

LAWASIA MOOT COMPETITION 2009

IN THE INTERNATIONAL CENTER OF ARBITRATION

2009

THE CASE CONCERNING COEUR de l' OCEAN

BENEVOLENT HERITAGE INC.

Applicant

v.

THE GOVERNMENT OF ROLGA

Respondent

MEMORIAL FOR THE RESPONDENT

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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 Center for Arbitration (KLRCA), to be read together with Article 1 of the UNCITRAL Arbitration Rules 1976. The Parties shall accept any decisions of the Arbitral Tribunal as final and binding upon them and shall execute it in its entirety and in good faith.

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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 the 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 site including taking photographs.

II.

Whether Benevolent Heritage 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 1800, Astoria, a former colonial empire from the West had conquered Zamzala, an ancient trading city which is now a territory of Rolga. The Astorian army, led by Captain Van Cleef, had plundered the palace of Zamzala and the city of its wealth in the form of royal jewelry, silk, spices and other riches. They left on the ‘Coeur de l’ Ocean’ vessel which carried other commercial cargo and war booty as well, but sunk en route to another city due to the monsoon.

Rolga gained independence from Astoria on the 7 November 1959. Over the last 50 years, its economy has thrived on agriculture and tourism, particularly on eco tourism due to the vast World War II remnants and other war wrecks in its maritime waters. In the 1980s however, some wrecks in the Rolgan waters became targeted by illegal treasure hunters, jeopardizing the historical and cultural value of the artifacts.

DISCOVERY OF COEUR DE L’ OCEAN

In 1990, Mr Bernard Bodd, a reputable Astorian salvor and the major share holder in Heritage Inc.. submitted a proposal to the Rolga Cultural Heritage Committee for the recovery of historical wrecks in the region. After much research, a wreck was discovered in 1993, confirmed to be Coeur de l’ Ocean, approximately 12 nautical miles off the coast of Rolga. Heritage Inc. recovered some silver coins from the vessel to convince the Government to approve the recovery proposal. The coins were described by government archaeologists as ‘rare

items' in mint condition. The National Geographic described the find as 'bedazzling' and estimated it to be worth more than US\$1 billion.

THE APPROVAL OF THE PLAN TO RECOVER COEUR DE L' OCEAN

The Government eventually approved the recovery and signed the 'Partnering Agreement Memorandum' on the 27 September 1995. The memorandum contained the project plan, including steps for preservation and conservation, fees and deposits, sharing arrangement, merchandising income as well as conditions for termination. Today, many artifacts have been recovered from the wreck. Some have been auctioned overseas to partly support the cost of the project. The Government also showcased some of the artifacts recovered in the National Museum in 2000.

THE CHANGE IN POLICY

A new law was introduced in 2000 to protect historical and cultural wrecks and to deal with the problem of looting and destruction of cultural property. Subsequently, the Government of Rolga adopted the UNESCO Convention on the Protection of the Underwater Cultural Heritage in November 2001. The Convention was however only formally ratified by Rolga in 2005 and officially came into force in 2009. The Government also introduced a new economic policy with the goal of ensuring sustainable use of its cultural resources. Riska Benti, Minister of Rolga Cultural Heritage, in her speech before the Rolga Cultural Heritage Committee noted the lack of legal mechanism to protect cultural property and stated that every civilized nation must protect its cultural heritage from exploitation as it was destroying the "very capsule containing our history".

Following this, the Government of Rolga entered into the ‘Protection of Astorian Wrecks’ Agreement with Astoria in 2001. In the Agreement, Astoria transferred all its rights and interest in Astorian ancient vessels in and off the coast of Rolga to the Government of Rolga. In return, the Government of Rolga recognized that Astoria had a continuing interest historically and culturally in the items recovered.

AQUATIC VIEW

Aquatic View, a tour operator had been given a permit by the Government to organize underwater trips to view the vessel, charging customers a price of US\$ 20,000 per person. The operator took photographs and made video clips of the wrecks to use only as promotional materials. In addition, they had engaged a songwriter to write a song entitled “Cour de l’ Ocean” and the CD’s were marketed as souvenirs. These issues were brought by Heritage Inc. as a complaint to the Rolgan Historic Monument Executive Agency. They were unable to deal with the issue at that point as they were understaffed.

THE DISPUTE

Recent developments have thus resulted in Heritage Inc. reconsidering their position under the contract. They requested that the Agreement be brought to an end, as they believed it would not benefit the company. Attempts at finalizing the distribution of artifacts or sale via a joint marketing plan have failed. The situation has been worsened by unsubstantiated allegations made by Heritage Inc. as to unfair distribution. The dispute is brought to the International Center of Arbitration.

SUMMARY OF PLEADINGS

I. The International Center for Arbitration (“ICA”) has jurisdiction over the dispute between Heritage Inc. and the Government of Rolga by virtue of Clause 10 of the Partnering Agreement Memorandum (“the 1995 Agreement”). Clause 10 is a valid arbitration agreement in law and it gives a very wide jurisdiction to ICA over any disputes between the Parties. Rolgan law, which is in *pari materia* with Malaysian law, shall be the applicable law in the disputes. Case law from other common law countries, international treaties, cases from international tribunals as well as domestic case law and state practice of other nations will be cited as Rolga is a monist state with a common law tradition.

II. The Government of Rolga has not interfered with Heritage Inc.’s salvage rights either under or independent of the 1995 Agreement as Heritage Inc.’s rights were not that of ‘salvage’. Further, the Government of Rolga’s acts of entering into an agreement with Astoria, ratifying the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage and allowing other tour operators to organize wreck diving to the site do not constitute interference. Such acts are within Rolga’s sovereign rights. In the alternative, the actions do not affect the 1995 Agreement. In any case contractual interference *per se* does not incur State responsibility. Lastly, these actions are justified on grounds of public benefit and were not short of ‘fair and equitable’.

