

INTERNATIONAL ARBITRATION CENTRE

2009

MEMORANDUM FOR CLAIMANT

CLAIMANT

Benevolent Heritage Incorporated

Étage 3, 157 Rue Van Cleef

Astoria City

ASTORIA.

RESPONDENT

The Government of the State of Rolga

Parliament Buildings

Zamzala City

ROLGA.

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	2
STATEMENT OF JURISDICTION.....	6
QUESTIONS PRESENTED.....	7
STATEMENT OF FACTS.....	7
SUMMARY OF PLEADINGS.....	10
PLEADINGS.....	11
RESPONDENT BREACHED THE TERMS OF THE CONTRACT.....	11
DELIBERATE MISCONSTRUCTION AND DISREGARD OF THE IMPLIED TERMS OF THE CONTRACT.....	13
ALTERNATIVE ENTITLEMENT.....	15
DELIBERATE MISCONSTRUCTION AND DISREGARD OF THE EXPRESS TERMS OF THE CONTRACT.....	16
ARGUMENT ON THE LAW.....	19
CONTRACT.....	21
BREACH.....	22
REMEDIES.....	24
CONCLUSION ON THE MERITS.....	24
PRAYER FOR RELIEF.....	25

INDEX OF AUTHORITIES

ABBREVIATION	FULL CITATION	CITED IN
<i>Berne Convention</i>	Berne Convention for the Protection of Literary and Artistic Works, 1886.	14
<i>Copyright Treaty</i>	WIPO Copyright Treaty, 1996.	14
CPUCH	United Nations Convention on the Protection of the Underwater Cultural Heritage 2001	10,12,16
	European Convention on Human Rights, 1950.	20,21
<i>Law of the Sea</i>	United Nations Convention on the Law of the Sea (UNCLOS), 1982.	6
<i>Law of Treaties</i>	Vienna Convention on the law of Treaties, 1969.	12
<i>Salvage Convention</i>	International Convention on Salvage. 1989.	16,19
<i>The Model Law</i>	UNCITRAL Model Law on International Commercial Arbitration 1985.	6

SCHOLARLY WORKS AND ARTICLES

<i>Mo</i>	Mo, John Shijian, <i>International Commercial Law</i> (4 th ed, Butterworths, Australia 2009)
-----------	--

<i>Booth</i>	Booth, Forrest (2006). Art and Cultural Heritage. B. Hoffman (Ed) <i>The Collision of Property Rights and Cultural Heritage; the Salvor's and Insurers' Viewpoints</i> , p 296. Cambridge University Press.	17,18
--------------	--	-------

JUDICIAL DECISIONS

<i>Aircraft Recovery, L.L.C. v Abandoned Aircraft</i>	54 F. Supp.2d 1172 (1999).	
<i>Anglo-Norwegian Fisheries Case</i>	I.C.J. (1951).	6
<i>Bell v Lever Brothers Ltd</i>	[1932] AC 161.	14
<i>Bernis v RMS Lusitania</i>	884 F.Supp 1042 (1995).	
<i>B Seppelt and Sons Ltd v Commissioner for Main Roads</i>	(1975) 1 BPR 9147.	21
<i>Carlill v Carbolic Smoke Ball Co</i>	(1893) 1 QB 256.	22
<i>Codelfa Construction Pty Ltd v State Rail Authority of New South Wales</i>	(1982) 149 CLR 337.	14
<i>Colombus-America Discovery Group v Atlantic Mutual Insurance Company</i>	974 F.2d 450 (1992).	
<i>Colombus-America Discovery Group v Atlantic Mutual Insurance Company</i>	203 F.3d 291 (2000).	
<i>Colombus-America Discovery Group v Sailing Vessel</i>	742 F.Supp. 1327 (1990).	
<i>Currie v Misa</i>	(1875) LR 10 Ex 153.	22

