

**LAWASIA 2009**

**INTERNATIONAL MOOT COURT COMPETITION**

**IN THE INTERNATIONAL ARBITRATION CENTER**

**September 2009**

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*Case Concerning the Salvage of the Shipwreck Coeur de l'Ocean*

**BENEVOLENT HERITAGE INC.**

*Claimant*

**v.**

**THE GOVERNMENT OF ROLGA**

*Respondent*

**MEMORIAL FOR THE CLAIMANT**

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## **STATEMENT OF JURISDICTION**

Benevolent Heritage, Inc and the Government of Rolga have submitted this matter to the International Arbitration Center pursuant to the 1995 Partnering Agreement Memorandum between the two parties. Benevolent Heritage Inc. and the Government of Rolga have accepted the jurisdiction of the Arbitral Tribunal.

## **QUESTIONS PRESENTED**

I. Whether the Respondent, the Government of Rolga, has interfered with the Claimant's rights and performance under the Agreement by entering into Agreement with Astoria, by ratifying the 2001 UNESCO Convention and by allowing the tour operators to organise wreck divers to the wreck site including the taking photographs.

II. Whether the Claimant, Benevolent Heritage Inc. was entitled to enjoy exclusive rights of photographing and documenting of the Coeur de l' Ocean.

III. Whether the distribution of artefacts solely on the basis of salvage legal principles was envisaged by the 1995 Partnering Agreement Memorandum.

## SUMMARY OF FACTS

Historically, Astoria was a colonial empire of the West, it took numerous expeditions from the West to the New World in the 17<sup>th</sup> century. One of the most notable adventures was that of the journey made by the Coeur de l' Ocean led by Captain Van Cleef in 1800 to conquer the ancient trading city of Zamzala. Zamzala is now part of the territory of the State of Rolga, which gained independence from Astoria on 7<sup>th</sup> November 1959. After tearing down the city, Astoria's army left, the Coeur de l' Ocean was greedily laden by the soldiers of Astoria, with cargoes of exotic goods, silks and spices, as well as trunks of royal jewelry, and other riches of the Palace of Zamzala. While en rout to another destination, the vessel sank.

Rolga is now known as an extremely popular destination among wreck divers from around the world because of the extraordinary collection of war wrecks which are remnants of the World War II scattered in its maritime waters including the Japanese submarines.

In 1990, Mr. Bernard Bodd, a well known salvor and a major shareholder in Benevolent Heritage Inc (hereinafter 'Heritage Inc') with expertise in historic wrecks recovery submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant historical wrecks belonging to the era of expansion of Astorian presence in the region. In order to convince the relevant authority to approve the project, they have recovered some silver coins from the wreck and these were confirmed by government archaeologists as 'rare items' and were found in mint condition. Further, some gold bars were found. There were also gold bullions and ingots. Therefore, the Government eventually approved the project and the 'Partnering Agreement Memorandum was signed

on 27th September 1995 pursuant to the then existing law of Rolga, the relevant authority must approve all survey or recovery or excavation projects involving historical objects or sites.

Today, many of the artefacts have been recovered from the wreck Coeur de l' Ocean. Some parts of the collection have been auctioned off at overseas auction houses to partly finance the costs of the project. However, a maritime exhibition was set up and has also doubled within the National Museum by the Government in 2000 to showcase some of the recovered artifacts from the wreck of Coeur de l' Ocean. These showcases does not provided in the Memorandum between the Government and the Heritage Inc.

In the same year, the Government of Rolga strengthened its cultural heritage appreciation as “symbol of nationhood”. They adopted the United Nations Convention in the Protection of the Underwater Cultural Heritage in Paris on 2nd November 2001. Following this, the Government entered into an agreement on the “Protection of Astorian Wrecks” with the Government of Astoria in 2001. In the agreement, Astoria agreed to transfer all its right, title and interest in and to wrecked ancient vessels of the Astoria lying on or off the coast of Rolga to Rolga.