III. Heritage Inc. does not enjoy exclusive rights of photographing and documenting of the Coeur de l’ Ocean as salvage rights do not include such rights. Additionally, salvage rights cannot be extended to include these exclusive rights. In the event that exclusive rights of photography and documentation are capable of constituting salvage rights, there is no justification to grant these rights to Heritage Inc. Furthermore, any grant of exclusive rights to

Heritage Inc. will be inconsistent with the UNESCO Convention and Rolgan law. In addition Heritage Inc. has no legitimate expectation under the 1995 Agreement for the enjoyment of exclusive photography and documenting rights based on the literal and contextual interpretation of the Agreement. Lastly, Heritage Inc. does not have any intellectual property rights over Coeur de l' Ocean to justify exclusive rights to photograph and document the wreck

IV. The distribution of artifacts solely on the basis of salvage legal principles was not envisaged in the 1995 Agreement. This is because the Agreement is not a salvage contract and hence, should not be subject to salvage legal principles. In any event, the terms of the Agreement are to be given effect as Parties are strictly bound by the terms of the 1995 Agreement. Further, Heritage Inc. cannot invoke the 1989 Salvage Convention to modify Clause 5. Heritage Inc. thus should receive 40%, while the government of Rolga should receive 60% of the relative share of the artifacts. However, due to the negligence of Heritage Inc. the amount of compensation due under the contract should be modified to reflect the losses.

PLEADINGS

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

A. Source of jurisdiction

The International Centre for Arbitration (“ICA”) has the jurisdiction to arbitrate the “Questions Presented”¹ as a result of Clause 10 of the Partnering Agreement Memorandum² (“the 1995 Agreement”). The Arbitral Tribunal has the authority to rule on its own jurisdiction. The decision is final and binding on the Parties.³

B. Arbitration clause

1. The governing law of the arbitration clause

The governing law of the arbitration clause shall be Rolgan law as agreed to by the Parties.⁴ Notwithstanding the separability of an arbitration clause, there is a strong presumption that the same law should apply for both the main agreement and the arbitration clause unless there is an express choice to the contrary.⁵

¹ See page XVII of this Memorial.

² Appendix 1 of the Moot Problem.

³ 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.

⁴ Clause 9 of the 1995 Agreement.

⁵ *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*, 3rd Edition Sweet & Maxwell 1999, para.3-35 – 3-38.

Rolgan law is *pari materia* with Malaysian law on all issues covered.⁶ Therefore the Malaysian Arbitration Act 2005 and common law⁷ are referred to as authorities of Rolgan law.

2. Validity of arbitration clause

Clause 10 is a valid arbitration agreement as it is in writing and it concerns a legal relationship between the Parties.⁸ Furthermore, the agreement is worded clearly, leaving no ambiguity with respect to the intention of the Parties and their choice of forum.⁹

3. Scope of arbitration clause

On a true interpretation of the arbitration clause, Clause 10 gives ICA a very wide jurisdiction over any disputes between the Parties.¹⁰ Therefore, the arbitrability as mutually agreed by the Parties is wide enough to cover the present dispute.¹¹

C. **Applicable law**

Since both the Parties have expressly agreed for Rolgan law to govern the agreement,¹² Rolgan law shall be the applicable law to the disputes presented before the Arbitral Tribunal. Case law from other common law countries, especially that of the United Kingdom will be cited

⁶ Para 8 of the Further Clarifications to the Moot Problem (“Further Clarifications”).

⁷ Section 3 and 5 of the Civil Law Act 1956.

⁸ Section 9 of the Arbitration Act 2005; Article 7 of UNCITRAL Model Law.

⁹ 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; *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.

¹⁰ *Ashville Investments Ltd. v. Elmer Contractors* 10 Con LR 72.

¹¹ *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.* [1942] 1 All ER 337 (House of Lords).

¹² Clause 9 of the 1995 Agreement.

as authorities of common law and equity principles.¹³ As Rolga is a monist state,¹⁴ international treaties, cases from international tribunals as well as domestic case law and state practice of other nations will be cited as sources of international law and general principles of law.¹⁵

II. THE GOVERNMENT OF ROLGA HAS NOT INTERFERED WITH THE APPLICANT'S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ENTERING INTO AGREEMENT WITH ASTORIA IN 2001, RATIFYING THE 2001 UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE AND BY ALLOWING OTHER TOUR OPERATORS TO ORGANIZE WRECK DIVING TO THE WRECK SITE INCLUDING THE TAKING OF PHOTOGRAPHS

A. Heritage Inc. did not have any salvage rights arising either under, or independent of the 1995 Agreement

1. Coeur de l' Ocean, as a military vessel is not subjected to the law of salvage

As a military vessel, the law of salvage has no application to Coeur de l' Ocean. The application of the rule that excludes warships from salvage is embodied in the 1989 Salvage Convention. Article 4(1) of the 1989 Salvage Convention provides for a broad presumption that the law of salvage do not apply to warships.¹⁶ If salvage law is applied to a warship, the salvor will be able to obtain a *maritime lien* over the vessel which will then bind the operation of

¹³ Section 3 and 5 of the Civil Law Act 1956.

¹⁴ Para 7 and 8 of Further Clarifications.

¹⁵ Article 38(1) of the Statute of International Court of Justice.

¹⁶ The broad application of the rule was affirmed by the International Maritime Organization (IMO) in *Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage*, UNESCO Doc. CLT-96/CONF. 605/6 at p. 12, para 48.

sovereign immunity. This is inconsistent with Article 35 of United Nations Convention on the Law of the Sea (“UNCLOS”) which guarantees the immunity of State vessels. Further, *opinio juris* and consistent practice by States makes the non-application of salvage to sunken military vessels a *jus gentium*.¹⁷

2. In the alternative, Rolga was not the legal owner of Coeur de l’ Ocean when the 1995 Agreement was entered into and therefore could not grant Heritage Inc. salvage rights

A person who is not owner of the legal title to a property cannot transfer or assign any rights arising in the property as he cannot give what he does not have (*nemo dat quad non habet*). In the present case, Coeur de l’ Ocean was a part of the Astorian armada when it sank, and it continued to be owned by Astoria up until Astoria transferred its legal title to the Respondent in the 2001 Agreement. Therefore, when the 1995 Agreement was entered into, it conferred no salvage right to the Applicant as the Respondent was not the owner of the wreck.

a. *The doctrine of sovereign immunity prevented Rolga from obtaining legal title to Coeur de l’ Ocean at the time of the 1995 Agreement*

Warships and other vessels belonging to a State are protected with sovereign immunity¹⁸ and therefore entitled to the presumption against abandonment.¹⁹ This immunity has been extended to salvage of State vessels, where a State holds indefinite title to its sunken vessels.²⁰

¹⁷See also Patrick J. O’ Keefe & James A.R. Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 Ocean Development & International Law (1994) at 408, where “the laws of salvages relates solely to the recovery of items endangered by the sea; it has no application to saving relics”; Recommendation 848 (1978) of 4 October 1978, of the Parliamentary Assembly of the Council of Europe; Article 14 of the 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea.

¹⁸UNCLOS, Article 35.

