

**LAWASIA MOOT COMPETITION 2009**

**IN THE INTERNATIONAL CENTER OF ARBITRATION**

**2009**

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**THE CASE CONCERNING COEUR de l' OCEAN**

**BENEVOLENT HERITAGE INC**

*Applicant*

**v.**

**THE GOVERNMENT OF ROLGA**

*Respondent*

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**MEMORIAL FOR THE APPLICANT**

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**STATEMENT OF JURISDICTION**

Benevolent Heritage Inc (“Heritage Inc.”) and the Government of Rolga have submitted the present dispute before the International Center of Arbitration, pursuant to Clause 10 of the Partnering Agreement Memorandum and Rule 1(1) of the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Center (KLRCA), to be read together with Article 1 of the UNCITRAL Arbitration Rules 1976. The Parties shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

**QUESTIONS PRESENTED**

**I.**

Whether the Government of Rolga has interfered with Benevolent Heritage Inc's salvage rights and performance under the 1995 Agreement when it entered into Agreement with Astoria in 2001 and Ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operator to organize and make profits from visiting activities to the side including taking photographs.

**II.**

Whether Benevolent Heritage Inc. has exclusive rights of photographing and documenting of the Coeur de l' Ocean

**III.**

Whether the calculation of profits and/or distribution of artifacts between the Parties to be made solely on the basis of salvage legal principles

## **STATEMENT OF FACTS**

### **BACKGROUND**

In the 17<sup>th</sup> century, Astoria a colonial empire of the West, was using the riches of the New World of the East to finance her military adventures. An adventure by the Coeur de l' Ocean led by Captain Van Cleef in 1800 conquered Zamzala, now a territory of Rolga. Coeur de l' Ocean was laden with precious cargo pillaged from the city and its palace. En route to another destination, the vessel sank due to the monsoon.

Since its independence, Rolga has prospered on agriculture and tourism, particularly eco-tourism attributable to its astounding collection of cultural and natural resources as well as World War II war wrecks. This lured treasure hunters into the area causing some wrecks to be targets of illegal treasure hunting. Reports have been made by the Historical and Cultural Society of Zamzala of extensive lootings in territorial waters of Rolga.

### **DISCOVERY OF COEUR DE L' OCEAN**

In 1990, Mr. Bernard Bodd, a renowned Astorian salvor and major shareholder in Benevolent Heritage Inc proposed to the Rolga Cultural Heritage Committee for the survey and recovery of historic wrecks. The plan attracted the attention of the Government of Rolga as it involved the discovery of the Coeur de l' Ocean. Following extensive research by Heritage Inc, they found the vessel to lie 12 nautical miles from Rolgan baseline. To obtain the approval of the government, some silver coins were recovered from the site, confirmed by government archaeologists as 'rare items' in mint condition. The National Geographic estimated the find as worth more than USD 1 billion.

## **THE SIGNING OF THE 1995 AGREEMENT**

The Government ultimately approved the project and the 'Partnering Agreement Memorandum' was signed on 27<sup>th</sup> September 1995 which included provisions for merchandizing income from the wreck. Some of the many artifacts recovered from the wreck have been auctioned off to fund the project. The Government has concealed the actual collection of recovered artifacts from the public, but showcased some of them in the National Museum in 2000. This has doubled the number of tourist visits to the museum.

## **CHANGE IN ROLGAN GOVERNMENT POLICY**

Subsequently, the Government of Rolga adopted the UNESCO Convention on the Protection of the Underwater Cultural Heritage in November 2001 as part of their new policy to enhance appreciation of cultural heritage. The new economic plan introduced in the same year promised more efforts by the Government in protecting cultural resources.

A new law passed in late 2000 gave the Minister of Rolga Cultural Heritage the authority to designate areas of cultural significance as restricted areas. In 2001 Rolga entered into an agreement on the "Protection of Astorian Wrecks" with the Government of Astoria. The main objective was to provide better protection to historic wrecks where both countries shared historical and cultural legacy. In the Agreement, Astoria agreed to transfer all its rights in Astorian ancient wrecks and their contents lying on or off the Rolgan coastline to Rolga. The Astorian Minister of Foreign Affairs expressed hope that Rolga will endeavor to preserve the objects recovered for the 'benefit of mankind'. Rolga in return recognized that Astoria has a continuing interest in the articles.

## **THE GRANTING OF PERMIT TO AQUATIC VIEW**

Aquatic View, a tour operator was then permitted by the Government to organize exclusive underwater trips to view the Coeur de l 'Ocean. Twenty five tickets have been sold at USD 20,000 each. Aquatic View staff have photographed and made video clips of the wreck to promote the trips. A songwriter was signed on to write a song entitled 'Cour de l' Ocean' and the CDs commercially marketed as souvenirs. Heritage Inc. brought these issues to the attention of the Rolgan Historic Monument Executive Agency but the Agency was unable to handle the matter. The actions of Aquatic View have jeopardized Heritage's current television documentary deal with an International Broadcasting Company.

## **THE DISPUTE**

The shift in public mindset regarding preservation of underwater cultural heritage and the ratification of the 2001 UNESCO Convention have prompted Heritage Inc. to reevaluate their contractual arrangements with Rolga. By 2003, they felt that further investment into other Astorian wrecks would only be detrimental to the company. At the finalizing of the division of artifacts, Heritage Inc. found the distribution by Rolga to be unfair and contrary to the 1995 Agreement. Parties have failed to agree upon a joint marketing plan. The dispute is now brought before the International Center of Arbitration.

## SUMMARY OF PLEADINGS

I. The International Center of Arbitration (ICA) has jurisdiction over the dispute between Heritage Inc. and the Government of Rolga. ICA derives its jurisdiction to arbitrate from the Clause 10 of the Partnering Agreement Memorandum ('the 1995 Agreement') which is valid as per Rolgan law. Rolgan law shall be the applicable law the disputes. In addition, case laws from other common law jurisdictions will be cited as authorities. International treaties, cases from international tribunals as well as domestic case laws and state practice of other nations will be cited as sources of international law and general principles of law as Rolga is a monist State.

II. The Government of Rolga interfered with Heritage Inc's salvage rights and performance under the 1995 Agreement by entering into 2001 Agreement with Astoria, ratifying the UNESCO Convention and by allowing other tour operators to organize wreck diving to the wreck site including the taking of photographs. The Government of Rolga has effectively granted salvage rights to Heritage Inc. Alternatively, they are estopped from denying the validity of the salvage rights. Also, Heritage Inc has fulfilled the necessary elements of 'salvage'. Thus, Heritage Inc's has a right to salvage without interference. Furthermore, they are entitled to right of non-interference as accorded to an internationalized contract. The actions of the Government of Rolga constitute interference with Heritage Inc's salvage rights under the 1995 Agreement. The interference incur state responsibility for they amount to expropriation, were below 'fair and equitable' standard as expected in international law and breached the Applicant's legitimate expectation.