<i>Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd</i> [1915] AC 847.	22
<i>H.M.S. Thetis</i> (1835) 3 Hagg, 228.	20
<i>In re 'La Lavia'</i> (1990) I.L.R.M. 194.	
<i>Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd</i> (1938) 61 CLR 286.	23
<i>Morris v Lyonesse Salvage Co. Ltd</i> (The Association) [1970] Lloyds Rep 59.	20
<i>R.M.S. Titanic v Wrecked and Abandoned Vessel</i> (1996) A.M.C. 2497.	
<i>R.M.S. Titanic v Wrecked and Abandoned Vessel</i> 9 F.Supp.2d 624 (1998).	
<i>R.M.S. Titanic v Haver</i> (1999) A.M.C. 1330.	
<i>Robinson v The Western Australian Museum</i> (1997) 51 A.L.J.R. 806.	
<i>Sea Hunt Inc v Unidentified Shipwrecked Vessel or Vessels</i> 22 F.Supp.2d 521 (1998); 2000 A.M.C. 2113.	
<i>The Blenden Hall</i> DODS 414 (1814).	19
<i>The Moorcock</i> (1889) 14 PD 64.	13
<i>U.S. v Steinmetz</i> 763 F.Supp.1293 (1991).	

QUESTIONS PRESENTED

Counsel makes the following submissions on behalf of the Claimant. For the reasons stated in this Memorandum, Counsel respectfully requests this Honourable Tribunal to declare that;

- The Arbitral Proceedings should continue.
- The Respondent breached the terms of the contract.
- The Respondent misconstrued and disregarded the implied and express terms of the contract.
- The Claimant is entitled to rely on their common law rights as salvor.
- The Claimant is entitled to relief in the form of the terms of the contract.

STATEMENT OF JURISDICTION

The UNCITRAL Model Law on International Commercial Arbitration is the body of law which applies to international commercial arbitrations, and is the law by which this tribunal submits. Article 1 of the Model Law outlines the territorial scope of its application. Although the current situation does not meet the international aspect of the law's application, it is suggested that the Memorandum between the Government of Rolga and Benevolent Heritage satisfies the requirement of subsection (5) which states that; 'this model law shall not affect any other law of this State by virtue of which certain disputes may or may not be submitted to arbitration.' Given that clause 9 of the memorandum creates an arbitration agreement as defined in article 7 of the Model Law, as well as the monist applicability of Rolgan ratified

conventions the Model Law is suggested to apply to the current arbitration. The Arbitral Tribunal is respectfully requested to continue with Arbitral proceedings.

For the purpose of the following submissions the wreck of the ‘Coeur de l’Ocean’ is considered to be located within the maritime zone of the territorial sea of Rolga. Article 3 of the Law of the Sea provides that each State has the right to establish the breadth of its territorial sea provided it does not exceed 12 nautical miles. Given the wreck is located at 12 nautical miles, and from instructions Rolga has acceded to a territorial sea limit of 12 nautical miles, it provides that the wreck is within the territorial sea. The territorial sea, as its name implies, enables the State to exercise the same sovereignty over the littoral waters as pertains to the land itself. (*Anglo-Norwegian Fisheries case*¹). In the alternative if the tribunal finds the wreck to be outside the territorial limit, the wreck will be presumed to lie in the contiguous zone. States have a duty to protect objects of an archaeological and historical nature, in order to control traffic in them pursuant to article 303 of the Law of the Sea, States have the right to treat the removal from contiguous zones as a breach of territorial laws.

STATEMENT OF FACTS

In 1800 the City of Zamzala was part of the ancient Nation of Astoria, it is noted however that the City of Zamzala now forms part of the State of Rolga. During the 1800s Zamzala was plundered and the attacking soldiers stole riches and valuable property from the Sultan’s Palace in Zamzala and loaded the stolen booty on board a ship named ‘Coeur de l’Ocean’. The ship sailed from Zamzala and sank shortly thereafter still laden with stolen booty.

¹ *Anglo-Norwegian Fisheries case* I.C.J. (1951).

The sea area of Rolga near to the location of the wreck of the 'Coeur de l'Ocean' attracted treasure hunters and divers in the 1980s, with some wrecks targeted by illegal treasure hunters. In 1990 Mr Bernard Bodd, a renown sailor and major shareholder of the Claimant, submitted a proposal to the Rolga Cultural Heritage Committee to survey and recover significant historical wrecks that related to Astorian related activities of past years. The Claimant has expertise in the recovery of historic wrecks and this proposal included reference to the location of the 'Coeur de l'Ocean' which, it was believed, lay some 20-25 kilometres off the coast of Rolga. Subsequently, on 1 June 1993 the Claimant located the wreck of the 'Coeur de l'Ocean' some 12 nautical miles off the coast of Rolga.

The Claimant and the Respondent continued the negotiations of 1990 and on the 27 September 1995 signed a 'Partnering Agreement Memorandum' which described the principal terms of the memorandum as 'Agreement Concerning the Shipwreck Coeur de l'Ocean' (Agreement). This Agreement accorded with the relevant and applicable law of Rolga at that time.