¹⁹ See *United States v. Steinmetz*, 763 F.Supp. 1293 (D.N.J. 1991), *aff’d* 973 F.2d 212 (3d Cir. 1992), *cert. denied* 113 S.C. 1578 (Mar. 22, 1993); Geoffrey Brice, *Maritime Law of Salvage*, Sweet & Maxwell at 146-150.

Although Coeur de l' Ocean was discovered within the 12 nautical miles limit, rendering it within the Respondent's territorial jurisdiction,²¹ the Respondent does not automatically obtain any rights in the vessel as it is an Astorian military vessel²² that is protected by sovereign immunity. Such immunity still subsists after the vessel has sunk, as it is treated as the flag State's property.²³ Thus, it must be shown that Astoria has abandoned the vessel²⁴, and that as a result, the Respondent has obtained an effective title to it.

b. Astoria had not abandoned Coeur de l' Ocean at the time of the 1995 Agreement

Mere passage of time following the sinking of a ship will not be enough to establish abandonment, especially when technology only recently becomes available for its location and salvage.²⁵ Furthermore, there is a consistent State practice and *opinio juris* of non-abandonment where State vessels are concerned,²⁶ rendering it a rule of international customary law²⁷ that State vessels are presumed not to have been abandoned.

²⁰ *US v. Steinmetz*; Craig Forrest, *A New International Regime for the Protection of Underwater Cultural Heritage*, ICLQ Vol. 51, No. 3 (Jul 2002), at 527; Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L.J. 313 2004-2005 at 334-336; Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 UNIV. MIAMI INTER-AM. L. REV. 101, 110-11 (2002).

²¹ UNCLOS, Article 3.

²² Para 1 of the Moot Problem and Para 5 of the Further Clarifications.

²³ J. Ashley Roach, *Sunken Warships and Military Aircraft*, Office of the Legal Advisor, U.S Department of State; 29 JAPANESE ANN. INT'L L. 186 (1986) (Soviet note of Oct. 3, 1980, regarding the *Admiral Nakhimov* sunk on May 28, 1905); 1958 High Seas Convention, articles 8-9; UNCLOS, articles 95-96; Queneudec, *Chronique de droit de la mer*, 23 ANNUAIRE FRANQAIS DE DROIT INTERNATIONAL 735 (1977); Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, at 222.

²⁴ *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 (herein after *Sea Hunt*).

²⁵ *Ibid.*

²⁶ *See, Harris, supra* note 16; *Simon v Taylor*, 2 Lloyd's Rep 338, 345 (Singapore High Court, 1974) in relation to the German U-Boat that sank in the Strait of Malacca; *Nordjso Dykker Co. v Hording Skipsopphugning*, Norsk Retstidende 346 (1970); Shigeru Oda & Hisashi Owada, *Annual Review of Japanese Practice in International Law XVI (1979-1980)* in relation to the Japanese warship, *Awa Maru*; *Exchange Notes Constituting Britain and Northern*

Therefore, the presumption is that Astoria did not abandon Coeur de l' Ocean. Astoria's act of transferring its title to all Astorian ancient wrecks in 2001 only further confirms that Astoria did not abandon Coeur de l' Ocean in 1995.²⁸

3. In any case, Heritage Inc.'s excavation work does not fulfill the requisite requirements of 'salvage' under maritime law

Before salvage law may be applied, four criteria must be satisfied;²⁹ (a) property in marine peril on navigable waters; (b) voluntary efforts to rescue the property; (c) partial or total success; and (d) conducted bona fide in the interest of the owners. Additionally, as provided in Article 9 of the 1989 Salvage Convention, (e) the owner must have consented to the salvage. It is submitted that the requirements, namely (a), (b), (d) and (e) are not satisfied in relation to the recovery of Coeur de l' Ocean.

a. *Coeur de l' Ocean was not in marine peril*

Marine peril refers to a vessel that is exposed to any danger which might result in her destruction if the salvage services were not rendered.³⁰ For underwater cultural heritage, the danger has passed and it may be exposed to greater danger from salvage operations than to be

Ireland and the Government of Italy regarding the Salvage of HMS Spartan, Rome, Nov. 6, 1952, 158, U.N.T.S 432 (1952); J. Ashley Roach, *France Concedes United States Has Title to CSS Alabama*, 85 Am. J. INT'L L. 381 (1991).

²⁷ *The Lotus Case*, PCIJ Series A, No 10.; *The North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands)* (1969) ICJ Rep 3; D'Amato, *The Concept of Custom in International Law*, Cornell, 1971; Akehurst, *Custom as a Source of International Law*, (1974) 47 BYIL 1; Mendelson, *The Formation of Customary International Law*, (1999) 272 HR 159.

²⁸ An analogy can be drawn here with the *Netherlands-Australia Agreement (1972)*

²⁹ *The Blackwall*, 77 US 10 Wall 1 19L Ed 870 (1869); *The Sabine* 101 US 384 (1880); Forrest, *supra* note 20.

³⁰ *Clifford v. M/V Islander*, 751 F.2d 1, 5 (1st Circuit 1984).

allowed to remain underwater.³¹ The term marine peril as enunciated in the law of salvage cannot thus apply to underwater cultural heritage such as Coeur de l' Ocean.

b. The recovery work was not conducted voluntarily

The existence of a commercial contract will generally preclude voluntariness as such work is done due to contractual obligations.³² The 1995 Agreement was a commercial contract for a joint venture between the parties to conduct excavation works on an archeological site. The work performed by the Applicant was in pursuance of its contractual obligations.

c. The recovery work was not conducted bona fide in the interest of the owners

When salvage services are rendered, the salvor is expected to provide his service for the interest of the ship owner, and not for the purpose of gaining profits from the ship and any goods therein. The converse is true on our facts, as the Applicant sought to recover the artifacts from Coeur de l' Ocean in order to gain from the wreck.

d. There was no express consent to salvage from the owner

Generally, courts objectively assess whether the owner would permit salvage services³³ and may presume that the owner desires salvage.³⁴ However, a different treatment is accorded to sunken warships. States have consistently treated such warships as “military gravesites” and

³¹ O’Keefe & Nafziger, *supra* note 17.

³² Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 4th ed. 2004.

³³ *Merrit & Chapman Derrick & Wrecking Co v United States*, United States Supreme Court 274 U.S. 611, 613 (1927); *Tidewater Salvage Inc v Weyerhaeuser Co.* 633 F.2d 1304, 1307 (9th Cir. 1980); The prudent mariner test for refusal of salvage can be traced back to English admiralty precedents. See *The Vandyck*, 5 Aspinall’s Maritime Law Cases 17 (C.A. 1882) (Eng.); *The Annapolis*, Lush. 355, 375, 167 Eng. Rep. 150 (P.C. 1861) (Eng.).