III. Heritage Inc has exclusive rights photographing and documenting Coeur de l' Ocean. The policy of historical salvage law justifies the inclusion of exclusive rights of photography and

documenting and Heritage Inc is justified under salvage law to have exclusive photography and documenting rights. Further, Heritage Inc's exclusive rights of photography and documentation do not infringe the right to free navigation. Lastly, Heritage Inc is entitled to the exclusive photography and documenting rights from the contextual interpretation of the 1995 Agreement.

IV. The calculation of profits and distribution of artifacts between the parties should be based solely on the basis of salvage legal principles. Salvage legal principles applies on the facts despite the existence of the 1995 Agreement. Clause 5 of the 1995 Agreement is to be annulled based on the 1989 Salvage Convention. Alternatively, Clause 5 is frustrated due illegality as a result of the ratification of UNESCO Convention. As Clause 5 is can no longer be performed, salvage legal principles should be invoked to provide the Applicant a remedy. Heritage Inc's success in its salvage work entitles it to remuneration based on salvage legal principles. The measure of award based on salvage legal principles should be substantially more than what was provided for under the Agreement as the Applicant has invested much skill, effort and capital in ensuring the proper execution of the salvage works.

## PLEADINGS

### I. THE INTERNATIONAL CENTER OF ARBITRATION HAS JURISDICTION OVER THE DISPUTE BETWEEN HERITAGE INC AND THE GOVERNMENT OF ROLGA

#### A. Source of jurisdiction

The International Center of Arbitration ('ICA') derives its jurisdiction to arbitrate the 'Questions Presented'<sup>1</sup> from Clause 10 of the Partnering Agreement Memorandum ('the 1995 Agreement') which is quoted in *verbatim* as follows:

"Any differences, discrepancies and disputes should the parties be unable to reach mutual understanding and agreement, those disputes and/or differences shall be referred to and/or decided by the arbitration in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration. The arbitration shall be conducted in English Language. The award of the Arbitrators shall be final and binding on the parties."

Should there be any dispute as to the existence or scope of ICA's jurisdiction, the Arbitral Tribunal has the authority to rule on its own jurisdiction. The decision will be final and binding on the Parties.<sup>2</sup>

#### B. Arbitration clause

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<sup>1</sup> See page IV of this Memorial

<sup>2</sup> Article 16 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law; Section 18(1) and 13(9) of the Malaysian Arbitration Act 2005.

1. The governing law of the arbitration clause

Since the Parties had stipulated Rolgan law as the governing law for their agreement,<sup>3</sup> then the presumption is that Rolgan law governs the arbitration clause, unless there is express evidence to the contrary.<sup>4</sup> Rolgan law is *pari materia* with Malaysian law on all issues covered.<sup>5</sup> Therefore the Malaysian Arbitration Act 2005 and common law (section 3 and 5 of the Civil Law Act 1956) are referred to as authorities of Rolgan law.

2. Validity of arbitration clause

The arbitration clause has satisfied the criteria for a valid arbitration agreement as per Rolgan law. Section 9 of the Arbitration Act 2005 provides that the agreement must be (1) in writing, (2) in respect of a defined legal relationship, and (3) signed by the parties.<sup>6</sup> Upon satisfying these criteria, any arbitration agreement is subject to the ICA's ruling that the agreement is null and void, inoperative or incapable of being performed or that there was no dispute between the Applicant and the Respondent.<sup>7</sup> Section 18(1) of the Arbitration Act 2005 gives ICA the authority to decide on the validity of the arbitration agreement.<sup>8</sup>

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<sup>3</sup> Clause 9 of the Partnering Agreement Memorandum 1995, Appendix I of the Moot Problem ("1995 Agreement")

<sup>4</sup> *Union of India v. McDonnell Douglas Corp.* [1993] 2 Lloyd's Rep. 48; Derains, *The ICC International Court of Arbitration Bulletin*, Vol. 6, No. 1, 10 pp, 16 – 17; Redfern, Alan & Hunter, Martin, "*Law and Practice of International Commercial Arbitration*", 3<sup>rd</sup> Edition Sweet & Maxwell 1999, para.3-35 – 3-38.

<sup>5</sup> Para 8, Further Clarifications to the Moot Problem ("Further Clarifications")

<sup>6</sup> Section 9 of the Arbitration Act 2005; Article 7 of *UNCITRAL Model Law*.

<sup>7</sup> Section 10(1) of the Arbitration Act 2005; Article II.3 of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"); Article 8(1) of *UNCITRAL Model Law*

<sup>8</sup> Section 18(1) of the Arbitration Act 2005 which states that "*the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*"; read together with Section 13(9) which gives ICA the exclusive authority to decide on these issues; Article 16 of *UNCITRAL Model Law*.

On the facts, both parties had signed the Agreement which incorporates an arbitration clause – Clause 10. Clause 10 is clearly in writing and concerns the contractual relationship between the Applicant and the Respondent. Further, there was a dispute between the Parties in the present case as laid down in the “Questions Presented”.<sup>9</sup> The recognition of such dispute is implied by the conduct of both the Parties agreeing to settle before ICA.

With respect to Section 10(1)(a) of the Arbitration Act 2005, it is also submitted that Clause 10 is valid as it cannot be invalidated for illegality. Should the main agreement become void or repudiated, Clause 10 shall remain valid by virtue of the doctrine of separability.<sup>10</sup> The only exception is if the main agreement is void *ab initio*.<sup>11</sup> It is submitted, without conceding, that any absence of title to the shipwreck does not render the 1995 Agreement void *ab initio*. At most it could only amount to a violation of an implied term that the Rolgan Government has title over the shipwreck.

Lastly, the wording of Clause 10 is such that it is clear evidence of the Parties’ intention to submit to the jurisdiction of ICA. As such, it passes the test of certainty usually applied to arbitration clauses.<sup>12</sup> Therefore the dispute shall be settled by ICA according to the Rules of Arbitration of KLRCA (‘Rules of Arbitration’) and that its decision shall legally bind both parties.

### 3. Scope of arbitration clause

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<sup>9</sup> See page XV of this Memorial

<sup>10</sup> *Harbour Assurance Co v. Kansa General International Insurance* [1992] 1 LIL Rep 81; *Heyman v Darwins*

<sup>11</sup> *Joe Lee Ltd v. Lord Dalmer* [1927] 1 Ch 300

<sup>12</sup> *Star Shipping AS v. China National Foreign Trade Transportation Corp.* [1993] 2 Lloyd’s Rep. 445; *Nokia Maillefer SA v. Mosser*, Tribunal Cantonal [Court of Appeal] March 30, 1993, (1996) XXI Yearbook Commercial Arbitration 681; and ASA Bulletin (1995, No. 1)

As a general rule, the scope of an arbitrator's jurisdiction is determined based on the true interpretation of the arbitration clause.<sup>13</sup> It is submitted that the words of Clause 10 give a very wide jurisdiction to ICA over the dispute between the Parties.<sup>14</sup> Clause 10 does not provide that the disputes arbitrable only arise under the contract.<sup>15</sup> As such, the scope of arbitrability is neither restricted to the terms of the 1995 Agreement nor to disputes arising arising out of or incidental to the 1995 Agreement.