At the same time, Aquatic View, a specialized tour operator was given permission by the Government to organize exclusive underwater trips to view the wreck of Coeur de l' Ocean. The staff have been taking photographs and making video clips of the wrecks and have posted these materials on their website as promotional materials for the exclusive trips. In addition, this company also engaged a songwriter to write a song entitled ‘Cour de l' Ocean’ and the CDs of which are commercially marketed as souvenirs. Heritage Inc.

brought these issues to the attention of the Rolgan Historic Monument Executive Agency but the Agency was unable at this time of the complaint to deal with the matter. The activities of the tour operator have, according to Heritage Inc., jeopardized their ongoing television documentary deal with an International Broadcasting Company

These developments plus the change of mindset within society regarding the need for the protection of underwater cultural heritage and the move towards ratifying the 2001 UNESCO Convention, which, have prompted Heritage Inc. to reconsider their position under the contract with the Government of Rolga. By 2003, they felt that further investment in efforts, time and money into other Astorian wrecks would only be harmful to the company. Heritage Inc. accused the Government of Rolga of unfair distribution of artefacts contrary to the 1995 Agreement. The dispute is now brought before the International Arbitration Center pursuant to Art. 10 of the 1995 Agreement.

## SUMMARY OF PLEADINGS

- I. Under the 1995 Memorandum between Rolga and Benevolent Heritage Inc., the present dispute in regard to the wreck *Coeur de l'Ocean* falls within the jurisdiction of the Arbitration. The law of salvage in the legal system of Rolga which is of common law tradition is applied in this case on the grounds that the salvor is not the owner of the wreck.
- II. As Rolga entered into Agreement with Astoria in 2001, 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, it interfered with the salvage rights and performance of Benevolent Heritage Inc. under the 1995 Memorandum. Particularly the exclusive right to salvage, the right to exclusive possession, the right to gain profit from the salvage operation and the right to decide the transportation of the recovered artifacts, which are well established under the 1995 Memorandum, the International Convention on Salvage 1989 and the law of case are interfered. Moreover, Rolga violated its obligation under Art. 8(2) of the International Convention on Salvage 1989 providing the obligation to fully cooperation with the salvor as it interfered the above-mentioned rights of the Claimant.
- III. That Claimant has the exclusive right of photographing and documenting of the wreck is firmly established under the 1995 Memorandum and the law of case. Rolga violated its obligation of due diligence under international customary law to protect

the right as it did not prevent the acts of taking photograph and using the name of the wreck by the staff of the tour operator Aquatic View.

- IV. The calculation of profits and/or distribution of artifacts between the parties are made solely on the basic of salvage legal principles because the 1995 Memorandum no longer governs the sharing arrangement on the grounds that Rolga did gravely interfere the rights of the Claimant. The salvage legal principles are provided under Art. 13(1) of the International Convention on Salvage (1989) and the law of case.

## PLEADINGS

**I. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1992 AGREEMENT WHEN IT ENTERED INTO AGREEMENT WITH ASTORIA IN 2001, 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 THE TAKING OF PHOTOGRAPHS.**

**1. The Respondent interfered the exclusive right to salvage when ratifying the 2001 Convention and allowing the trip**

*a. The 1995 Memorandum gave the Claimant the status of salvor and did not prohibit the commercial exploitation on the artifacts*

The 1995 Memorandum was signed between Rolga, which is the owner of the wreck and Claimant, the salvor authorized to salvage the wreck. Moreover, the sharing arrangement in the 1995 Memorandum is based on the commercial value of the artifacts without mentioning the archaeological value. It is inferrable that when signing the 1995 Memorandum, Rolga had no intention to prohibit the trading of artifacts.

Furthermore, according to Art. 5 of the 1995 Memorandum the two parties will formulate a joint marketing plan for placement and sales of the artifact, which obviously shows that the parties intend to deal with the matter of artifact solely basing on their market value.

In sum, the Claimant is an authorized salvor under the 1995 Memorandum and has the right to trade the artifacts recovered from the wreck.

***b. The Claimant has the exclusive right to salvage***

Under the 1995 Memorandum, the Claimant is the authorized salvor, and until now it is the sole person having the permission from the Government of Rolga. As first salvor, it is entitled to salvage without interference.<sup>1</sup>

Moreover, Courts generally grant the exclusive right to salvage if the salvor's effort is ongoing and there is likelihood of success.<sup>2</sup> In this case, the claimant meets these two conditions to be granted the above right. First, the salvage operation is still ongoing as it is the solely authorized salvor until now. Second, there are many artifacts recovered from the wreck,<sup>3</sup> the appraised and sold value of which is hundreds of million dollars.