³⁴ *International Aircraft Recovery, LLC v The Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255, 2000 AMC 2345 (11th Cir. 2000).

archaeological sites that should not be salvaged, except when permission is expressly given by the flag State.³⁵ Thus, in the absence of express permission to salvage Coeur de l' Ocean by Astoria, the Applicant cannot claim that it has obtained salvage rights.

4. Conclusion

Based on the submissions above, the 1995 Agreement was not a contract for salvage. It was an agreement to conduct excavation works for the Coeur de l' Ocean with Heritage Inc. providing the necessary excavation service. The right given was an exercise of Rolga's territorial sovereignty under Article 3 of UNCLOS, but not an exercise of Rolga's non-existent ownership rights.

The distinction between a salvage contract and an ordinary service contract for excavation works is crucial as the former will give the Applicant a maritime lien, extensive right of non-interference and a salvage award based on salvage legal principles, whereas the latter only grants them an ordinary contractual claims. In the present case, the Applicant's claim is limited to ordinary contractual claims, and not salvage.

B. The Government of Rolga did not interfere with Heritage Inc.'s rights and performance under the 1995 Agreement

1. Rolga cannot be held contractually liable for exercising its sovereign rights

a. Rolga is protected by sovereign immunity

³⁵ William J. Clinton, *Statement on United States Policy for the Protection of Sunken Warships* (Jan 19, 2001) 37 WEEKLY COMP. PRES. DOC. 195 (Jan 22, 2001); Statement of Japan; Statement of Spain; Statement of United Kingdom, and Statement of Germany, *Protection of Sunken Warships, Military Aircraft and other Sunken Government Property*, 69 Fed. Reg. 5647, 5647 (Feb 5, 2004).

A State cannot incur civil or contractual liability for exercising its sovereign rights.³⁶ Rolga's sovereignty is incumbent upon the Applicant as it is a Rolgan company.³⁷ Although the major shareholder of Heritage Inc., Mr. Bernard Bodd is an Astorian, Heritage Inc.'s legal nationality remains Rolgan, as the place of incorporation is determinative of a company's legal nationality.³⁸ Thus, the Applicant cannot claim that Rolga's exercise of *acta jure imperii* interfered with its contractual rights.

In addition, Heritage Inc. has acquiesced to Rolga's sovereignty by virtue of the choice-of-law clause in the 1995 Agreement, which is the Rolgan law.³⁹ When a private party has agreed to the contracting State's law as being the exclusive governing law of the contract, the contract cannot be 'internationalized' and continues to be subjected to the State's sovereignty.⁴⁰

b. There was no 'stabilization clause' in the 1995 Agreement

A State may be precluded from invoking sovereign immunity for interference with a contract only where there is a "stabilization clause" in the contract.⁴¹ A 'stabilization clause' is one whereby the State undertakes to refrain from adopting any governmental actions that will unduly and directly undermine the other party's contractual rights.⁴²

³⁶ *I Congreso del Partido* [1983] 1 AC 244, 267 (House of Lords), citing *Claim against the Empire of Iran* (1963), 45 ILR 57, 80 (Ger Fed Const Ct).

³⁷ Further Clarifications, para 21.

³⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970; see also *Salomon v A Salomon & Co Ltd* [1897] AC 22 for exceptions in piercing of the corporate veil.

³⁹ 1995 Agreement, Clause 9.

⁴⁰ Mann, *State Contracts and State Responsibility*, Studies in International Law (1973) 302 at 315.

⁴¹ *Texaco Overseas Petroleum Co & California Asiatic Oil Co v Government of the Libyan Arab Republic (Merits)* (19 Jan 1977), 17 ILM 4.

⁴² *Ibid*; W Peter, *Arbitration and Renegotiation of International Investment Agreements* (Kluwer Law International,

There was no such clause in the 1995 Agreement. There was no express or implied assurance by the Respondent to the Applicant that the 1995 Agreement will exist in a legislative vacuum. As such, the Applicant remains bound by Rolga's sovereignty.

2. The Government of Rolga's actions did not affect the 1995 Agreement

a. *UNESCO Convention does not operate retrospectively so as to affect the 1995 Agreement*

Article 28 of the Vienna Convention on the Law of Treaties 1969⁴³ provides that a treaty does not operate retrospectively unless a different intention appears from the treaty. Thus, the UNESCO Convention does affect the performance of the 1995 Agreement as it was only formally ratified by Rolga in 2005,⁴⁴ and comes into force in 2009. This was after the Parties had agreed to bring the 1995 Agreement to an end.⁴⁵

b. *Further, UNESCO Convention is consistent with the 1995 Agreement*

The purpose of the 1995 Agreement is for the "*conservation ... [of] any art[i]facts that may be retrieved from [Coeur de l' Ocean].*"⁴⁶ UNESCO Convention similarly is for the protection and conservation of such artifacts.⁴⁷

The means of compensation or award provided in the 1995 Agreement is not inconsistent with the UNESCO Convention. Clause 5 is to be read contextually⁴⁸ with the spirit and purpose

The Hague, 1995) 136-42.

⁴³ 1155 UNTS 331 ("Vienna Convention").

⁴⁴ Para 16 of the Moot Problem.

⁴⁵ Para 12 of the Moot Problem.

⁴⁶ Clause 2 of the 1995 Agreement.

⁴⁷ See Article 2 of the UNESCO Convention.

⁴⁸ *Prenn v Simmonds* (1971) 3 All ER 237 (House of Lords).

of the 1995 Agreement i.e for the preservation and conservation of the artifacts. Thus, the term “*relative share*” in Clause 5 is to be interpreted broadly so as to allow for monetary award in accordance with the artifacts’ appraised value as opposed to the compulsory distribution of the artifacts.

c. The 2001 Agreement does not affect the operation of the 1995 Agreement

Para 6 of the Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga⁴⁹ (“2001 Agreement”) provides that only the “*representative collection*” of the artifacts is to be made available to a museum in Rolga and Astoria respectively. This can be done while giving the Applicant compensation as Clause 5 of the 1995 Agreement allows the award of monetary compensation as long as it satisfies the 40% requirement. Thus, the 2001 Agreement has no effect on the Applicant’s share as Rolga is allowed to make adjustments to give effect to the 1995 Agreement.

d. Heritage Inc. has no exclusive rights over Coeur de l’ Ocean or its surrounding waters so as to prohibit Rolga’s granting of tour permits

The Applicant can only claim that Aquatic View’s activities interfered with their rights under the 1995 Agreement if the Agreement granted them exclusive control of the area surrounding Coeur de l’ Ocean by virtue of them being salvors-in-possession. However, as the rights given under the Agreement were not salvage rights, the Applicant cannot have such exclusive rights.⁵⁰

⁴⁹ Appendix 2 of the Moot Problem.