### C. Applicable law

Rolgan law shall be the applicable law to the disputes presented before the Arbitral Tribunal as both the Parties have expressly agreed for Rolgan law to govern the Agreement.<sup>16</sup> However, as the Agreement is an 'internationalized contract',<sup>17</sup> it will also be subjected to international law. As Rolga is a monist state,<sup>18</sup> international law is supreme over Rolgan municipal law. In the event of conflict between international law and Rolgan law, international law shall prevail. International treaties, cases from international tribunals as well as domestic case laws and state practice of other nations will be cited as sources of international law and

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<sup>13</sup> *Ashville Investments Ltd. v. Elmer Contractors* 10 Con LR 72

<sup>14</sup> See Clause 10 of the 1995 Agreement

<sup>15</sup> *Thiagarajah Pooipatarsan v. Shanmugam Paramsothy & 2 Ors* [1990] 2 CLJ 312; *Dato' Teong Teck Kim & 2 Ors v. Dato' Teong Teck Leng* [1996] 1 AMR 737; *Fillite (Runcorn) Ltd. v. Aqua-Lift* 26 ConLR 66; *Heyman & Anor v Darwins Ltd*, *supra* note 10

<sup>16</sup> Clause 9 of the 1995 Agreement

<sup>17</sup> See *infra*, page 9-11 of this Memorial

<sup>18</sup> Para 7 and 8 of the Further Clarifications

general principles of law.<sup>19</sup> In addition, case law from other common law countries, especially that of the United Kingdom, will be cited as authorities of common law and equity principles.<sup>20</sup>

## **II. THE GOVERNMENT OF ROLGA INTERFERED WITH HERITAGE INC'S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ENTERING INTO AGREEMENT WITH ASTORIA IN 2001, RATIFYING THE UNESCO CONVENTION AND BY ALLOWING OTHER TOUR OPERATORS TO ORGANIZE WRECK DIVING TO THE WRECK SITE INCLUDING THE TAKING OF PHOTOGRAPHS**

### **A. Heritage Inc has salvage rights over Coeur de l' Ocean**

A claim in salvage law requires that (1) the salvage service is consented to by the owner of the salvaged property, (2) the property is in marine peril, (3) the service is voluntary and (4) it resulted in success.<sup>21</sup> The salvage of Coeur de l' Ocean fulfills these conditions. Therefore, Heritage Inc has salvage rights over Coeur de l' Ocean.

#### **1. The Government of Rolga was in ownership of the shipwreck and hence could consent to its salvage**

At the time the 1995 Agreement was entered into, Coeur de l' Ocean had been abandoned by Astoria and its title had been properly vested in the Respondent. Abandonment of a vessel by

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<sup>19</sup> Article 38(1) of the *Statute of the International Court of Justice*, June 26, 1945, 59 stat. 1055, T.S.T.S no.993, 3B bens 1179 ("ICJ Statute")

<sup>20</sup> S. 3 and S. 5 of Civil Law Act 1956

<sup>21</sup> *Sea Hunt Inc v Unidentified Shipwreck Vessel or Vessels*, 221 F.3d 634 (2000), US Court of Appeals for the Fourth Circuit, July 21, 2000; *International Aircraft Recovery, LLC v The Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255, 2000 AMC 2345 (11<sup>th</sup> Cir. 2000); *The Sabine*, 101 U.S. (11 Otto) 384 (1879); *Markakis v. S/S VOLENDAM*, 486 F. Supp. 1103 (S.D.N.Y. 1980); Thomas Schoenbaum, *Admiralty and Maritime Law* § 15-1, (1987) at p. 502

the original owner can be implied.<sup>22</sup> Proof of express abandonment is only necessary where the original owner has come forward and asserts ownership.<sup>23</sup>

The discovery of Coeur de l' Ocean was highly publicized,<sup>24</sup> and despite that, Astoria never came forward to claim ownership of the wreck. This implicitly means that Astoria has abandoned ownership of the wreck.

The concept of "sovereign immunity"<sup>25</sup> which entails a presumption of non-abandonment and exclusion of a coastal state's jurisdiction does not apply to historical shipwrecks. Sunken historical vessels cease to be "warships" protected under UNCLOS and are therefore no longer under the exclusive jurisdiction of the flag State.<sup>26</sup> Thus, the Respondent, at the time of the 1995 Agreement was in ownership of Coeur de l' Ocean.

In any event, the 2001 Agreement, where Astoria transferred its title in all Astorian ancient wrecks including Coeur de l' Ocean to the Respondent, perfected the imperfect title.<sup>27</sup> Salvage rights were therefore effectively granted by the Respondent to the Applicant.

2. In any event, the Government of Rolga is estopped from denying the validity of salvage rights as their conduct has been inequitable

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<sup>22</sup> *Sea Hunt Inc v Unidentified Shipwreck Vessel or Vessels, ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Moot Problem, para 5.

<sup>25</sup> Article 29 *United Nations Convention on the Law of Sea* ("UNCLOS")

<sup>26</sup> Sarah Dromgoole, "2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage", 18 *International Journal Of Marine & Coastal Law* 59 (2003); W Riphagen, "Some Reflections on 'Functional Sovereignty'" *Netherlands Yearbook of International Law* (1975), 128 L Migliorino, "The Recovery of Sunken Warships in International Waters", in B Vukas (ed.), *Essays on the New Law of the Sea* (Zagreb: Sveucilisna naklada Liber, 1985), 251.

<sup>27</sup> *Butterworth v Kingsway Motors* [1954] 1 W.L.R. 1286; *Ng Ngat Siang v Arab Malaysian Finance Berhad & Anor* (1988) 3 MLJ 319, High Court of Malaya.

The Respondent cannot claim that due to the operation of the maxim *nemo dat quad non habet*, the 1995 Agreement is rendered void for parties' common mistake as to ownership of the legal title. There is an implied term in the Agreement that the legal title of the wreck was owned by Rolga.<sup>28</sup> Upon true construction of the Agreement, the Respondent warrants that it has the necessary capacity to grant salvage rights.<sup>29</sup> By entering into the Agreement, the Respondent represented erroneously that it had the competency to grant such rights. Any mistake was induced by the recklessness of the Respondent in failing to ascertain the true ownership of the wreck. Thus, the Respondent's fault excludes them from now asserting that the contract is void for mistake.<sup>30</sup>

An estoppel may arise in international law so as to bind a state.<sup>31</sup> Here, the Respondent is estopped from claiming that due to its lack of ownership, the Applicant obtained no salvage rights. The 1995 Agreement was entered into in full confidence that the Respondent had the necessary capacity to grant the Applicant such rights. It was on that faith that the Applicant proceeded with investing a substantial amount of its own resources and carried out its obligations under the Agreement.

### 3. Heritage Inc fulfills other elements of salvage claim

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<sup>28</sup> *McRae v Commonwealth Disposal Commission* (1951) 84 CLR 377 (High Court of Australia); approved in *Associated Japanese Bank (International) v Credit du Nord SA* (1989) WLR 255.