The Claimant, in compliance with Article 3 of the Agreement, had paid considerable sums of cash money to the Respondent by way of a license fee and deposit. Item 5 of the Agreement also included a value Sharing Arrangement with respect to recovered artefacts and the proceeds of sales of those artefacts.

The Claimant, in partnership with the Respondent and in accordance with the terms of the Agreement, embarked on research and recovery of artefacts from the wreck of the 'Coeur de l'Ocean'. Some recovered artefacts had been sold with the proceeds put towards the cost of the project while other artefacts were in the care and custody of the Respondent. The Respondent had placed on public display in the National Museum some recovered artefacts however not all artefacts had been made public.

In late 2000 the Respondent passed a law, for the protection of wrecks of historical and cultural significance to Rolga, which authorised the relevant Minister to declare a restricted area around a ship wreck of importance.

On 2 November 2001 the Respondent adopted the United Nations Convention on the Protection of the Underwater Cultural Heritage. The Respondent's relevant Minister has subsequently spoken publicly regarding the need for the Respondent to protect its cultural heritage from being lost forever. At that time the Respondent had also entered into an agreement with the Government of Astoria in which all rights, title and interest in wrecked, ancient vessels of ancient Astoria were transferred to the Respondent which accepted such rights, title and interest. An appendix to this 2001 agreement provided for the division of some artefacts with museums in Astoria.

The Respondent had been questioned by different parties on the perceived exploitation of artefacts from the 'Coeur de l'Ocean' and on the reported destruction of some artefacts subsequent to their recovery. Furthermore, the Respondent had given authority to a tour operator for underwater viewing tours of the 'Coeur de l'Ocean' and this tour operator has engaged in marketing the site of the 'Coeur de l'Ocean' by way of photographs, video clips and a musical compilation.

The Claimant and Respondent agreed to finalise the distribution of recovered artefacts in accordance with the terms of Article 5 of the Agreement but the Claimant believes that such distribution favoured the Respondent and was contrary to the Agreement.

Accordingly, the Claimant is of the opinion that this behaviour of the Respondent regarding the operation of the terms of the Agreement is such as to constitute a serious breach of the Agreement, in terms of Article 8 of the Agreement, and that the Agreement is thereby terminated.

SUMMARY OF PLEADINGS

The Claimant and Respondent had entered into an exclusive contractual arrangement in 1995 via their Partnering Agreement Memorandum which described the principal terms 'Agreement Concerning the Shipwreck Coeur de l'Ocean' in ten items.

This Memorandum and Agreement granted exclusive rights to the Claimant, in exclusive partnership with the Respondent, concerning the surveying of the shipwreck site, recovery of artefacts from the before mentioned shipwreck site, the dealing of any recovered artefacts from that site by way of sale or preservation whether by display or not, and also any photography or marketing of the shipwreck site of the 'Coeur de l'Ocean'.

It is submitted that the Respondent interfered with those exclusive rights by their ratification of the United Nations Convention on the Protection of the Underwater Cultural Heritage in 2001, by their entering into a shared agreement with the Nation of Astoria in 2003, and by their granting of a permit to a tour operator to conduct exclusive underwater tours to the 'Coeur de l'Ocean' including the marketing of the shipwreck site.

The Memorandum and Agreement provides for the calculation of and distribution of profits from the recovery of artefacts from the 'Coeur de l'Ocean' between the Claimant and the Respondent. The Respondent has not engaged in such calculation and distribution in accordance with the terms of the Agreement.

This non-compliance with the terms of the Agreement is considered a serious breach of contractual obligation. The Claimant, therefore, wishes to terminate the Agreement. Prior to

such termination the Claimant considers that the artefacts recovered thus far, in the custody of the Respondent, should be distributed in accordance with the terms of the Agreement.

PLEADINGS

In relation to the first of the substantive issues in dispute, the Claimant submits that the Respondent is wholly responsible for the breaches of contract between them.

In relation to the second of the substantive issues in dispute, the Claimant submits that the Respondent has deliberately misconstrued and disregarded an implied term of the contract, namely that all photography and documentation of the resting place of the wreck of the 'Coeur de l'Ocean' was an exclusive right of the Claimant.