***c. The Respondent interfered the above right as the Convention's provisions came into force after Rolga's ratification and it allowed the trip***

The 1995 Memorandum should be considered to be not in conformity with this Convention as it violates Art. 2(7) on the grounds that its activities aim at commercial exploitation. Therefore, this consequence leads to the application of Art. 14 on preventing illicit dealing export and Art. 15 on preventing the use of port and place to store, which is applied to those salvage activities which are inconsistent with the Convention. The application is the

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1 Columbus-American Discovery Group v. Atlantic Mutual Insurance Company (2000), 203 F.3d 291 at 295, (U.S, C.A)

2 *Bemis v. RMS Lusitania* (1995), 99 Fed 1129, 884 F.Supp. 1042 p. 1051, (U.S, C.A)

3 *Moot problem*, para. 6.

violation of the right to salvage without interference of the Claimant as it prevents the Claimant from operating its activities authorized under the 1995 Memorandum.

Moreover, Art. 7 provides Rolga with an extensive power to create and impose rules which envisage neither in the 1995 Memorandum nor Rolgan law, basing on which the 1995 Memorandum was signed. This may hinder the activities of the Claimant.

Furthermore, trip and other activities provided under Art. 2(10) will hinder the salvage effort as its participants approach the wreck in a near distance.

**2. The Respondent interfered the possession right of the Claimant over the wreck as it allowed the trip**

***a. The Claimant has the right to exclusive possession over the wreck***

“In order to establish that they are in possession of a derelict salvors must show, firstly, that they have *animus possidendi*, and, secondly, that they have exercised such use and occupation as is reasonably practicable having regard to the subject-matter of the derelict, its location, and the practice of salvors.”<sup>4</sup> In other words, there are two elements to be satisfied: the intention to possess and the physical possession. The first element is satisfied as the Claimant has intention to possess the wreck. In this case regarding the underwater wreck, there are four questions relating to the physical possession: “What are the kinds of physical control and use of which the things in question were practically capable? Could physical control be applied to the res as a whole? Was there a complete taking? Had the

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<sup>4</sup> *Morris v. Lyonesse Salvage Company Ltd.*, [1970] 2 Lloyd's Rep. 59 (Adm.)

plaintiffs occupation sufficient for practical purposes to exclude strangers from interfering with the property?"<sup>5</sup> It is obvious that the Claimant has the physical possession over the wreck as it has rendered its service to salvage the whole wreck continuously for over 15 years and by keeping the location of the wreck secret its occupation over the wreck is sufficient to exclude others from interfering with the property. Therefore the Claimant has the right to possess the wreck. Moreover, the "possession is single and exclusive."<sup>6</sup> In sum, the Claimant as the sole salvor has the right to exclusive possession over the wreck.

***b. The Respondent interfered the right to exclusive possession of the Claimant over the wreck as it allowed the trip***

One of the components of the right to exclusive possession is the right of possessor to remain in possession and to maintain trespass against intruder who has no superior right to possession.<sup>7</sup> In this case Aquatic View obviously has no superior right to possession. Thus, the approaching of the wreck by the participants of the trip organized by Aquatic View is considered as a trespass on the wreck. Thus the Respondent interfered the right to exclusive possession of the Claimant as it allowed the trip.

Furthermore, the Claimant is in the position of the salvor in possession, thus it has the right to salvage without interference which may take two forms: interference with the salvor's active operations and interference with the wreck itself.<sup>8</sup> In order to view the wreck the

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<sup>5</sup> *Tubantia*, (1924), 18 Ll. L. Rep. 158 (Adm.)

<sup>6</sup> *F. Pollock and R.S. Wright*, *An Essay on Possession in The Common Law*, London, Clarendon Press, 1988, at 20-21.

<sup>7</sup> Elizabeth Cooke, *Modern Studies In Property Law*, Volume I: Property (Hart Publishing, 2001) at 28.

<sup>8</sup> *RMS Titanic Inc. v. The Wreck and Abandoned Vessel* (1998), 9 F.Supp.2d 624 at 635, (U.S. C.A)

participants of the trip must approach it in near distance and this leads to a significant risk of interference with or injury to the wreck itself.<sup>9</sup> Aquatic view, the organizer of the trip, interfered the above right as it interfered with the Claimant's active operation and the wreck itself.