<sup>29</sup> Clause 5 of the 1995 Agreement, here it is stated that "*the Government [of Rolga] shall be at all time be considered the owner of the shipwreck.*"

<sup>30</sup> *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* (2002) EWCA Civ 1407.

<sup>31</sup> *El Salvador v. Honduras*, I.C.J. Rep. 1990, p. 118, para 63.

In addition to consent by owner, the other conditions for a salvage claim are:<sup>32</sup> (a) a maritime peril from which the ship could not have been rescued without the; (b) a voluntary act by the salvor – under no official or legal duty to render assistance; and (c) the salvage efforts must be successful, in whole or in part.

*a. Marine Peril*

Although the Coeur de l' Ocean is a historic wreck that has been lying in the sea bed for over a century, it is still in marine peril as it is in danger of being lost through the actions of the elements<sup>33</sup> as well as pirates.<sup>34</sup> It thus falls under the definition of marine peril.

*b. Voluntariness*

The existence of pre-existing contractual obligations that compel a person to act will not result in the granting of salvage rights to the person. However, where the contract was concluded after the need for the services arose, the existence of contractual obligations does not extinguish any salvage rights.<sup>35</sup> Such was the case for Heritage Inc, where the 1995 Agreement was only entered into after the need for salvage arose. Thus, the Applicant will be treated as a contracted salvor with full salvage rights.

*c. Success in whole or in part*

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<sup>32</sup> *The Sabine*, supra note 21; *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985).

<sup>33</sup> *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, "Nuestra Señora De Atocha,"* 546 F. Supp. 919, 926.

<sup>34</sup> *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp.540, 544 (S.D. Fla. 1982).

<sup>35</sup> *Christopher Hill*, Maritime Law 6<sup>th</sup> ed. 2003.

Despite the inherent difficulties in salvaging delicate items from a historic wreck, the Applicant has done a commendable work by recovering all the artifacts. This will suffice to constitute ‘success.’

**B. The extent of the salvage rights of Heritage Inc under the 1995 Agreement**

1. Heritage Inc has the right to salvage without interference under jus gentium maritime law

As a salvor-in-possession, the Applicant is entitled to the right to salvage without interference.<sup>36</sup> What amounts to ‘interference’ in maritime law is determined on the basis of equity.<sup>37</sup> It depends on the nature of the salvage operation and the circumstances surrounding the operation. It is not limited to physical interferences, but covers every aspect which is necessary to facilitate the salvage operation.

Deep-sea salvage operation, similar to that carried out by Heritage Inc, involves great cost and extreme risks to the lives of its staff. Therefore, under salvage law, ‘interference’ includes (a) interference with the Applicant’s means of financing the operation under Clause 5 of the 1995 Agreement, (b) any actions which undermines the safety of the staff of Heritage Inc and (c) any disruptions with the schedule of the salvage operation.

2. In addition, Heritage Inc is entitled to right of non-interference as accorded to an internationalized contract

a. *The 1995 Agreement is an internationalized contract and is subjected to international law*

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<sup>36</sup> *R.M.S. Titanic v. The Wrecked and Abandoned Vessel* 9F. Supp. 2d 624 (1998), p. 635 (“Titanic II”); *Hener v. United States* 525 F. Supp. 350, p. 357; *The Edilio*, (1917) 246 F. 470, p. 474.

<sup>37</sup> See *Hener v. United States* and *The Edilio*, *ibid.*

A state is bound to respect an international agreement under the international customary legal principle of *pacta sunt servanda*.<sup>38</sup> This extends to ‘internationalized’ contracts that a state enters into with foreign investors and it will bring the contract under the protection of international law, which will strip the State of its defence of sovereign immunity.<sup>39</sup>

A contract is ‘internationalized’ if it provides for international arbitration for settlement of disputes instead of municipal courts.<sup>40</sup> The 1995 Agreement is such a contract as it provides for an international arbitration by the ICA and the parties had agreed to a foreign seat of arbitration, namely Ho Chi Minh.<sup>41</sup> In addition, the Respondent entered into the 1995 Agreement, not as a private contracting party, but as a state. By agreeing to international arbitration, the Respondent has agreed to refrain from exercising its sovereign prerogatives to interfere with the contract.<sup>42</sup>

Although both parties agreed to Rolgan law as the governing law of the 1995 Agreement, it shall not exclude the application of international law. This is because the Respondent’s actions, as exercises of its sovereign prerogatives, effectively deprive the Applicant any

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<sup>38</sup> *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Libyan Arab Republic*, 17 ILM 1 (1978), para. 51 (“TOPCO/CALASIATIC”); *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, 35 ILR at p. 181; *Revere Copper and Brass Incorporated v Overseas Private Investment Corporation*, Award of 24 August 1978, 56 ILR (1980) 258; Opinion of Phillip C. Jessup as appeared in Annex 6 to the TOPCO/CALASIATIC Memorial on the Merits; Wehberg, *Pacta Sunt Servanda*, 53 AJIL 775 (1959).

<sup>39</sup> *Ibid.*

<sup>40</sup> *TOPCO/CALASIATIC*, *supra* note 38; Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 AJIL 585, 596 (1961); *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, *supra* note 38 at p. 172.

<sup>41</sup> Clause 10 of the 1995 Agreement; Para. 24 of the Further Clarifications.

<sup>42</sup> *TOPCO/CALASIATIC*, *supra* note 38, para. 59-62; *The S.S Wimbledon*, [1923] PCIJ, ser. A, No. 1, at 5; Abdel-Wahab, *Economic Development Agreements and Nationalization*, 30 U. Cincinnati L. Rev. 418, 440-441 (1961); Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham L. Rev. 177, 224 (1959).

contractual remedy in municipal law.<sup>43</sup> International law must now come in to provide the Applicant with a remedy.

International law recognizes that a state has a duty to protect a foreign investor's rights and interests under a contract which provides for economic development.<sup>44</sup> The Applicant qualifies for such protection as it is in fact a legal person of foreign nationality under international investment law norms. In determining the nationality of an investor company, the tribunal is to give effect to the existence of foreign control, rather than the place of incorporation.<sup>45</sup> In the present case, Heritage Inc is to be treated as being of foreign nationality as the major shareholder and the person in control of the company, Mr. Bernard Bodd, is an Astorian.<sup>46</sup>

Further, the 1995 Agreement qualifies as an "economic development agreement." It has been recognized that contribution of a historical and cultural nature is considered as contribution towards the economic development of a host state.<sup>47</sup> Obviously, the 1995 Agreement provides such kind of long-term economic development for Rolga. On this basis, there is an added justification for the 1995 Agreement to come under the protection of international law.

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<sup>43</sup> *Waste Management, Inc. v. United Mexican States (II)*, (30 April 2004) Final Award, ARB(AF)/00/3; *Claim of Company General of the Orinoco (France v. Venezuela)*, (31 July 1905) Opinion of Umpire, reported in Jackson Ralston, ed., *Report of French-Venezuelan Mixed Claims Commission of 1902* (Washington: U.S. Gov., 1906) 322 at 362; *Shufeldt Claim (U.S. v. Guatemala)*, (1930), 2 RIAA 1079 (Award); D. O'Connell, *International Law*, vol. 2 (London: Stevens & Sons, 1970), at 986.