In relation to the third of the substantive issues in dispute, the Claimant submits that the Respondent has further misconstrued and disregarded an express term of the contract, that any profits based on the appraised value and/or selling prices of artefacts be distributed fairly between the Claimant and the Respondent in accordance with salvage legal principles.

RESPONDENT BREACHED THE TERMS OF THE CONTRACT

The Claimant and the Respondent entered into the terms of their Contract, subsequent to some five years of exploration, surveys, and research of shipping records concerning historical activities of the Nation of Astoria. This exploration, surveying and research included, in part, the sovereign, territorial waters of the State of Rolga and was not undertaken in secret as at all times the Respondent was aware of the Claimant's activity. From an historical perspective the Respondent was eager to locate the 'Coeur de l'Ocean'

wreck and when the wreck was located, in 1993, the Respondent kept that location a secret. Artefacts recovered from the wreck were confirmed as genuine and were described in glowing terms by historical authorities such as the renowned National Geographic. It took two years subsequent to the discovery, for the Partnering Memorandum Agreement to be agreed upon and signed by the parties.

The Claimant submits that the Memorandum is clear and easily applied by virtue of its brevity. Article 1 of the Memorandum states: This Memorandum sets forth the principal terms “Agreement concerning the Shipwreck Coeur de l’Ocean” (“Agreement”).

The Claimant submits that this simple sentence expressly provides that all activity concerning the ‘Coeur de l’Ocean’ wreck is covered in this Agreement, and that activity is restricted between the Claimant and the Respondent. The Claimant submits that the actions of the Respondent in ratifying the U.N. Convention on the Protection of the Underwater Cultural Heritage in 2001, entering into a agreement with the Nation of Astoria in 2001 providing for the sharing of artefacts from the ‘Coeur de l’Ocean’, and by further allowing a tour operator, other than the Claimant, to conduct tours of the ‘Coeur de l’Ocean’ constitutes serious breaches of contractual obligations under Article 8. The Claimant further submits that the actions of the Respondent in their endeavours to apply the Convention on the Protection of the Underwater Cultural Heritage to the instant case is contrary to international law. There is no provision in this Convention for the retroactive application of the Convention. The custom that applies, and with which Article 28 of the Vienna Convention on the Law of Treaties agrees, is that international agreements are not retroactive. Therefore any attempt by the Respondent to apply the terms of the CPUCH to the Agreement should be considered as having no application.

DELIBERATE MISCONSTRUCTION AND DISREGARD OF THE IMPLIED TERMS OF THE CONTRACT

Article 6 of the Agreement makes specific reference to the granting, by the Respondent, of the right to use the name ‘Coeur de l’Ocean’ in relation to all sales and marketing related to the wreck of that ship. The second paragraph of Article 6 is very specific in that the Claimant will pay a set fee to the Respondent for the gross value of the sales of merchandise that utilises the name ‘Coeur de l’Ocean’. The Claimant submits that by the use of ordinary language applied in the interpretation of this Article, and by the application of the intent of the parties at the time of drafting, agreement and signing of the Agreement, it was intended that this Article granted exclusive rights to the Claimant with respect to all sales and marketing relating to the wreck of the ‘Coeur de l’Ocean’.

If one were not to accept this argument, one should ask “Why would the Claimant embark on such a venture if the fruits of their labours would not lead to their being exclusively entitled to all sales and marketing relating to the ‘Coeur de l’Ocean’ wreck?” The Claimant submits that such exclusivity, by way of this implied term of fact, is the only interpretation that can be applied, objectively, to the terms of the Agreement. Implied terms have their origins in the case *The Moorcock* (1889) 14 PD 64², in which Bowen LJ held, at 68;

“I believe that if one were to take all the cases...it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all

² *The Moorcock* (1889) 14 PD 64

events it should have...(N)ot to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure.”

Mason J, in the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337³, at 345, spoke of “an implied term necessary to give business efficacy to a particular contract.”

Jordan LJ in *Bell v Lever Brothers Ltd* [1932] AC 161⁴ at 226 held that, in considering whether to adopt an implied term or not, “it is not sufficient that it would be reasonable to imply term, it must be clearly necessary.”

The Claimant submits that there is no other interpretation that can be applied to the Agreement, other than the Claimant was entitled to the exclusive rights of sales and marketing relating to the wreck of the ‘Coeur de l’Ocean’.