Therefore, the Rolga interfered the right to exclusive possession of the Claimant as it allowed the trip and refused to deal with the subsequent complaint of the Claimant on the issue of the trip.<sup>10</sup>

**3. The Respondent interfered the right to gain profit of the Claimant from its salvage operation when ratifying the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage**

*a. The Claimant has the right to be reward and gain profit from its salvage activities*

The claimant has the right to reward for its salvage operation as it meets all three conditions.<sup>11</sup> First, the wreck is in the peril manner. Second, the service is voluntary; it is not operated under any obligation under law and 1995 Memorandum with the owner of the wreck before it sank. Lastly, as proven above, the service brings outstanding success.

It is obvious that the award for salvage "generally far exceeds a mere remuneration."<sup>12</sup> In other hand, the salvor has profit as launching its service. In this case, the Claimant is

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<sup>9</sup> Ibid

<sup>10</sup> *Moot problem*, para. 11.

<sup>11</sup> *Supra* note 2.

<sup>12</sup> *Colombus-America Discovery Group v. Atlantic Mutual Ins'ce Company* (1992), 974 F.2d 450 (1992) at

eligible to receive and gain profit from the reward for its salvage service.

***b. The Respondent interfered the above right as the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage's provisions came into force after its ratification and it allowed the trip***

Once the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (hereinafter “the 2001 UNESCO Convention”) is ratified its provisions will be effective on the state parties, in this case Rolga, which will effect negatively in the Claimant’s interests under the 1995 Memorandum. In particular, Art. 2(7) and Rule 2 of the 2001 UNESCO Convention provides that underwater cultural heritage shall not be commercially exploited.<sup>13</sup> Art. 2(7) prevents the sale of artifacts to compensate for the salvor which is the only means to reward the salvor for his service. Therefore, the application of the Art. 2(7) after Rolga’s ratification the 2001 UNESCO Convention interfered the right to reward and gaining profit of the Claimant.

Moreover, by violating the Art. 2(7), the 1995 Memorandum and the activities of the Claimant will be considered as not in conformity with the Convention. Therefore, sanctions under Art. 17 and seizure of artifacts under Art. 18 may be imposed, which damage the interests of the Claimant.

**4. The Respondent interfered the right to decide the transportation of artifacts as it signed the 2001 Agreement with Astoria**

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468, (U.S, C.A)

<sup>13</sup> *Convention on the Protection of the Underwater Cultural Heritage*, 2 November 2001, (entered into force in 2 January 2009), Art. 2(7), Rules 2.

***a. The Claimant has the right to decide the transportation of the artifacts recovered under the Art. 5 of the 1995 Memorandum and the Art. 21(3) of the International Convention on Salvage 1989***

According to Art. 5 of the 1995 Memorandum, the joint marketing plan will be formulated when the value of the artifact exceeds 45 ml. dollars. In this case, the value far exceeds the mentioned limit, thus the future of the remaining artifact shall be decided by both two parties including the Claimant. And under Art. 21(3) of the ICS 1989 the salvaged vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.<sup>14</sup> Thus, without the consent of the Claimant the artifacts cannot be removed or transferred.

In sum, the consent from the claimant is a prerequisite to decide the transportation of the remaining artifacts.

***b. The Respondent interfered the right to decide the transportation of artifacts as it signed the 2001 Agreement with Astoria***

Claimant as salvor has not yet been rewarded for the salvage operation, and as provided by Art. 5 of the 1995 Memorandum and Art. 21(3) of the International Salvage Convention (hereinafter “the ISC”), Rolga must get the consent of the Claimant before transferring the

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<sup>14</sup> *International Convention on Salvage*, 28 April 1989, IMO-454A, (entered into force in 14 July 1996), Art. 21(3).

artifacts. In the year 2001 when signing the Agreement purporting to deposit the artifacts recovered from wrecks of Astoria to National Museums of Rolga and Astoria, Rolga did it without the consent of the Claimant, thus it interfered the right to decide the transportation of the artifacts.

**5. Rolga interfered the above mentioned rights, thus it is violated its obligation under Art. 8(2) of the 1989 International Salvage Convention**

Art. 8(2) of the ISC 1989 provides the obligation of the State to cooperate fully to the salvor,<sup>15</sup> which in this case means that in all issue concerning the salvage operation, including the distribution of artifacts Rolga must cooperate with the Claimant. By signing the Agreement which interfered the rights of the salvor, Rolga violated the obligation under Art. 8(2).