<sup>44</sup> *Amco v. Indonesia* (1992) 89 ILR 368; TOPCO/CALASIATIC, *supra note* 38 para. 45; confirmed by *Revere Copper & Brass, Inc. v. OPIC*, *supra note* 38

<sup>45</sup> *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389; *see also* International Centre for Settlement of Investment Disputes (ICSID) Convention and North Atlantic Free Trade Agreement (NAFTA), which provide for a broad principle of "foreign control" in determining the nationality of an investor company.

<sup>46</sup> Para 7 of the Moot Problem and para 22 of the Further Clarifications.

<sup>47</sup> *See Malaysian Historical Salvors v. Malaysia* (ICSID Case No. ARB/05/10) where ICSID interpreted investment in the context of economic development of a state to include cultural and historical contribution.

*b. Under an internationalized contract, Heritage Inc.'s right to non-interference is expanded to include other broader rights*

Through internationalized contracts, private parties acquired certain rights which can be enforced against states for the exercise of their sovereign powers.<sup>48</sup> Such rights to challenge the exercise of sovereign powers are justified because the basic attribute of state sovereignty to make international commitments entails the obligation to abide by such commitments.<sup>49</sup> These rights include (1) the freedom against expropriation by states, (2) entitlement to 'fair and equitable' treatment and (3) entitlement of respect of its legitimate expectation as a foreign investor.

Therefore, in addition to the right to salvage without interference under maritime law, the Applicant is entitled to such rights under the 1995 Agreement. Violation of these rights would constitute interference in international law, and the Respondent will have no defence of sovereign immunity.

**C. The actions of the Government of Rolga constitute interference with Heritage Inc's salvage rights under the 1995 Agreement**

The ratification of the UNESCO Convention on the Protection of Underwater Cultural Heritage ("UNESCO Convention") amounts to such interference because it interferes with Clause 5 of the 1995 Agreement.<sup>50</sup> Since Clause 5 provides for the distribution and selling of artifacts, it clearly falls within the meaning of 'commercial exploitation' as prohibited by Article

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<sup>48</sup> TOPCO/CALASIATIC, *supra note* 38, para. 48; Robert B. von Mehren and P. Nicholas Kourides, *International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases*, AJIL Vol. 75, No. 3 (Jul., 1981), pp. 476-552.

<sup>49</sup> TOPCO/CALASIATIC, *supra note* 38, para. 59-62; *The S.S Wimbledon*, *supra note* 42 at 5; Abdel-Wahab, *supra note* 42; Kissam & Leach, *supra note* 42.

<sup>50</sup> Appendix 1 of the Moot Problem.

2(7) of the Convention.<sup>51</sup> In the Rolgan monist system, the ratification of the Convention makes it automatically incorporated into municipal law. Consequently, the major means of financing the salvage operation is rendered incapable of performance.

Further, the 2001 Agreement interferes with the Applicant's share of artifacts as provided under Clause 5. Article 2 of the Guiding Principles<sup>52</sup> provides that all the artifacts must be "capable of reassembly to allow further statistical and scholarly analysis." Evidently, the provision is inconsistent with the selling and distribution of artifacts under Clause 5. Prior to entering into the 2001 Agreement, the Respondent did not inform the Government of Astoria of the commercial arrangement with the Applicant.<sup>53</sup> The 2001 Agreement itself did not envisage ownership and selling of the artifacts by the Applicant, other than distribution between Rolgan and Astorian museums.

In addition, considering the inherent risk of underwater salvage operation, allowing Aquatic View to carry out underwater operations at the same time with Heritage Inc. posed huge risks to the safety of those present at the site. As a result, Aquatic View's underwater trips threatened to disrupt the salvage operation.

It is submitted that these actions incur state responsibility for they (1) amount to expropriation; (2) were below the 'fair and equitable' standard as expected in international law; and (3) breached the Applicant's legitimate expectation as a foreign investor.

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<sup>51</sup> Article 2(7) and Rule 2 of the Annex to the *UNESCO Convention*.

<sup>52</sup> Appendix 2 of the Moot Problem.

<sup>53</sup> Para. 26 of the Further Clarifications.

1. The Government of Rolga’s actions amount to expropriation of Heritage Inc’s salvage rights under the Agreement

Indirect expropriation is defined as a “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.”<sup>54</sup> For the purpose of international law, expropriation is determined based on the consequence of a state’s actions.<sup>55</sup> The ratification of the UNESCO Convention and the signing of the 2001 Agreement amounted to expropriation as it deprives the Applicant of ownership and commercialization of the artifacts.

In addition to property rights, interference with contractual rights also amounts to expropriation as it is a taking of a person’s rights and benefits under a contract.<sup>56</sup> Under the 1995 Agreement, the Applicant has the right to non-interference with its salvage operation. Thus, the granting of permit to Aquatic View, which interferes with the Applicant’s salvage operation amounts to expropriation.

2. The conduct of Rolga was below the standard of “fair and equitable”

A State is in breach of an international obligation if it falls below the standard of “*fair and equitable*” in its treatment of foreign investors. The general principles of “fair and equitable treatment” is co-extensive with the rule on “international minimum standard” that is normally

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<sup>54</sup> *Metalclad Corporation v. Mexico*, (30 August 2000) Award, ARB(AF)/97/1, 16 *ICSID Review-Foreign Investment Law Journal* 165 (2001), at § 103.

<sup>55</sup> Michael Reisman & Robert Sloane, “*Indirect Expropriation and Its Valuation in the BIT Generation*” (2003) 74 *B.Y.I.L.* 115 at 121.

<sup>56</sup> *Case concerning certain German interest in Polish Upper Silesia (Germany v. Poland)*, (1926) P.C.I.J. Ser. A, No. 7; *Phillips Petroleum Co. v. Iran*, (1989) 21 *Iran-U.S.C.T.R.* 79 at §. 76.

present in investment treaties.<sup>57</sup> It consists of a State's consistent and transparent behaviour, free of ambiguity that involves an obligation to grant and maintain a stable and predictable legal framework, which is necessary to fulfill the legitimate expectations of the foreign investor.<sup>58</sup>

The Respondent failed to observe the standard. The change in policy came merely five years (in 2000) after the 1995 Agreement was entered into. The abrupt change left the Applicant uncertain as to the true state of its investment. No assurance was provided by the Respondent that the Applicant's rights under the Agreement will continue to be respected, notwithstanding that it might be inconsistent with the new policies introduced by the government. The Respondent thus failed to provide a stable and predictable legal framework to the Applicant, falling below the standard of "*fair and equitable*."

3. Lastly, there was a breach of Heritage Inc's legitimate expectation

The legitimate expectations of an investor are assessed from the investor's point of view at the time the investment was made.<sup>59</sup> The relevant factors in making this determination are the activities carried out, the corporate purpose of the investment, as well as the terms and conditions that were initially applicable to the investment.<sup>60</sup> In the present case, the Applicant is entitled to a legitimate expectation that its investment would generate a long term profit, free from interference by governmental actions.