⁵⁰ See page 3 to 8 of this Memorial.

Even if the Applicant is the salvor-in-possession, the conduct of Aquatic View did not amount to interference. In salvage, interference may take two forms -- interference with the salvor's active operations and interference with the wreck itself. There was no such interference on the facts. What was complained of in relation to the activities of Aquatic View is the interference with their exclusive rights to photograph and document Coeur de l' Ocean, which do not form part of their salvage rights.⁵¹

3. In the event the actions amount to interference, the existence of interference *per se* does not incur State responsibility

A State cannot be held responsible for committing an internationally wrongful act by interfering with a contract.⁵² To extend the principle of internationally wrongful act to include such actions threaten the principle of state sovereignty as it allows a private corporation to determine a State's political and economic policies.⁵³ Thus, States are only bound by obligations resulting from treaty, custom and general principles of law.⁵⁴

International law will only give a remedy for a breach or interference of a contract where it is followed by a denial of justice.⁵⁵ This is when there is "denial, unwarranted delay or obstruction of access to courts", "gross deficiency in the administration of judicial or remedial

⁵¹ *Infra*, page 15 of this Memorial.

⁵² Ian Brownlie, *Principles of Public International Law*, 2nd Edition (1973); Roberto Ago, *Third Report on State Responsibility*, (1971) vol. 2 (Part 1) Yearbook of the Int'l Law Comm. 199, 219, UN Doc. A/CN.4/246 and ADD. 1-3; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 43, Arts 4 and 5.

⁵³ Ian Brownlie, *Legal Status of Natural Persons in International Law (Some Aspects)*, 162 RdC 245, 309 (1979-I); F. Rigaux, *Des Dieux et des Héros. Réflexions sur Une Sentence Arbitrale*, 67 *Revue Critique de Droit International Privé* (RCDIP) 435, 456- 57 (1978).

⁵⁴ Article 6, *Third Committee of the Hague Conference 1930*, ILC Yearbook (1956) at 225.

⁵⁵ James Crawford, *The International Law Association's Articles on State Responsibility*, (Cambridge: Cambridge University Press, 2002).

process”, and “failure to provide guarantees which are generally considered indispensable to the proper administration of justice”—and “a manifestly unjust judgment.”⁵⁶

In the present case, Rolga has not committed any act amounting to a “denial of justice”. Rolga has readily and willingly agreed to a settlement of disputes through arbitration, agreed by parties pursuant to the 1995 Agreement.⁵⁷

4. In any event, the actions of the Government of Rolga are defensible

a. *The actions of the Government of Rolga are justified on grounds of public benefit*

A State cannot be held liable for interferences with a party’s contractual rights if its actions are justified on grounds of public benefit or economic necessity of the State.⁵⁸ The ratification of the UNESCO Convention and the 2001 Agreement was done precisely for the benefit of the public, in light of the international consensus that “[a]ll objects of an archaeological and historical nature...shall be preserved or disposed of for the benefit of mankind as a whole”.⁵⁹ Furthermore, it was done in observance of the overriding duty of “States...to protect objects of an archaeological and historical nature found at sea.”⁶⁰

b. *The conduct of the Government of Rolga has not fallen below the standard of “fair and equitable”*

⁵⁶ Harvard Research Project, “*Responsibility of States for Damage Done on their Territory to the Person or Property of Foreigners*” (1929, spec. suppl.) 23 A.J.I.L. 133, Art. 9.

⁵⁷ Clause 10 of the 1995 Agreement; para 4 of the Corrections and Clarifications to the Moot Problem (“Corrections and Clarifications”).

⁵⁸ Professor F.V Garcia Amador, “*Second Report on State Responsibility*” ILC Yearbook, 1957, at 104 and 116.

⁵⁹ *UNCLOS*, Article 149.

⁶⁰ Article 303, *UNCLOS*

The term “fair and equitable treatment” in relation to the customary rule of treatment for foreign investors should be given its plain meaning.⁶¹ The international minimum standard as espoused by the NAFTA Free Trade Commission Award in *Pope and Talbot v Government of Canada*, is that the conduct complained of must be ‘egregious’, ‘outrageous’, ‘shocking’ or otherwise ‘extraordinary’.⁶²

On the present facts, the Applicant was not severely prejudiced by measures adopted by the Rolgan government in pursuance of its obligations under the UNESCO Convention and the 2001 Agreement. In fact, the Rolgan government has done its best to observe its commitments under the 1995 Agreement. This was evident when the Rolgan government did not impose any sanctions on the Applicant despite strong calls from various quarters to end the “commercial exploitation” of Coeur de l’ Ocean and reports that many of the artifacts were destroyed due to poor handling of objects by the Applicant.⁶³

III. HERITAGE INC. DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L’ OCEAN

A. Heritage Inc. does not have exclusive rights of photographing and documenting under the law of salvage

As the Applicant was not the salvor-in-possession of Coeur de l’ Ocean, there is no reason to award them such extensive exclusive rights to photograph and document the wreck. In

⁶¹ United Nations Conference on Trade and Development (“UNCTAD”), “*Fair and Equitable Treatment*” (New York and Geneva, United Nations), 1999.

⁶² *Pope and Talbot v Government of Canada*, NAFTA Free Trade Commission, Interpretative Note of 31 July 2001. See also Patrick Dumbery, *Pope & Talbot inc. v. Government of Canada – Fair and Equitable Treatment for Investor under International Law*.

⁶³ Moot Problem, para 10.

the event that the rights granted to the Applicant was salvage rights, it is submitted that salvage rights do not extend to the exclusive rights to photograph and document Coeur de l' Ocean.

