rebut the opposing arguments.[132] Often, the arbitrator will interrupt with questions, teasing out the critical issues of the dispute.[133] Then, the arbitrator will come to a conclusion, effectively resolving the dispute.[134]

Although arbitration is a growing phenomenon in the modern legal world, it is not a new or untested concept.[135] Arbitration has been practiced in commercial disputes since the seventeenth century and is already used regularly in admiralty disputes.[136] The United Nations Convention of the Law of the Sea mandates arbitration for international admiralty disputes in its charter.[137] Clearly, the United Nations believes that arbitration is an effective tool for resolving cultural heritage disputes, and the United States should follow its lead.[138]

B. Proposing an Alternative

This Note proposes that the United States should, through congressional enactment, pioneer a new approach to treasure salvage law by implementing mandatory binding arbitration for parties with treasure salvage disputes. Mandating arbitration would resolve many problems outlined in Part II and bring treasure salvage law into the modern world. The Federal Arbitration Act (FAA), which outlines guidelines and procedures for resolving

129. *See* Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOT. J. 329, 329 (1995); WARE, *supra* note 127, at 5.

130. *See* WARE, *supra* note 127, at 5.

131. AM. BAR ASS'N, GUIDE TO RESOLVING LEGAL DISPUTES: INSIDE AND OUTSIDE THE COURTROOM 9 (2007).

132. *See id.* at 87.

133. *See id.*

134. *See id.* at 87, 89.

135. *See* George Applebey, *What Is Alternative Dispute Resolution?*, 15 HOLDSWORTH L. REV. 20, 26 (1991).

136. *See id.*

137. U.N. Convention on the Law of the Sea art. 188, ¶ 1, Dec. 10, 1982, 1833 U.N.T.S. 397.

138. *See id.*

disputes through arbitration, makes implementing arbitration more feasible.[139] The FAA addresses procedural intricacies such as appointing arbitrators, compelling witnesses, and calculating damages awards.[140] The same logistics should be adopted and followed for the purposes of resolving treasure salvage issues. Instead of litigating in courts, parties to treasure salvage disputes, such as those in the S.S. *Central America* litigation, would be sent to binding arbitration in the place of federal district courts. This would allow for arbitration to better address the modern age of treasure salvage while still preserving the due process of the appeals procedure of the federal judiciary. It is particularly worth noting that the FAA has a specific section stating that arbitration clauses to maritime transactions are valid, enforceable, and irrevocable.[141] Clearly, Congress already believes that arbitration is a meaningful tool to use in resolving admiralty and maritime law disputes under the FAA.[142]

Some states already utilize mandatory arbitration as an effective means to resolve disputes. For example, the Illinois legislature granted their judicial branch the power to mandate arbitration in civil claims, which it has done for such claims with an exclusively monetary remedy.[143] Illinois is not alone; Washington State also allows for mandatory arbitration, demonstrating its growing use and suggesting that national implementation is possible.[144]

Arbitration is also better suited for treasure salvage disputes than other types of ADR, such as mediation or negotiation. Mediation, for example, is led by the parties themselves as they attempt to resolve their dispute through negotiations overseen by a neutral mediator.[145] Mediation is particularly useful in disputes in which parties have a preexisting relationship and there are emotional issues at stake, which is why it is often employed in family law

139. 9 U.S.C. §§ 1-16.
140. *Id.* §§ 5, 7, 9.
141. *Id.* § 2.
142. *See id.*
143. ILL. SUP. CT. R. 86. *See generally* Suzanne J. Schmitz, Theresa M. Cameron & Joel E. Lueck, *Survey of Illinois Law: Mandatory Arbitration*, 23 S. ILL. U. L.J. 843 (1999).
144. WASH. REV. CODE § 7.06.020 (2018).
145. *See* AM. BAR ASS'N, *supra* note 131, at 43.

disputes.[146] Conversely, the complexities of treasure salvage law are not something laypeople can easily resolve without attorneys engaging in complex arguments,[147] something that arbitration better facilitates.

Negotiation is also not appropriate because it does not have any impartial fact-finder to resolve the legal dispute but rather involves attorneys attempting to settle for their client by coming to a mutually beneficial agreement.[148] This is not suited for treasure salvage disputes because often, the parties in these disputes have mutually exclusive interests. Preservationists want to leave wrecks undisturbed or recover them safely while salvors want to maximize the monetary rewards of their discovery, which requires disturbing the wrecks without regard to cultural heritage.[149] Negotiations from these two perspectives are highly unlikely to reach a mutually beneficial agreement. Arbitration also does not preclude parties from negotiation[150]—it is likely already used for resolving treasure salvage disputes, just as it is used throughout the American legal system to make out-of-court settlements.[151] Arbitration balances the best of all methods by incorporating an impartial fact-finder to resolve the dispute with a formal process that can incorporate witnesses and evidence while at the same time creating a platform that emphasizes fairness rather than the cumbersome nuances of litigation.[152]