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<sup>57</sup> See NAFTA Free Trade Commission, Interpretative Note of 31 July 2001; *Pope and Talbot v. Government of Canada*, (10 April 2001) Award on the Merits, NAFTA Tribunal; see also Patrick Dumberry, "*Pope & Talbot inc. v. Government of Canada – Fair and Equitable Treatment for Investor under International Law*" (2002) 20:3 A.S.A. Bull. 453 United States, *Model Bilateral Investment Treaty* (2004).

<sup>58</sup> *LG&E v Argentina*, Decision on Liability of 3 October 2006, ICSID no. ARB/02/1; *Azurix Corp v Argentine Republic*, Award of 14 July 2006, ICSID Case no. ARB/01/12 (2006) ; and *Saluka Investments BV (the Netherlands) v The Czech Republic (Partial Award)*, Award of 17 March 2006 , UNCITRAL.

<sup>59</sup> *Técnicas Medioambientales TECMED S.A. v United Mexican States*, Award of 29 May 2003, ICSID Case no. ARB(AF)/00/2.

<sup>60</sup> *Ibid.*

When the 1995 Agreement was entered into, the Applicant had a legitimate expectation that the Respondent would do what was proper in order to facilitate the proper execution of terms of the Agreement. The Agreement was to continue for twenty years,<sup>61</sup> and it involved not merely the salvage of Coeur de l' Ocean, but also other ancient wrecks that are to be found off the coast of Rolga. Hence, at the time of the Agreement, it is reasonable and justified for the Applicant to expect that their investment would not be interfered with by governmental actions.

Nevertheless, their legitimate expectations were breached when the Respondent imposed measures that rendered the commercialization of the artifacts, as provided in the Agreement, incapable of being performed. The Applicant had invested a substantial amount of time and money, and expected a fruitful return. Their legitimate expectation was breached due to the Respondent's interference.

### **III. HERITAGE INC HAS EXCLUSIVE RIGHTS PHOTOGRAPHING AND DOCUMENTING COEUR DE L'OCEAN**

#### **A. Heritage Inc has exclusive rights of photographing and documenting under salvage law**

1. The salvage rights of Heritage Inc entails the exclusive right to photograph and document Coeur de l' Ocean

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<sup>61</sup> Clause 8 of the 1995 Agreement

As a salvor-in-possession of a historic wreck, Heritage Inc has the exclusive right to photograph and document Coeur de l' Ocean.<sup>62</sup> It forms part of its right to salvage without interference, in line with the established policy of historical salvage law.

*a. Policy of historical salvage law justifies the inclusion of exclusive rights of photography and documenting*

Recent cases that deal with historic wrecks have shown that the policy of salvage law includes consideration of the historical significance of shipwrecks. In determining the salvage rights to be awarded, the admiralty courts have observed that archaeological preservation constitutes “a significant element to be considered when salvage rights are sought.”<sup>63</sup> Moreover, in affirming an unprecedented salvage award in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, the salvor’s exceptional efforts to preserve the historic value of the S.S. CENTRAL AMERICA’s artifacts for scientific and educational purposes was emphasized on.<sup>64</sup> In furtherance of this policy, salvage law recognizes a salvor’s exclusive right to photograph and document a historic wreck.

However, in *R.M.S. Titanic v. Haver*,<sup>65</sup> the U.S. Court of Appeals objected to the inclusion of such rights as it is contrary to the purpose of salvage law; to encourage the rescue of ships and their cargo in distress.<sup>66</sup> The exclusive right to photograph was argued to allow a salvor

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<sup>62</sup> *Titanic II*, *supra* note 36

<sup>63</sup> *MDM Salvage v. Unidentified, Wrecked & Abandoned Sailing Vessel* (1986) 631 F. Supp. 308, at p. 310 (“MDM Salvage Case”)

<sup>64</sup> *Columbus-America Deiscovery Group v. Atlantic Mutual Insurance Co.* 974 F. 2d. 450, at p. 573

<sup>65</sup> 171 F. 3d 943 (1999) (“*Titanic v. Haver*”)

<sup>66</sup> *Ibid* at p. 969

to benefit from the salvage work before the actual recovery of the property itself.<sup>67</sup> Therefore, it was said that the inclusion of such right does nothing to serve the aforesaid purpose of salvage law. Any salvage rights then are restricted to a maritime lien imposed on the salvaged property and the possessory rights to facilitate the enforcement of the lien.<sup>68</sup>

Nevertheless, historical salvage must be distinguished from traditional salvage which concerned the U.S. Court of Appeals in *Titanic v. Haver*.<sup>69</sup> Traditional salvage seeks to return property to the commercial stream.<sup>70</sup> Historical salvage, on the other hand, is concerned with the recovery and preservation of artifacts for archaeological study and public education.<sup>71</sup> As historic wrecks present important evidence of the past, archaeological preservation in all its form including photography and documentation must be protected.<sup>72</sup> Historic wrecks “*constitute a window in time [and thereby] provides a unique opportunity to create a historical record of an earlier era.*” Therefore, any form of archaeological preservation including photography and documenting is very important.<sup>73</sup>

Further, the exclusive right to photograph and document presents a method to generate income to fund the salvage operation. The prospect of such income is justified to encourage those who take on an extremely risky, complex and expensive task to recover artifacts from deep

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<sup>67</sup> *Danner v. United States*, 99 F. Supp. 880 (S.D.N.Y. 1951); *The Barque Island City*, 66 U.S. (1 Black) 121, 17 L. Ed. 70 (186).

<sup>68</sup> *Titanic v. Haver*, *supra* note 64 at p. 963

<sup>69</sup> *Supra* note 64.

<sup>70</sup> *Danner v. United States*, *supra* note 66.

<sup>71</sup> D.K. Abbass, “A Marine Archaeologist Looks at Treasure Salvage” 30 J.Mar. L. & Com. 261, 262-63 (1999)

<sup>72</sup> Stern, Justin S., “Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights Historic Shipwrecks”, 68 Fordham L. Rev.(2000) 2489, p. 2537.

<sup>73</sup> *MDM Salvage Case*, *supra* note 63 atp. 310

seabed<sup>74</sup> in addition to the need to recoup their investments. *Titanic v. Haver* failed to give due consideration to the significance of the photographs as a source of income for the salvor.

The need for such income is compounded by the fact that historical salvors are more often than not unable to benefit from maritime lien to compensate their investment. Historical salvage, unlike commercial salvage, involves recovering artifacts, the value of which lies in its historical stature rather than its commercial value.<sup>75</sup> In fact, most artifacts do not have commercial value.<sup>76</sup> As such, the sale of these artifacts would not provide adequate return when the salvors enforce his *in rem* action. Furthermore, due to long passage of time, the owners of the artifacts are usually not ascertainable or difficult to find. As a result, any *in personam* action to recover compensation would be impractical at the very least and impossible in most cases.