The Claimant submits that they are the author of literary and artistic works, as referred to in the preamble to the Copyright Treaty, and therefore, under Article 6 of that Treaty, the Claimant shall enjoy the exclusive right of authorizing and making available to the public any and all copies of photographs, video clips and musical compilations that relate to the wreck of the ‘Coeur de l’Ocean’ or the artefacts therefrom. By this reference to the Copyright Treaty, and by default the Berne Convention for the Protection of Literary and Artistic Works, the Claimant thereby submits that the Respondent had no authority, under international law, to make a further contract with a third party for the delivery of underwater tours and the taking of photographs, video clips and musical compilations that involve the ‘Coeur de l’Ocean.’

³ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337

⁴ *Bell v Lever Brothers Ltd* [1932] AC 161

ALTERNATIVE ENTITLEMENT

The Claimant acted at all times as Salvor in that they engaged in the work of salvaging the 'Coeur de l'Ocean' wreck. On that basis the Claimant is entitled to the rights as outlined in Article 12 and Article 13 of the International Convention on Salvage.

Article 12 provides:

1. Salvage operations which have had a useful result give right to a reward.
2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.
3. This chapter shall apply, notwithstanding that the salvaged vessel and the vessel undertaking the salvage operations belong to the same owner.

It is the Claimant's submission that the apportionment of payment to the Claimant by way of reward is in accord with the Sharing Arrangements outlined in Article 5 of the Agreement. The salvage of the 'Coeur de l'Ocean' by the Claimant had a useful result in that the vessel was identified, its location was plotted and given to the Respondent, artefacts were recovered from the shipwreck and they were transferred to the care and custody of the Respondent, and some of those recovered artefacts were sold with the result that the profits of sales went, in part, to the Claimant. This was the first time that the public at large was aware of the recovery of the 'Coeur de l'Ocean', as up to that point in time the public would have believed that the wreck and the artefacts, in the form of stolen booty, were somewhere on a seabed, there to remain lost to humanity for the rest of time. It was right and proper, and in

accord with the terms of the Agreement, that the profits should go towards the cost of the recovery operation.

The Claimant further submits that the implied terms of Article 6 of the Agreement, in relation to merchandising income that was granted to them by the Respondent, is their rightful entitlement under international law, namely the International Convention on Salvage. This rightful entitlement was taken from the Claimant by the Respondent when the Respondent gave credence to other subsequently acquired obligations, for example the sharing arrangement in the agreement with the Nation of Astoria, the ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage and the granting of permits to an exclusive underwater tour operator which included the sales and marketing of 'Coeur de l'Ocean' merchandise.

That the Respondent Government has the prerogative to enter into such arrangements under alternative circumstances is not in issue. That the Respondent Government exercises such prerogatives while it still has obligations under earlier contractual arrangements with third parties, such as the Claimant, is the main point at issue.

DELIBERATE MISCONSTRUCTION AND DISREGARD OF THE EXPRESS TERMS OF THE CONTRACT

The Claimant submits that Article 5 of the Agreement can be construed as an express term having a direct bearing on the apportionment of the value of the artefacts recovered from the wreck of 'Coeur de l'Ocean'. This express term provides for the division of artefacts between the Claimant and the Respondent, as the only two parties involved. There is no provision for the inclusion of any other party, or the projected possibility that some or any

other party may become involved at a future time. This apportioning, the Sharing Arrangement, is set out in terms that the Claimant describes as fair. The lower value range, under Article 5, that provides for 20% of the value to the Respondent and 80% of the value to the Claimant, up to \$45 Million, is an indication that the Respondent acknowledged the large set-up and operating costs incurred by the Claimant. As the value of the recovered artefacts increases so does the Respondent's share of the value of the recovered artefacts and the Claimant's share decreases. This is what was agreed to at the time and the Claimant has no objection to the Sharing Agreement.

It is readily conceded by the Claimant that the Respondent has a duty under International Law, by virtue of its ratification of the Convention on the Protection of the Underwater Cultural Heritage, to 'protect objects of an archaeological and historical nature found that sea and shall co-operate for that purpose'; Article 303(1).

The Claimant submits that even prior to this ratification the Respondent had accepted this moral point of view and the Claimant supported the Respondent's position. The Respondent had not undertaken any enquiries with underwater recovery organisations, such as the Claimant, prior to the Claimant approaching the Respondent with a suggestion for a partnership arrangement to locate the wreck of the 'Coeur de l'Ocean' and, the Claimant submits, no other organisation is in a position to undertake any further recovery of artefacts from the resting site of the 'Coeur de l'Ocean'. It is highly desirable that the artefacts of the 'Coeur de l'Ocean' be raised from the ocean bed and placed in a safe environment from where they can be sold or displayed.