C. How Arbitration Resolves the Shortcomings of Treasure Salvage Law

Arbitration is a useful alternative to litigation that fits modern concerns of cultural heritage preservation, particularly through its incorporation of experts as decision makers and its more informal

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146. *See id.*
147. *See* Hidalgo, *supra* note 1, at 55-56.
148. *See* AM. BAR ASS'N, *supra* note 131, at 2-3.
149. *See* Bederman, *supra* note 9, at 102-03.
150. *See* AM. BAR ASS'N, *supra* note 131, at 19 (explaining how negotiation is often the first step in dispute resolution).
151. *See* Rebecca Hollander-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2081 (2017).
152. *See* AM. BAR ASS'N, *supra* note 131, at 67.

structure. These elements allow for unique solutions, cost-effectiveness, expedition of dispute resolution, and a less adversarial nature.

One major issue in treasure salvage law outlined in Part II is the inability or rather the refusal, of courts to properly weigh the scientific aspects of treasure salvage.[153] Arbitration allows the decision maker in the dispute to have actual knowledge of the salvage, preservation, and cultural heritage concerns at stake because an arbitrator can be selected for their expertise.[154] Cultural heritage issues are particularly vulnerable to a lack of expertise because the field is so specific and requires weighing a variety of considerations that raise ethical, religious, cultural, historical, and economic questions with a degree of specialized knowledge.[155] Some may claim that juries and judges can be educated by expert witnesses on such matters.[156] However, as stated above, admiralty courts have been reluctant to credit such testimony by expert witnesses.[157] Further, when expert testimony is allowed, it may be biased toward the litigant who has called the expert and who often is paying for their services[158]—another advantage to commercial salvors with deep pockets. Further, even ignoring the possibility of expert bias, calling countless experts to testify and educate the court on the specificities of cultural heritage preservation is neither cost- nor time-efficient, further disadvantaging underfunded litigants.[159] Cultural heritage preservation is not a field one can learn overnight; it is unreasonable to expect fact-finders to glean such specialized knowledge from experts in a matter of minutes at trial.[160] A more direct path would be to employ an arbitrator with the specialized knowledge themselves. It is possible that appointing an expert in preservation and salvage could create some bias against commercial salvors in

153. *See supra* Part II.

154. *See* Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 CARDOZO J. CONFLICT RESOL. 477, 482 (2012).

155. *See* ISABELLE FELLRATH GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES 118 (2004).

156. *See* Varner, *supra* note 154, at 483.

157. *See* Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Vessel, 549 F. Supp. 540, 560-61 (S.D. Fla. 1982).

158. *See* E. Ray Stevens, *Expert Testimony*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 188, 190 (1919); Steven Lubet, *Expert Testimony*, 17 AM. J. TRIAL ADVOC. 399, 433-34 (1993).

159. *See* Varner, *supra* note 154, at 483.

160. *See id.*

resolving these disputes. However, policies similar to voir dire could be implemented with this proposal allowing parties to mutually agree upon an arbitrator, ensuring that all parties feel comfortable that the arbitrator is not biased.

Arbitration is also a less formal process in which the arbitrator can get to the points they find more relevant—especially if they are an expert in the field—instead of dancing around the formalities of a courtroom. Evidentiary formalities or cumbersome procedures should not prevent a fair outcome.[161] This less formal process would allow for remedies not ordinarily available under traditional salvage law.[162] For example, while courts are bound to either award a salvage award or title to the original owner, arbitrators would be able to come up with more creative solutions. For example, for an underwater site of particular cultural significance or one that is particularly difficult to preserve, an arbitrator could order the salvor to leave the site untouched until the wreckage can be properly removed with more effective technology.[163] Alternatively, the arbitrator could require a temporary loan of the privately owned artifact to a museum every five years to be enjoyed by the public. An arbitrator could also more adequately address concerns of cultural heritage preservation by granting the property to its country of origin when relevant.

Some may oppose this benefit as a drawback of arbitration, claiming that creativity can lead to inequity and inconsistent outcomes for parties. However, this argument presumes a uniformity in litigated decisions that does not exist either; consider the number of times courts came to different outcomes in the S.S. *Central America* litigation alone.[164] Innovative solutions are necessary to address the complexities and unique circumstances of every salvage operation for the particular artifacts in a dispute.

161. Gegas, *supra* note 92, at 155.

162. *Id.*

163. *See* Varmer, *supra* note 97, at 286.