1. Salvage rights do not include exclusive rights of photographing and documenting of wreck

a. *Admiralty courts have never granted exclusive rights of photographing and documenting of a wreck as salvage rights*

Traditionally, salvage rights only include maritime *lien* and possessory rights over the saved property to enforce the *lien*.⁶⁴ The underlying public policy behind the granting of such rights was to encourage voluntary assistance to ships and their cargo in distress.⁶⁵ Such encouragement came only in the form of compensation for the salvor's work by means of an *in personam action* against the owner or alternatively by way of an *in rem* action to enforce the *lien*. Admiralty courts have never awarded a right to use the salvaged property for the salvor's commercial use in the form of exclusive rights of photographing and documenting.⁶⁶

b. *Possessory rights of a salvor does not entail the exclusive rights of photography and documentation*

When a salvor is granted possessory rights over the wreck and its cargo, it does not include preventing others from photographing and documenting wreck as long as it remains at its public site.⁶⁷ Exclusive photography and documentation rights can only be achieved once the

⁶⁴ *R.M.S. Titanic v. Haver* 171 F. 3d 943 (1999), p. 963 (“*Titanic v Haver*”).

⁶⁵ *Ibid*, p. 969.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

salvor exercises his possessory right and removes the property into a private or controllable area.⁶⁸ Even a superior title to the shipwreck granted under the law of finds would not entail such exclusive rights when it is still in the public space; much less would the law of salvage.⁶⁹

Therefore, the Applicant cannot claim exclusive rights of photographing and documenting the wreck, as long as the Coeur de l' Ocean remains at its public site in the sea.

2. Additionally, salvage rights cannot be extended to include such exclusive rights

a. *The award of exclusive rights to photograph and document would be inconsistent with the nature of salvage rights*

Salvors are considered 'trustees' over the property saved and are not entitled to remove the property for their own use and benefit.⁷⁰ Salvage law rests on the belief that salvors save and hold the property on trust for the benefit of the owner.⁷¹ The award of such rights would contradict such belief and assume instead that salvage operations serve the commercial interest of salvors and not that of the true owners.⁷²

Furthermore, it is an established rule in maritime law that a right to salvage without interference is only granted when the salvage operation is *ongoing* and offers a *fair prospect of success*.⁷³ In the present case, the Applicant had ceased its excavation effort⁷⁴ and had failed to

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Danner v. United States*, 99 F. Supp. 880 (S.D.N.Y. 1951).

⁷¹ *The Barque Island City*, 66 U.S. (1 Black) 121, 17 L. Ed. 70 (1861).

⁷² *Titanc v Haver*, *supra* note 64, p. 970.

⁷³ *Ibid*; *The Edilio*, (1917) 246 F. 470, p. 474.

⁷⁴ Para 12 of the Moot Problem.

excavate all the artifacts which worth approximately US\$1 billion (they had only excavated US\$616 million worth of artifacts).⁷⁵ Therefore, there is no need to grant the right to salvage without interference at the present as the purpose of such right was to facilitate the recovery of shipwrecks and their cargo.⁷⁶

If an extension is to be made, it would undermine the uniformity and consistency of the *jus gentium* body of salvage law, as there is no such precedent in maritime law.⁷⁷ In addition, such exclusive rights would violate the right of free navigation in the seas as it prevents access by others to the site.⁷⁸

3. In the event that exclusive rights of photography and documentation are capable of constituting salvage rights, there is no justification to grant these rights to Heritage Inc.

The facts of the present case do not justify the granting of exclusive rights of photography and documenting. It was thought that the justification for granting of such rights in the case of ‘historic salvage’ is rooted in public policy i.e the need for historical salvors to recoup their investments.⁷⁹ This is only when they were not able to sell the artifacts (e.g. they may be bound by agreements to not sell the artifacts), or the true owners cannot be found to enforce compensation claims.⁸⁰

⁷⁵ Para 5 of the Moot Problem; Para 18 of the Corrections and Clarifications.

⁷⁶ *Hener v. United States* 525 F. Supp. 370, p. 358.

⁷⁷ *Titanic v Haver*, *supra* note 64, at 970.

⁷⁸ *Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 204 (S.D. Fla. 1981) p. 203.

⁷⁹ The only case supporting such extension was *R.M.S. Titanic v. The Wrecked and Abandoned Vessel* 9F. Supp. 2d 624 (1998); Stern, Justin S., *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights Historic Shipwrecks*, 68 Fordham L. Rev.(2000) 2489.

⁸⁰ *Titanic v. Haver*, *supra* note 64.

However, Clause 5 of the 1995 Agreement has provided for an award to the Applicant. Based on the current appraised value of the artifacts now in the Government's custody, the Applicant could potentially own at least US\$264 million worth of artifacts or monetary award based on the appraised value of the artifacts. In addition, Clause 3 of the Agreement has provided for the return of the Expense Deposit to Heritage (the Deposit worth US\$1.25 million). In fact some of the artifacts have been auctioned off to finance the cost of operations.⁸¹ Therefore, the Applicant does not need to resort other means to finance its operation.

4. Any grant of exclusive rights to Heritage Inc. will be inconsistent with the UNESCO Convention and Rolgan law

Article 4 of the UNESCO Convention provides that salvage law should fully conform with the Convention. Further, Article 2(10) of the Convention provides that “[r]esponsible non-intrusive access to observe and document *in situ*” the wreck must be encouraged. Read together with Rule 7 of the Convention, restriction of access to the wreck would only be justified when access is irresponsible, intrusive or inconsistent with the protection and management of the site.

Thus, the granting of exclusive rights to photograph and document the wreck would be contrary to the spirit of the Convention which aims to promote public awareness of underwater cultural heritage. As a natural consequence, the grant of such exclusive rights will be incompatible with Rolgan law which incorporates the UNESCO provisions directly.

Hence, as long as there was no interference with the excavation work and the wreck itself, the public including Aquatic View and its tourists could not be prevented from entering the

⁸¹ Moot problem, para. 6.

site. In the present case, there was no evidence that Aquatic View and its tourists interfered with the salvage operation or damaged the wreck or its artifacts.

B. Heritage Inc. has no legitimate expectation under the 1995 Agreement for the enjoyment of exclusive photography and documenting rights

1. Literal interpretation of the 1995 Agreement

Based on the literal interpretation of the 1995 Agreement, there was no grant of exclusive right to photograph and document the “wreck” to the Applicant.⁸² The Agreement only provided for the conservation and documentation of the “artifacts” from the shipwreck.

2. Contextual interpretation of the 1995 Agreement

Even the contextual interpretation⁸³ of the Agreement does not justify the Applicant’s expectation for these rights. Although it is generally known that *in situ* photography and documentation of a historical wreck is an essential part of archaeological preservation,⁸⁴ it does not necessarily follow that *exclusive* photography and documentation rights are necessary for every excavation work.

At the time of the Agreement, there was no precedent that recognized an exclusive right to photography and documentation as necessary to generate income.⁸⁵ A reasonable man with the

⁸² Clause 2 of the 1995 Agreement.