There has been comment on the efficacy of removing artefacts from the seabed and placing them in safe custody for viewing by the public. An Article by Forrest Booth in *Art and Cultural Heritage*, page 296, comments on the R.M.S. Titanic which sank on 15 April 1912.

When the ship was discovered in 1985 the wooden decking had almost wasted away, the iron hull rusting in the saltwater environment. It is said that rust-eating bacteria are feeding on the ship and are devouring some 600 pounds of iron each day. The ship sits in some 3788 meters of water and all of the various artefacts that remain in the ship will only every be seen via deep-sea submersibles by a very select group of people well versed in deep-sea diving. The general public would never see these artefacts of ‘cultural heritage’ and to that extent they might as well not exist at all while they lie on the ocean floor. There are numerous other examples of well-known vessels and mention is made, in the above referred article, of the S.S. Andrea Doria, which sank in 1956 off the coast of Massachusetts and whose artefacts remain with the ship on the sea bed. To quote directly from the article:

Although shallow by the standards of most of the world’s oceans, it is well beyond the capability of 99.9 per cent of the world’s population to reach. Mankind would be far better off if artefacts from that ship were recovered and sold for use, display and/or study.

Wooden ships, such as the Vasa of the Swedish Navy, which sank in 1628 and was raised and preserved in 1961, and the British ship H.M.S. Mary Rose, which sank in 1545 and was raised and preserved in 1982, have been put on public display for the benefit of all who would want to visit and view them. This, the Claimant submits, is the true purpose of recovering a ship of renown and of displaying its cargo, whatever it may be. The owner of the ship, if they can be identified, may well then be at liberty to sell preserved artefacts that are intact, such as cutlery or china, as they no doubt would have done if their ship had not sunk at some previously inopportune time.

To quote further from Booth at page 298;

To assert manmade objects should be left on the ocean floor as the common cultural heritage of all mankind is both elitist and misinformed. Such artefacts will simply remain in the deep ocean, progressively decaying and wasting away, as are the Titanic, the Lusitania and the Andrea Doria. Eventually they will be lost or completely destroyed by this process or by some natural disaster. Ordinary people will never be able to see them and even the most sophisticated sports divers are unable to reach them. However, if salvage (recovery) of such artefacts is allowed, the process of recovering them will pay for itself. The salvor will be remunerated whether under the law of salvage or the law of finds, and the artefacts will then be made available for purchase. If they are of great historical, artistic or archaeological significance, museums can purchase them and place them on public display. However, even if they remain in private hands, they can be enjoyed by someone, which cannot be said of any artefacts on the ocean floor.

ARGUMENT ON THE LAW

The Claimant submits that at law they are to be regarded as the salvor in terms of the common law of the sea and also in terms of the International Convention on Salvage. The common law of the sea took its precedent from the Courts of England, as the major imperial power particularly during the 19th century. In simple terms, the Claimant submits that the law of Rolga, which is *pari material* with the law of the Federation of Malaysia, has thereby accepted the legal precedents that applied to the Union / Federation of Malaya as a dominion of the British Empire and that have not been displaced by subsequent laws promulgated by Malaysia.

The case of *The Blenden Hall* DODS 414 (1814)⁵ gave weight to the concept that the first person who boards and takes possession of a derelict, or discarded ship thereby acquires the status of salvor in possession and as such, per Sir W. Scott at 416, was held to “have a legal interest, which cannot be invested...and it is not...for any other person to dispossess them without cause.”

This went further in the case involving *H.M.S. Thetis* (1835) 3 Hagg, 228⁶ which extended the concept of derelict from an abandoned and floating vessel to those which had sunk to the seabed. This included that sunken vessel’s cargo.

In *Morris v Lyonesse Salvage Co. Ltd (The Association)* [1970] Lloyds Rep 59⁷, the Court considered that the recovery of artefacts amounted to salvage. The *Morris* case is supportive of the submissions of the Claimant in two respects. Firstly, this case involved an archaeological excavation rather than a traditional salvage operation. It thereby established that a maritime archaeologist could become a salvor in possession, and thereby protect their sites from intrusion. This leads further to the view that an archaeologist or salvor who is manifesting control over a site may acquire a possessory right which is enforceable against the world, and which one may say is analogous to a proprietary right in the site. That this has profound implications for maritime archaeology cannot be denied.