**II. BENEVOLENT HERITAGE INC. HAS EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L'OCEAN**

**1. Benevolent Heritage Inc. has exclusive rights of documenting of the Coeur de l'Ocean under the 1995 Memorandum:**

First, according to the 1995 Partnering Agreement Memorandum between the Government of Rolga and Benevolent Heritage Inc., the latter submitted a Project Plan that set forth, amongst other things, the equipment, personnel and methodologies to be employed in the exploration of the shipwreck believed to be the Couer de l'Ocean and the conservation and

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<sup>15</sup> *Ibid.* Art. 8(2).

the documentation of any artifacts that may be retrieved from the shipwreck.<sup>16</sup> Therefore, Heritage Inc. arranged all operations of documenting of any artifacts regarding the Coeur de l’Ocean.

Secondly, the Memorandum also prescribed that Heritage Inc. shall place on deposit with the Government the sum of \$100,000 to assure the Government that funds are available for the conservation and documentation of any artifacts retrieved from the site.<sup>17</sup> Moreover, when it becomes reasonably apparent that the cost of conserving and documenting the artifacts will be substantially less than the Deposit, the Government will return such excess Deposit to Heritage Inc.<sup>18</sup> It is obvious that Heritage Inc. covered all costs of the documenting any artifacts retrieved from the shipwreck.

Furthermore, there is no fact indicating that Rolga Government entitled any third party to make documentation of the wrecks. So, Heritage Inc. is the only one who has the rights of documenting of the Coeur de l’Ocean under the 1995 Memorandum.

## **2. Benevolent Heritage Inc. has exclusive rights of photographing and documenting of the Coeur de l’Ocean under law of the case**

In the *R.M.S v. The wrecked and abandoned vessel* Case, United States Court of Appeals, Eastern District of Virginia, in its judgment on August 13, 1996, stated that photograph can be marketed like any other physical artifact.<sup>19</sup> Moreover, as proven above, the Benevolent

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<sup>16</sup> *Moot problem*, Appendix (1) Partnering Agreement Memorandum, Part 2, para. 1.

<sup>17</sup> *Moot problem*, Appendix (1) Partnering Agreement Memorandum, Part 3, para. 3.

<sup>18</sup> *Moot problem*, Appendix (1) Partnering Agreement Memorandum, Part 3, para. 4.

<sup>19</sup> *R.M.S Titanic, Inc. v. Wrecked and Abandoned Vessel*, 1996 WL 650135, 1996 A.M.C 2497 (E.D.Va. August 13, 1996) (NO. CIV. A 2:93CV902), at 2499.

Heritage Inc., in this case, had the exclusive salvage rights to the shipwreck, including the rights to photographing and documenting of the Coeur de l’Ocean as physical artifact without any interference from any other third parties.<sup>20</sup>

**3. Rolga failed to exercise due diligence in protecting the exclusive rights of documenting and photographing of the Coeur de l’Ocean of Benevolent Heritage Inc.**

In the *Neer* case, the US Mexico Claim Commission expressed the concept of minimum standard as follows: “the propriety of Governmental acts should be put to the test of international standard...the treatment of an alien in order to constitute an international delinquency should amount to the outrage to bad faith to willful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authority to measure up to international standards is immaterial”.<sup>21</sup>

According to the case *Asian Agricultural Products Limited v. Republic of Srilanka*, para. 67, minimum standard includes, among other things, the obligation of due diligence, which attains the status of customary international law. Also in the AAPL case, para. 76 and 85B, it is said that “The obligation of due diligence requires the undertakings of all possible measures that be reasonably expected to prevent the eventual occurrence of killings or

property destruction”.

In the present case, Bennevolent Heritage was a foreign corporation that invests into Rolga, thus, it was entitled to be treated with due diligence from the Government of Rolga. In fact, the ongoing television documentary produced by Benevolent Heritage Inc. and the use of the name “Coeur de l’Ocean” are among the activities of the operations of Heritage Inc. to document this shipwreck. Nevertheless, the Government of Rolga had not prevented the Aquatic View to write a song entitled “Coeur de l’Ocean” and the CDs of which are commercially marketed as souvenirs. Heritage Inc. brought these issues to the attention of the Rolgan Historic Monument Executive Agency but the Agency was unable at this time of the complaint to deal with the matter. The activities of the tour operator have, according to Heritage Inc., jeopardized their ongoing television documentary deal with an International Broadcasting Company.<sup>22</sup> Consequently, the Government of Rolga failed to exercise such obligation in protecting the exclusive rights of documenting of the Coeur de l’Ocean of Benevolent Heritage Inc.