164. *Compare* Columbus-Am. Discovery Grp. Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 742 F. Supp. 1327, 1348 (E.D. Va. 1990) (holding that underwriters abandoned their claims to the salvaged wreck), *rev'd sub nom.* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992), *with* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992) (holding that there was insufficient evidence that underwriters abandoned their claims).

Additionally, arbitration is a favorable alternative to litigation because, if not overly judicialized, it is generally less expensive.[165] The S.S. *Central America* litigation is an example of how costly salvage cases can be, as the case was appealed and remanded several times, involved a great number of litigants, and lasted several years.[166] Litigation over cultural heritage issues can make headlines and become "show trials," sometimes with costs exceeding millions of dollars per party.[167] The high costs of litigating these disputes are especially problematic when considering the key stakeholders involved—as mentioned in Part II, those advocating for preservation are likely to settle or not participate in litigation because it is too costly.[168]

On a related note, arbitration is also a quicker method than litigation.[169] Litigation can last several years, just as the S.S. *Central America* litigation did.[170] Some credit this to the awe and emotions that coincide with the discovery of such fascinating artifacts.[171] However, the duration of litigation in the S.S. *Central America* is not unique. For example, "litigation involving art stolen by the Nazis during World War II generally lasts between seven and twelve years."[172] This is not only cost prohibitive but also harmful to cultural artifacts. As mentioned in Part I, once a wreck is uncovered, there is a race to court to be declared the sole salvor.[173] But what happens in the meantime? Parties are unlikely to wait around years after discovery to ensure that preservation and cultural heritage are respected. In reality, once a discovery is made, commercial salvors will want to explore it, which could be harmful

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165. *See* Varner, *supra* note 154, at 481.

166. *See, e.g.*, *Columbus-Am. Discovery Grp.*, 742 F. Supp. at 1327; *Columbus-Am. Discovery Grp.*, 974 F.2d at 450; Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 556 (4th Cir. 1995).

167. *See* Varner, *supra* note 154, at 481.

168. *See supra* Part II.

169. *See* Varner, *supra* note 154, at 481.

170. *See id.*; *Columbus-Am. Discovery Grp.*, 974 F.2d at 450; *Columbus-Am. Discovery Grp.*, 56 F.3d at 556.

171. *See* Varner, *supra* note 154, at 481.

172. Madeline Chimento, Comment, *Lost Artifacts of the Incas: Cultural Property and the Repatriation Movement*, 54 LOY. L. REV. 209, 223 (2008) (citing Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Lost During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 27, 53 (1999)).

173. *See* Hidalgo, *supra* note 1, at 55.

to its preservation by disturbing the time capsules these sites are preserved in.[174]

Finally, arbitration is less adversarial than litigation, which allows stakeholders to preserve relationships and work toward a solution.[175] This turns the focus from "winning" to creating a mutually beneficial agreement that allows cooperation moving forward. In an ideal world, salvors and advocates of protecting cultural heritage would work together on salvage operations for the best outcomes for these fascinating wrecks. The S.S. *Central America* case and Tommy Thompson's imprisonment for refusing to turn over artifacts is an example of how adversarial litigation can result in negative outcomes for all litigants involved.[176]

In fact, these enlightened attitudes would allow for other considerations that are often forgotten in the course of preservation and litigation. For example, many shipwrecks are the final resting places for their passengers.[177] To some, recognizing this and protecting the site as a peaceful final resting place is critical.[178] This aim is more likely to be acknowledged if all parties involved have a cooperative relationship. Arbitration allows stakeholders to maintain positive relations to better resolve aspects of complex disputes.

Another potential counterargument to this proposal is that arbitration is typically a private form of dispute resolution, which removes public advocacy and stake in the outcome of cases.[179] However, as mentioned above, public trials risk becoming show trials that waste time and money critical to the salvage operation.[180] Show trials are just as dangerous as private dispute resolution, especially considering that arbitration would be more open to preservationists and other experts who would zealously advocate for the public's interests, even in private. Critics may also claim that this proposed plan would hinder treasure salvage operations completely by removing the salvage award as an incentive for

174. *See* Varmer, *supra* note 97, at 286.
175. *See* Applebey, *supra* note 135, at 24.
176. *See Treasure Hunter Marks Five Years in Jail*, *supra* note 42.
177. *See* Renee Elisabeth Torpy, *Grave Robbers or Archaeologists? Salvaging Shipwrecks*, 46 J. MAR. L. & COM. 83, 95 (2015).
178. *Id.*
179. *See* AM. BAR ASS'N, *supra* note 131, at 67.
180. *See supra* note 167 and accompanying text.

commercial salvors. However, this argument presumes that other salvors and philanthropists will not seek to uncover wrecks for the prospects of glory and becoming a notable name in history. Regardless, even if commercial salvage is deterred, this aligns with the many experts who believe that shipwrecks are better left undisturbed for a future generation with better preservation technology to uncover.[181] Arbitration may not be flawless, but it better protects cultural heritage in the context of modernizing salvage operations.