⁸³ *Prenn v Simmonds*, *supra* note 48.

⁸⁴ *MDM Salvage, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel* (1986) 631 F. Supp. 308, p. 310.

⁸⁵ It was not known until 1996 in *R.M.S. Titanic v. The Wrecked and Abandoned Vessel* (1996) AMC 2497 (“*Titanic II*”) that salvage right could consist of exclusive photography and documentation rights.

background knowledge of the Parties would not expect that the Applicant would have such exclusive rights.⁸⁶

C. Heritage Inc. does not have exclusive rights to photograph and document Coeur de l' Ocean by way of intellectual property rights

In the absence of exclusive rights granted through salvage or the 1995 Agreement, the only possible manner in which the Applicant acquires any exclusive rights to photograph and document is by way of intellectual property protection which allows for monopoly profits. The possible means of protection through copyright or trademark is not present in our facts and there is no justification for the extension of intellectual property rights to the Applicant.

1. Heritage Inc. has no claim for copyright protection

The Berne Convention for the Protection of Literary and Artistic Works 1886 (“Berne Convention”) provides for the protection of rights of authors in their literary and artistic works.⁸⁷ The Applicant does not qualify for protection as they are not the ‘authors’ that create Coeur de l’ Ocean. Further, the wreck itself does not qualify as their production under the definition of “literary and artistic works.”⁸⁸

While the Applicant is the first to discover the wreck, the “*discovery*” of a wreck does not come within the ambit of intellectual property protection. Copyright protection does not

⁸⁶ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 , p. 912-913.

⁸⁷ Preamble, Berne Convention

⁸⁸ *Ibid*, Article 2; See Adolf Dietz, *The Concept of Author under the Berne Convention*, *Revue Internationale du Droit d’Auteur*, January 1993, para. 155

extend to any idea, procedure, method of operation, concept or *discovery*, no matter what form it is in.⁸⁹

2. Heritage Inc. has no protection under trademark laws

As the Applicant did not register Coeur de l' Ocean as their trademark, their only means of claiming for trademark protection is through the common law tort of passing off.⁹⁰ However, the Applicant's case does not satisfy the requirements to establish the tort.⁹¹

Firstly, the Applicant does have goodwill⁹² in the wreck per se as they do not own the shipwreck. Their goodwill was in their company's salvage services as it is that business which generates income for them.⁹³ Secondly, there was no misrepresentation as Aquatic View never had any intention to or actually represented that their services had any connection to or was endorsed in any way by the Applicant.⁹⁴ Furthermore, Aquatic View were established in their own right as specialist tour operators, and thus did not need to ride on the goodwill of the Applicant. The Applicant and Aquatic View were involved in different fields of activity,⁹⁵ i.e salvage and tour operations respectively. Thus, there could have been no harm to the Applicant's goodwill.

⁸⁹ Section 7(2A) Malaysian Copyright Act 1987

⁹⁰ Section 57 (1) of Trademark (Amendment) Act 2000

⁹¹ The requirements as per *McCurry Restaurant (KL) Sdn. Bhd. v. McDonalds Corporation*, NO. W-02-1037-2006, Court of Appeal (Malaysia) are (i) misrepresentation by the other party; (ii) made in the course of trade; (iii) to prospective or ultimate customers; (iv) that is calculated to injure the goodwill and reputation of the Claimant; (v) and the Claimant must suffer resultant damage.

⁹² *Warnick v Townend* (1979) AC 731, 742, 755-6

⁹³ Lionel Bently and Brad Sherman, *Intellectual Property Law*, 2nd Edition at pg. 725

⁹⁴ *Stringfellow v McCain* (1984) RPC 501

⁹⁵ *McCulloch v May* (1948) 65 RPC 58

3. The rationale of intellectual property rights in *Titanic II*⁹⁶ has no application in the present case

Although the District Court's decision in *Titanic II*⁹⁷ has been interpreted by some academic commentators as including intellectual property rights within the bundle of salvage rights,⁹⁸ such arguments were firmly rejected by the Appeals Court in *Titanic v. Haver*.⁹⁹

Further, it has to be recognized that the rights conferred by the District Court were unique and confined to its own facts, and are unlikely to be given in the future.¹⁰⁰ As our present case is very different from *Titanic II*¹⁰¹ the same decision thus cannot be reached.

The Respondent however will acknowledge the Applicant's intellectual property rights in the photographs and documentaries that the latter creates as it has been reduced to some material form.¹⁰² However, this is not tantamount to exclusive rights of photographing and documenting of the wreck which the Applicant is claiming for.

IV. THE DISTRIBUTION OF ARTIFACTS SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES WAS NOT ENVISAGED IN THE 1995 PARTNERING AGREEMENT MEMORANDUM

⁹⁶ *Supra note 85*

⁹⁷ *Ibid.*

⁹⁸ *See for example, Stern, supra note 79*

⁹⁹ *Supra note 64*

¹⁰⁰ Rachel Lin, "Salvage Rights & Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. Titanic?" *Tulane Maritime Law Journal* [Vol. 23 1999] p. 483.

¹⁰¹ *Supra note 85*

¹⁰² As provided under Section 7(3)(b) of the Malaysian Copyright Act 1987

A. The 1995 Agreement is not a salvage contract and hence, should not be subject to salvage legal principles

As the 1995 Agreement is not a salvage contract, it should be guided by ordinary contract law. The right to an award under pure salvage, or salvage legal principles arises when the person is a volunteer.¹⁰³ However, because there is a contractual duty to act here, the award must be the sum agreed to under the contract.

B. In any event, the terms of the Agreement are to be given effect

1. Parties are strictly bound by the terms of the agreement

Since the Parties have specified the obligations they assume to each other, the court should respect this choice and strive to give effect to the terms of the agreement. This is regardless of the nature of the contract i.e whether it is a salvage or ordinary contract. In *The Mulgrave*,¹⁰⁴ the court dismissed an action for salvage on the basis that the services were governed by the Parties' agreement alone. Similarly here, the 1995 Agreement fixes the amount to be paid to Heritage Inc. Thus, the Applicant loses their right to a discretionary salvage award.

The rule is that nothing short of a contract to pay a given sum for the services rendered, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage.¹⁰⁵ An agreement for compensation is binding upon salvors, and although it is

¹⁰³ *The Sabine*, *supra* note 29.

¹⁰⁴ (1827) 2 Hagg. 77.