With regards to the exclusive rights of Bennevolent Heritage Inc. to take photographs of the Coeur de l’Ocean, the Government of Rolga also failed to exercise its obligation of due diligence. Although the Aquatic View was permitted by the Government to organize exclusive underwater trips to view the wreck of Coeur de l’Ocean, there is no indicating that Aquatic View was entitled the right to photograph the Coeur de l’Ocean.<sup>23</sup> As a result, Rolga Government’s failure to prevent the Aquatic View to take photograph and making

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<sup>21</sup> U.N Reports of International Arbitral Award, 1926, IV, pp. 60ff.

<sup>22</sup> *Moot Problem*, para. 11.

video clips of the wreck amounted to its failure to exercise its obligation of due diligence.

### **III. THE CALCULATION OF PROFITS AND/OR DISTRIBUTION OF ARTEFACTS BETWEEN THE PARTIES TO BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES**

#### **1. The salvors of the artefacts, in this case, Bennevolent Heritage Inc., are entitled to be rewarded for their salvage operation under Art. 12 of the 1989 Salvage Convention**

Art. 1 of the 1989 ISC provides the definition of salvage operation. It states that salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other water whatsoever. *Kennedy and Rose* gives a working definition of the salvage as<sup>24</sup> a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor. The definition contains the essential elements of salvage service, which are: a recognised subject of salvage; danger necessitating salvage service, a volunteer salvor and success.

For the salvage award to be sustainable there must be some degree of success on the part of the salvor.<sup>25</sup> The well known phrase which characterises this aspect of marine salvage is “No cure, No pay”. Under the 1910 Salvage Convention the phrases used relating to

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<sup>23</sup> *Moot Problem*, para. 11.

<sup>24</sup> Sarah Catherine Derrington, “The Interaction between Admiralty and Insolvency law” (2009) 23, *Australian and New Zealand Maritime Law Journal*, 30-38.

success were that every act or assistance which had a “useful result” gave a right to reward and there should be no payment if the salvage operations had no “beneficial result”.<sup>26</sup> The terms of the 1989 ISC changes the wording of this requirement, but it retains the key phrase of the need for the salvage operations to have a useful result.

Moreover, Art. 12 of the 1989 ISC provided the condition for reward is that salvage operations which have had a “useful result” give right to a reward. Under the traditional salvage law, the salvor had to show, first, that some property in the ship, cargo or life was preserved and, secondly, that the salvor’ efforts contributed, in whole or in part, towards that preservation. The speech of Lord Phillimore in *Owners of The SS Melanie v Owners of The SS San Onofre*<sup>27</sup> was often accepted as an accurate statement of this requirement. He said: “Success is necessary for a salvage reward. Contributions to that success, or as it is sometimes expressed, meritorious, which do not contribute to the ultimate success, do not give a title to the salvage reward.”<sup>28</sup>

In the present case, the salvage operation of Benevolent Heritage Inc, in fact, had successful results. After the Coeur de I’ Ocean was discovered, in order to convince the relevant authority to approve an extensive recovery project, they have recovered some silver coins from the wreck and these were confirmed by the government archaeologists as “rare items”

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<sup>25</sup> *The Tojo Maru* [1972] AC 242 at 293; *The San Onofre* [1925] AC 246 at 242.

<sup>26</sup> Convention for the Unification of Certain Rules of law Relating to Assistance and Salvage at Sea, signed at Brussels, 23 September 1910; A2. “Art. 2: Every act of assistance or salvage which has had a useful result gives a right to equitable remuneration. No remuneration is due if the services rendered have no beneficial result. In no case shall the sum to be paid exceed the value of the property salvaged”.

<sup>27</sup> *Supra* note 25

<sup>28</sup> For further discussion, see Halsbury’s Laws of England, 4th ed, Vol 43, paras 1051-1052; Brice, above n 1, para 1-348ff; Kennedy’s Law of Salvage, above n 1, ch 7.

and were found in mint condition. Further, some gold bars were found, which made the finding even rarer, as gold bars would at that time normally have been melted down and made into coins. There were also gold bullions and ingots. The National Geographic has described the find as the most “bedazzling underwater treasures ever found today” with an estimate worth more than USD \$1 billion. The Government eventually approved the project and the ‘Partnering Agreement Memorandum’ was signed on 27th September 1995.<sup>29</sup> Moreover, many of the artefacts have been recovered from the wreck Coeur de l’ Ocean today.