D. Implementing the Solution

Implementing the mandatory arbitration that this Note proposes would have been effective in mitigating the problems that arose during the S.S. *Central America* litigation. Issues such as the long duration of the litigation or the tumultuous posttrial outcome could have been prevented by mandatory arbitration.[182]

The S.S. *Central America* litigation was first initiated in August of 1990 when Columbus-America first filed a lawsuit to establish their salvor's rights to the shipwreck.[183] The case was appealed and remanded several times to reach a final judgement, wasting the time and resources of all litigants involved.[184] This litigation officially ended in November of 1995 when the Supreme Court of the United States denied certiorari.[185] Arbitration would have been a more efficient solution because it would have cut out the formalities and resolved the dispute more quickly. Again, this would have been beneficial to any parties hoping to advocate for cultural heritage preservation efforts that likely could not afford such long and contentious litigation.

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181. *See* Varmer, *supra* note 97, at 289.

182. *See supra* notes 40-43 and accompanying text.

183. *See generally* Columbus-Am. Discovery Grp. v. Unidentified, Wrecked and Abandoned Sailing Vessel, Its Engines, Tackle, Apparel, Appurtenances, Cargo, Etc., No. 87-363-N, 1993 WL 580900 (E.D. Va. Nov. 18, 1993).

184. *See generally* Columbus-Am. Discovery Grp., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 742 F. Supp. 1327 (E.D. Va. 1990), *rev'd sub nom.* Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992); Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992); Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556 (4th Cir. 1995).

185. *See* Atl. Mut. Ins. Co. v. Columbus-Am. Discovery Grp., Inc., 516 U.S. 938, 938 (1995).

Further, arbitration could have avoided postjudgment turmoil by providing a more trusted forum to resolve the salvage dispute. While the litigation over the wreck itself may be over, Tommy Thompson still refuses to turn over gold coins and, as a result, is being held in jail.[186] Clearly, Thompson was not satisfied with the result of the formal litigation tribunal. Perhaps this can be attributed to the adversarial environment of litigation, which causes parties to adopt the mindset that if their opposition wins, in whole or in part, they are the loser. Arbitration would have been more effective because it is a less emotional and adversarial process. Additionally, if Thompson and Columbus-America had a hand in selecting the expert arbitrator, perhaps Thompson would have respected the decision more than that of a judge less familiar with salvage operations.

Finally, engaging in arbitration would have allowed an expert to address the cultural heritage concerns of this salvage operation. Perhaps an expert would have implemented better salvage procedures that would have led to great cultural heritage discoveries. The emphasis of the Columbus-America salvage operation was to recover gold from the site, but what else sank with the ship?[187] Perhaps these findings could be in a museum, enriching the public's understanding of this historically significant event. It may be impossible to know the answers to these questions, but it is clear that the S.S. *Central America* litigation did not adequately address these concerns, and arbitration could have dealt with many of them.

CONCLUSION

While the search for shipwrecks like the S.S. *Central America* may sound like a pirate tale come to life, there are complex

186. *See Treasure Hunter Stuck in Jail for Refusing to Disclose Location of Gold Coins Faces Judge; Ingot from Shipwreck Sells for $2.16 Million*, CBS NEWS (Jan. 25, 2022, 6:20 AM), https://www.cbsnews.com/news/treasure-hunter-tommy-thompson-jail-6-years-gold-coins-hearing-ingot-auctioned/ [https://perma.cc/GLP3-WFRS].

187. *See generally* Dalya Alberge, *Doomed Ship of Gold's Ghostly Picture Gallery Is Plucked from the Seabed*, THE GUARDIAN (Feb. 27, 2022, 3:00 AM), https://www.theguardian.com/artanddesign/2022/feb/27/doomed-ship-of-golds-ghostly-picture-gallery-is-plucked-from-the-seabed [https://perma.cc/BQG6-M259] (discussing the recent discovery of portraits in the wreckage).

considerations of cultural heritage that are not properly addressed by the current standing of treasure salvage law. Most notable of these concerns is the peril that salvage creates for otherwise preserved wrecks and the harm done by the commercial lens through which salvage claims are analyzed. Employing arbitration would address many of these concerns that will otherwise continue to be exacerbated as modern salvage technology develops and there is a resulting uptick in shipwreck discoveries. Courts must utilize modern techniques like arbitration to bring salvage law into the twenty-first century and ensure the protection of the world's cultural heritage for many generations to come.

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