¹⁰⁵ *The Camanche* 75 U.S. 8 Wall 448 (1869).

salvage, it is restricted to the amount agreed. The court will not require the party receiving the salvage service, to pay a higher sum than agreed to in the contract.¹⁰⁶

As long as an agreement is made fairly and impartially, and the parties understand their contractual obligations, such an agreement would be binding. It is the duty of a court to enforce it “*would be alike repugnant to common sense and to all principles of equity and justice...*”¹⁰⁷ to allow a party to escape from their contractual obligations.

It is clear here that the Applicant was perfectly competent in making an informed decision. There was no imminent emergency (e.g in normal salvage cases where a ship is in distress due to fire etc.). Thus, they were in the best position to estimate the value of the services required and should be bound by the award in the 1995 Agreement.

2. Clause 5 is still capable of being performed

a. *Clause 5 is not ambiguous*

Although Clause 5 stipulates for the distribution of artifacts and sale, these are meant to be in the alternative. Sale of the artifacts is still possible, without breaching UNESCO Convention such as the sale to museums or individuals who carry out exhibitions. Thus the Clause can be performed.

The mere fact that no joint marketing plan was carried out, does not in itself mean that Clause 5 cannot be performed. Following *Columbus-America Discovery Group v. Atlantic*

¹⁰⁶ *The Whitaker* (1855) 29 Fed. Cas. 946 District Court.

¹⁰⁷ *The True Blue* (1843) 2 W.Rob. 176.

Mutual Insurance Company,¹⁰⁸ the Tribunal can still direct as to a suitable marketing plan, or appoint a third party marketer.

b. *UNESCO Convention does not render performance of Clause 5 invalid as it does not operate retrospectively*

Clause 5 can still be performed without being affected by the UNESCO Convention. This is because the Convention does not operate retrospectively¹⁰⁹ so as to render the performance of Clause 5 invalid.¹¹⁰

c. *Clause 5 is not inequitable so as to be replaced with salvage legal principles*

The burden of proving that the salvage agreement is unfair or inequitable lies with the Applicant. Although there was no good faith obligation laid down in the contract, the Government is willing to keep to its side of the bargain and pay the company the 40% it is due under Clause 5 of the sharing arrangement. The company will be able to recover more than US\$246 million, which is a substantial amount and is a good incentive for salvors, in line with public policy.

Claims made by the Applicant that Rolga has unfairly distributed the artifacts are mere accusations. Rolga has always been and is willing to hold up its side of the bargain and give the Applicant the 40% it is due.

3. Heritage Inc. cannot invoke the 1989 Salvage Convention to modify Clause 5

¹⁰⁸ 203 F.3d 291 (2000).

¹⁰⁹ *Vienna Convention*, *supra note 43*, Article 28.

¹¹⁰ Para 28 of the Further Clarifications.

a. *The 1989 Salvage Convention does not apply in the present case*

According to Article 23(1) of the Convention, any action relating to the payment under the Convention shall be time barred if judicial arbitral proceedings are not instituted within 2 years from the date salvage operations are terminated. As the salvage had come to an end in 2003, and the Applicant has only filed the issue in 2009, the action is time barred.

Further, Article 4(1) clearly stipulates that the Convention shall not apply to warships owned or operated by a state and entitled at the time of salvage operations, to sovereign immunity under principles of international law. Since the *Coeur de l' Ocean* was a military vessel prior to its sinking and at the time of the salvage operation, the vessel belonged to Astoria, the Convention does not apply.

b. *In any event, Clause 5 cannot be annulled by the 1989 Salvage Convention*

The 1989 Salvage Convention provides that a clause can only be annulled or modified if the reward is too small or too large.¹¹¹ Any claims that the award has become subsequently too small should only be entertained if the subsequent performance of the contract has become over and above what was initially contemplated. As such, any event that is capable of annulling the Clause must be something that was not reasonably foreseeable by the parties. In the present case, it is evident that none of the Applicant's actions under the contract was over and above what was initially contemplated, and nothing unforeseeable has occurred. Thus, there are no such grounds for annulment or modification of Clause 5.

¹¹¹ Article 7(b).

Further, there is nothing to suggest that there was duress, misrepresentation or malice. Both the parties involved had negotiated the dealing at arm's length, and what was reached finally, was a compromise. There is no reason that the Applicant should be let of this bargain, to escape what it perceives to be a bad bargain for itself.

C. Apportionment

The total of the artifact values currently determinable is US\$616,298,000. According Clause 5, the Applicant thus should receive US\$246,519,200 (40%), while Rolga should receive US\$369,778,800 (60%). Once the values of the remaining artifacts are discovered, it too shall be apportioned accordingly. The amount is very generous and the Applicant should not be allowed to argue for a higher sum as the award agreed to, more than adequately compensates them for their work.

In fact, the Applicant's negligence has resulted in damages to many artifacts. Thus the amount of compensation due under the contract should be modified to reflect this. In *The Atlas*,¹¹² the court stated that mistake or misconduct which diminishes the value of the property salvaged or occasions expense to the owners, is taken into account in determining the amount of award.

Atkinson J in *Anglo-Saxon Petroleum Co Ltd. and Another v. Admiralty*¹¹³ stated that “*salvors have to exhibit the skill and care which can reasonably be expected from persons in their position...*” Although courts take a lenient approach to mistakes¹¹⁴ in order to encourage

¹¹² (1862) Lush. 518.

¹¹³ *The Delphinula* (1946) 79 Ll.L.Rep. 611.

¹¹⁴ *The St. Blane* (1974) 1 Lloyd's Rep 555,408.

salvors to act without fear of undue judicial scrutiny of their operations, this does not mean a salvor will not be held liable for his negligence or failure to perform his salvage service adequately, in addition to the general duty not to act negligently.¹¹⁵ As the Applicant are professional salvors (as opposed to a vessel passing by rendering aid to a ship in immediate need of relief), the standard expected is higher. Thus the 40% award should be set off against the loss caused by them.

¹¹⁵ *The Cape Packet* (1848) 3 W.Rob 122, 125.

PRAYER FOR RELIEF

On the basis of the foregoing facts and points of law, the Government of Rolga respectfully requests this Arbitral Tribunal to declare that:

- I. It has not interfered with the Applicant's rights and performance under the 1995 Partnering Agreement Memorandum;
- II. The Applicant does not enjoy exclusive rights of photographing and documenting of the Coeur de l' Ocean; and
- III. The distribution of artifacts solely on the basis of salvage legal principles was not envisaged by the 1995 Agreement.

Respectfully submitted,

Counsels for the Respondent.