To sum up, the salvage operation was successful and well met the conditions for reward, which are provided in Art. 12, therefore, Bennevolent Heritage Inc., is entitled to be rewarded for their salvage operation.

**2. The calculation of profits and/or distribution of artefacts between the parties to be made solely on the basis of salvage legal principles**

*a. The calculation of the profits and/or distribution of artifacts between the parties are not governed by the 1995 Memorandum in this case*

Art. 5 of the 1995 Memorandum provided the sharing arrangement between the Government and Heritage Inc. However, the ratification the 2001 UNESCO Convention has prompted Heritage Inc. to reconsider their position under the 1995 Memorandum with the Government of Rolga.<sup>30</sup> It is considered that the activities of the Government caused

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<sup>29</sup> *Moot Problem*, para. 5.

<sup>30</sup> *Moot Problem*, para. 12

changes in distribution of artefacts which were not provided in the 1995 Memorandum. Moreover, the Government of Rolga made unfair distribution of artefacts contrary to the 1995 Memorandum that made Heritage Inc feel that further investment in efforts, time and money into other Astorian wrecks would only be harmful to the company.<sup>31</sup> One of the activities of the Government that caused unfair distribution of artefacts was setting up maritime exhibitions and has also doubled them within National Museum in 2000 to showcase recovered artefacts from the wreck of Coeur de l' Ocean ranging from trade items such as cannons, elephant, tusks to gold coins.<sup>32</sup> The cultural purpose may be justifiable if the Government has measures to still ensure all rules in the Memorandum which has come in force for twenties years from the date Heritage Inc. commences operations.<sup>33</sup> However, in fact, the Government did not calculate and distribute the artefacts fairly and pursuant to the 1995 Memorandum between two parties.

Therefore, the calculation of the profits and/or distribution of artifacts between the parties are not governed by the 1995 Memorandum in this case.

***b. The Tribunal has jurisdiction in this case***

The amount of a salvage award under Admiralty law is always a matter of discretion for a tribunal or arbitrator. Even where a fixed price 1995 Memorandum has been agreed, the 1989 Convention give the right to modify the 1995 Memorandum if the price is deemed too

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<sup>31</sup> *Moot Problem*, para. 12

<sup>32</sup> *Moot Problem*, para. 6

<sup>33</sup> *Moot Problem*, Appendix (1) Partnering Agreement Memorandum, para. 8

high or too low to be fair to all parties.<sup>34</sup>

In this case, as proven above, the Government caused changes in practicing the 1995 Memorandum. In other words, they did not ensure the calculation and distribution of the artifacts pursuant to the 1995 Memorandum. The sharing arrangements are considered fair sharing which is accepted by to parties of the 1995 Memorandum. Therefore, the Government made unfair sharing to Heritage Inc.

Therefore, the Court has jurisdiction in this case.

*c. The calculation of profits and/or distribution of artefacts between the parties to be made solely on the basis of salvage legal principles under international law*

There are different ways of ensuring that the salvage reward can be determined after the salvage. Art. 13(1) of the Convention specifies the criteria to be taken into account in fixing the salvage reward:

- the salvaged value of the ship and other property
- the skill and efforts of the salvor to prevent or minimise pollution
- the degree of success of the salvage operation
- the degree of danger involved
- the skill and efforts of the salvor in salvaging life, the ship and other property
- duration and expense of the salvage operation and the cost incurred by the salvor

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<sup>34</sup> *International Convention on Salvage*, 28 April 1989, IMO-454A, (entered into force 14 July 1996) (1989 Convention), Art. 7.

- risk of liability
- promptness of the salvage operation
- availability of vessels and equipment for the salvage operation
- state of readiness of the salvor's equipment

In this case, sharing arrangements provided in the 1995 Memorandum cannot be practiced because of the unfair distribution of the artifacts of the Government, therefore, the calculation of profits and/or distribution of artefacts between the parties to be made solely on the basis of salvage legal principles.

## CONCLUSION AND PRAYER FOR RELIEF

**Benevolent Heritage Inc. respectfully requests the Tribunal to declare that:**

- I. The Respondent has interfered with their salvage rights and performance under the 1995 Memorandum when it entered into Agreement with Astoria in 2003, 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 the taking of photographs.
- II. Benevolent Heritage Inc. have exclusive rights of photographing and documenting of the Coeur de l' Ocean.
- III. The calculation of profits and/or distribution of artifacts between the Parties to be made solely on the basis of salvage legal principles.