It has been recognized that “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.”<sup>77</sup> Permitting another ‘salvor’ to photograph and document the wreck diminishes the ability of the salvor to generate income. Most operations of this type involve heavy cost and complex technologies. Locating the wreck and the recovery of its artifacts usually

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<sup>74</sup> *Titanic II*, *supra* note 36, at p.636; C.J.S. Forrest, “*Salvage Law and the Wreck of the Titanic*” [2000] LMCLQ Part 1 February, p. 11; *Alexander Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic* [1999] AMC 69 at p. 2499 where it is recognized that “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.”

<sup>75</sup> David J. Bederman, “*Historic Salvage and the Law of the Sea*”, 30 U. Miami Inter-Am. L. Rev. 99, 102 (1998)

<sup>76</sup> Stern, *supra* note 72

<sup>77</sup> *Alexander Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, *ibid.*

involves arduous and delicate processes.<sup>78</sup> As such, an alternative means of generating income is needed to encourage recovery and preservation of historic wrecks and their artifacts.<sup>79</sup>

The grant of exclusive rights to protect salvors' profits assures that these operations are less likely to become bankrupt.<sup>80</sup> Granting salvage rights to a financially solvent salvor gives the courts greater control over the salvage operations, because courts need only act upon one entity. A succession of failed businesses wrestling for and ceding possession of a wreck may cause confusion, impede the salvage, and damage the artifacts.<sup>81</sup>

In addition, the extent of the right to salvage without interference granted by admiralty law is tailored to adequately protect the salvage operation.<sup>82</sup> Due to the nature of deep sea exploration, allowing others to enter the wreck site would be hazardous to the safety of the Applicant's staff and interfere with its salvage operation.<sup>83</sup> Photography and documenting rights to the exclusion of others would prevent such hazardous interference. Besides, by virtue of these rights, the Applicant could license some parties to take photographs whilst being able to effectively supervise and regulate entry into the site.

Therefore, the denial of exclusive photography and documenting rights would be contrary to the policy of historical salvage and the inherent equity of salvage law.<sup>84</sup>

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<sup>78</sup> *Titanic II*, *supra* note 36 at p. 636

<sup>79</sup> C.J.S. Forrest, *supra* note 72.

<sup>80</sup> Stern, *supra* note 72.

<sup>81</sup> *Titanic II*, *supra* note 36.

<sup>82</sup> Stern, *supra* note 72.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, *supra* note 33; C.J.S. Forrest, *supra* note 72 at p. 10: "traditional salvage law, however, is not a rigid system of law. It is capable of adapting to new situations"

*b. It further follows that Heritage Inc is justified under salvage law to have exclusive photography and documenting rights*

Before commencement of the salvage operation, the Applicant had conducted years of research and survey locating Coeur de l' Ocean. The recovery process involved high expertise and complex machinery. Altogether the task lasted for more than a decade. Its effort to promote educational awareness (via a documentary deal with International Broadcasting Company) reflects the Applicant's noble intention serve the public interest in the wreck. As such, the policy of historical salvage as discussed earlier applies to the Applicant.

Further, the fact that the salvage operations incur substantial costs shows that the Applicant needs a secure means of obtaining income to enable the operation to proceed smoothly.

2. Heritage Inc's exclusive rights of photography and documentation does not infringe the right to free navigation

It is further submitted, that recognition of exclusive rights over the wreck and its site does not interfere with the navigation of vessels in the seas.<sup>85</sup> Freedom of navigation guaranteed under international law only applies to the high seas. Article 86 of UNCLOS provides that the high seas do not include the territorial sea of a State. In fact, the sovereignty of a coastal State extends over the territorial waters, thus entitling the law of the State to regulate its territorial sea.<sup>86</sup> In the territorial sea, foreign vessels only have the right to innocent passage.<sup>87</sup>

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<sup>85</sup> *C.f. Titanic v. Haver, supra note 64*

<sup>86</sup> Article 2(1) and 21 of *UNCLOS*

<sup>87</sup> Article 17 of *UNCLOS*

In the present case, the wreck lies within 12 nautical miles from the Rolgan coastline.<sup>88</sup> It follows that right of free navigation does not apply at the site of the Coeur de l' Ocean. Therefore, the granting of the exclusive rights would not infringe the rights of foreign vessels to free navigation.

**B. Heritage Inc is entitled to the enjoyment of exclusive photography and documenting rights under the 1995 Agreement**

1. Contextual interpretation of the 1995 Agreement

In an interpretation of a contract, the terms must not be interpreted in isolation from its 'matrix of facts'.<sup>89</sup> It must be interpreted as what it would mean to a reasonable man with the background knowledge of the parties.<sup>90</sup> This is to protect a party whose understanding and expectation is reasonable against the other party who had not interpreted the term reasonably.

It is common practice that historical salvage work involves photographing and documenting the wreck.<sup>91</sup> In the present case, the 1995 Agreement had set out that the purpose of arrangement with the Respondent was for the '*conservation and documentation*' of the shipwreck.<sup>92</sup> Therefore it is apparent for both the Parties that as an appointed salvor the Applicant is expected to be able to photograph and document the Coeur de l' Ocean without any form of interference.

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<sup>88</sup> Para. 1 of Further Clarifications

<sup>89</sup> *Prenn v Simmonds (1971)* 3 All ER 237 (House of Lords)

<sup>90</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 , p. 912-913.

<sup>91</sup> *Titanic II*, *supra* note 36 at p. 635

<sup>92</sup> Clause 2 of the 1995 Agreement

Moreover, the Applicant also has a legitimate expectation that it has the sole right to make profit from their photographs and documentation of the wreck. Clause 6 of the Agreement clearly envisages some form of profit-making by the sale and marketing of merchandise related to Coeur de l' Ocean. As the Clause excludes the sales and marketing of artifacts, the Applicant would therefore have to rely on photographs and documentation of the wreck to generate profit. The television documentary deal with International Broadcasting Company is evidence of the Applicant's reliance. Without these exclusive rights, the Applicant's photographs and documentation of the wreck would lose its market value as it will have to compete with other similar pictures.

Therefore, upon a reasonable interpretation of the terms of the 1995 Agreement, the Applicant has a legitimate expectation that it shall have the exclusive right to carry out photography and documentation work free from any interference as well as the exclusive right to benefit from its work.

#### **IV. THE CALCULATION OF PROFITS AND DISTRIBUTION OF ARTIFACTS BETWEEN THE PARTIES SHOULD BE BASED SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES.**

##### **A. Salvage principles applies despite the existence of the 1995 Agreement**

The existence of a contract does not exclude the general principles of salvage law and the contract should be construed, not according to common law principles, but in accordance with principles of salvage law.<sup>93</sup>

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<sup>93</sup> *The Beaverford v. The Kafiristan* [1938] A.C. 136

In any event, salvage rights can exist independent of a contractual arrangement provided it was done voluntarily.<sup>94</sup> ‘Voluntary’ here means that it is not attributable either to a pre-existing obligation or a legal duty. Thus, the existence of contractual obligations does not transform a salvor from a volunteer to a contractor, provided that the contract was concluded after the need for the services arose.<sup>95</sup> Thus, the 1995 Agreement does not negate the aspect of ‘voluntary’ in our case as the Agreement was only entered into after the circumstances necessitating salvage arose.

The International Convention on Salvage 1989 (“1989 Salvage Convention) applies in the instant situation to grant an award based on salvage legal principles. Article 6 states that the Convention shall apply to any salvage operations save to the extent that the contract otherwise provides. The 1995 Agreement does not exclude the Convention in any way whatsoever. Thus, the Convention continues to apply.

**B. Salvage legal principles should replace Clause 5**

1. Clause 5 is to be annulled based on the 1989 Salvage Convention

Based on Article 7(b) of the 1989 Salvage Convention, a term of a contract as to payment can be annulled or modified if payment under the contract is in an excessive degree too small for the services rendered.

Clause 5 should be departed from because of a change in circumstances that have now rendered the payment too little. Due to the Respondent’s action of allowing Aquatic View to photograph and videotape the wreck, it has jeopardized the Applicant’s documentary deal and

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<sup>94</sup> *The Unique Mariner* (No. 2) [1979] 1 Lloyd's Rep. 37.

<sup>95</sup> Hill, *supra* note 35; Martin Davis and Anthony Dickey, *Shipping Law*, 3<sup>rd</sup> ed. 2004

merchandizing income. This interfered with their means of financing the salvage work as had been earlier contemplated. Without this additional income, the distribution has become too little. The Applicant has spent more than ten years of effort, time and resources, and it is unfair that the Respondent acquires 60% of the profits for the discovery after prejudicing the Applicant's income. Thus, the Clause must be annulled and replaced with salvage legal principles to guide the distribution of income.

2. Clause 5 is frustrated due to UNESCO Convention

Article 2 *para* 6 of the UNESCO Convention states that, “recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation,” while *para* 7 states “that underwater cultural heritage shall not be commercially exploited.” Further, Rule 2 of the Convention prohibits trading and selling of underwater cultural heritage.

Clause 5 of the 1995 Agreement seeks to sell the artifacts and distribute them to the Applicant for further sale. Such arrangement would subject the artifacts to irretrievable disposal to the various persons to whom the property is sold contrary to Article 2 and Rule 2 of the UNESCO Convention.

As a monist state, the UNESCO Convention becomes automatically incorporated into Rofgan law upon ratification. Thus, Clause 5 is frustrated as the performance has become unlawful.<sup>96</sup> The Respondent, as the party who has received benefit from the Agreement is now legally responsible to restore the parties to their original position.<sup>97</sup> However, *restitutio in*

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<sup>96</sup> Section 57(2) Contract Act 1950; *see also Public Finance Berhad v. Ehwan bin Saring* [1996] 1 MLJ 331

<sup>97</sup> Section 66 of the Contract Act 1950

*integrum* is no longer possible in the present case<sup>98</sup> as the artifacts have been salvaged, and some have been auctioned off. As such, the Applicant is now left without a remedy. As the 1995 Agreement is a salvage contract and the Applicant has successfully completed its salvage operations, equitable considerations warrant salvage legal principles to be invoked to provide them with a remedy.

**C. Heritage Inc's success in its salvage work entitles it to remuneration based on salvage legal principles.**

1. The salvage work done by Heritage Inc. is successful

In maritime law of salvage, remuneration is given to persons who render assistance to a salvage object, saving it in whole or part from impending peril on the sea, or in recovering such property from actual loss, as in the cases of shipwreck, derelict, or recapture. Success in whole or in part is essential to the claim, because without it, no compensation is allowed.<sup>99</sup> In our present facts, the Applicant's salvage operations have resulted in success, in part if not in whole. Further, the salvage has yielded a useful outcome, thus satisfying the condition for salvage reward as provided in 1989 Salvage Convention.<sup>100</sup>

2. The measure of award based on salvage legal principles

In determining the amount of a salvage award, the courts traditionally look to the six factors in *The Blackwall*. The traditional *Blackwall* factors are modified when dealing with historic wrecks, due to the fact that it requires expensive modern technology and arduous effort

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<sup>98</sup> *Clarke v. Dickson* (1858) EB & E 148

<sup>99</sup> *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869)

<sup>100</sup> *1989 Salvage Convention*, Article 12, paragraph 1

is generally required just to locate them. The actual salvage operation is also extremely expensive, difficult and very dangerous.<sup>101</sup> The fact that the Applicant has invested money and recovered no returns for over ten years is also a factor to be considered. Thus, the award will be very substantial.

Applying the criteria for fixing a reward,<sup>102</sup> one of the factors that should be considered is that the value of the salvaged property was US\$616,298,000. Despite the extensive excavation and salvage works, there was no evidence of any damage to the environment. This illustrates the fact that the Applicant has invested much skill, effort and capital in ensuring the proper execution of the salvage work. They have also been highly successful in carrying out the salvage operations as most of the items from the wreck have been successfully salvaged.

The Applicant has also put in efforts into educating the public by virtue of its documentary deal. This shows its civic awareness, and its recognition that public awareness is necessary for the preservation and conservation of artifacts. The Respondent's actions have jeopardized this, not only causing a financial loss to the Applicant, but also to society generally.

Further, when the discovery was a derelict (or a wreck), on general principles of salvage, the amount of reward is to be raised.<sup>103</sup> The reward often consists of a generous percentage of the value of the salvaged vessel or part of the proceedings from the sale or auction of recovered treasures and artifacts.<sup>104</sup> The amount that a salvor is entitled to is not based on an hourly rate, but as a reward for ensuring the safety of property at sea. This because of a strong public policy

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<sup>101</sup> *Titanic II supra* note 36 and *Titanic v. Haver supra* note 64

<sup>102</sup> 1989 Salvage Convention, *Article 13*

<sup>103</sup> *The Janet Court*, Probate Divorce and Admiralty Division, 1897 P.59

<sup>104</sup> Christopher R. Bryant, "The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks" 65 ALB. L. REV. 97, 100 n.21 (2001)

in favour of encouraging salvors to save and restore salvagable objects, resulting in the award being in the form of a “reward” and not quantum meruit.<sup>105</sup> Therefore, the salvage award to the Applicant should be more than what was stated in the Agreement.

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<sup>105</sup> *Columbus America Discovery Group v The Unidentified Wrecked And Abandoned Sailing Vessel Believed To Be the SS Central America* 1990 AMC 2409

**PRAYER FOR RELIEF**

On the basis of the foregoing facts and points of law, Heritage Inc. respectfully requests this Arbitral Tribunal to declare that:

- I. Government of Rolga has interfered with Benevolent Heritage Inc's salvage rights and performance under the 1995 Agreement when it entered into Agreement with Astoria in 2001 and ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operator to organize and make profits from visiting activities to the side including taking photographs;
- II. Heritage Inc. has exclusive rights of photographing and documenting of the Coeur de l' Ocean; and
- III. The calculation of profits and/or distribution of artifacts between the Parties to be made solely on the basis of salvage legal principles.

Respectfully submitted,

Counsels for the Applicant.