As a point of note, the possessory rights of a salvor in possession are regarded as falling within the protection of the European Convention of Human Rights with the result that the salvor cannot be dispossessed by the State without payment of compensation, even when such dispossession is in the public interest.

⁵ *The Blenden Hall* DODS 414 (1814)

⁶ *H.M.S. Thetis* (1835) 3 Hagg, 228

⁷ *Morris v Lyonesse Salvage Co. Ltd (The Association)* [1970] Lloyds Rep 59

The Claimant concedes that the *Morris v Lyonesse* decision is not a Privy Council decision which would probably render it unlikely to be considered part of the law of Malaysia, even though Malaysia retained the Privy Council as its final Court of Appeal until 1985. However, the Claimant contends that such a decision may be regarded as highly persuasive on this matter. Similarly, while the European Convention on Human Rights does not form part of the law of either Malaysia or Rolga such an attitude may, likewise, be regarded as highly persuasive.

CONTRACT

The law of contract, which has existed since the beginning of commercial trading in the history of the world, comprises of three base elements; namely offer, acceptance and consideration.

OFFER: An offer can be described as an indication by one party to another party of his or her willingness to enter into a contractual relationship with that other party on certain terms. This willingness to be so bound must be without further negotiation as to the proposed terms of the relationship – ref *B Seppelt and Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147⁸. The OFFER was first submitted to the Respondent by Mr Bernard Bodd in 1990 in the form of a proposal to the Rolga Cultural Heritage Committee. This offer, in the form of a proposal, became the basis of discussions between the Claimant and the Respondent which culminated in the document titled ‘Partnering Agreement Memorandum’. The terms of this ‘Partnering Memorandum Agreement’ were agreed to by the Claimant and the Respondent. This indicated a clear willingness for both parties to be bound on certain agreed terms. Thus the offer was complete.

⁸ *B Seppelt and Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147

ACCEPTANCE: When an offer has been made and that offer has been accepted, in the exact terms, it is only then that a contract will result. That acceptance must be unequivocal and any modification to that will result in the process re-commencing. Ref: *Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256.⁹ The ACCEPTANCE was complete on the acceptance, in the agreed terms, by the Claimant and the Respondent with the signing of the ‘Partnering Memorandum Agreement’ on 27 September 1995.

CONSIDERATION: Consideration has been defined in various ways by differing judges in differing courts but a simple definition would be the ‘price’ for which a promise is purchased. Ref Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.¹⁰ It was also described in *Currie v Misa* (1875) LR 10 Ex 153¹¹ at 162: ‘A valuable consideration ...may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other..’ The CONSIDERATION was complete with the payment of funds by the Claimant to the Respondent, pursuant to the terms of the ‘Partnering Memorandum Agreement’, of USD\$30,000 as a refundable license fee, USD\$1,250,000 as a deposit to cover government expenses and USD \$100,000 as a deposit for the deposit and consideration of any artefacts retrieved from the site.

The Claimant submits that all terms necessary, at common law, for the creation of a contract between the two parties have been completed.

BREACH

The Claimant submits that the Respondent had placed themselves in such a position with respect to the terms, both express and implied, of the contract – the Agreement, that the

⁹ *Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256

¹⁰ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847

¹¹ *Currie v Misa* (1875) LR 10 Ex 153

contract was at an end. This point was considered by the High Court of Australia in the case of *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286¹² where Latham CJ, at 302, said:

“It was a term of the contract which went so directly to the substance of the contract or was so essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.”

Further, at 304, Latham CJ said:

“The clause was a condition, not a mere warranty. Accordingly, any breach of the clause would entitle the defendant to determine the contract.”

The position, therefore, was that the plaintiff had given the defendant the right to believe that the contract would not be performed according to its true construction. The circumstances were such as to justify the inference that breaches such as those which had already been committed would be committed in the future. The plaintiff, therefore, must be regarded as renouncing the contract which it had in fact made, even though it was contended by the plaintiff that the contract would be properly performed.”

It has been the submission of the Claimant that the behaviour of the Respondent regarding the operation of the terms of the Agreement has constituted a serious breach of the Agreement. This accords with the ratio of Latham CJ, above, and caused the Claimant to believe that the Respondent would continue to engage in similar behaviour in the future, thus rendering the contract – the Agreement, inoperable.

¹² *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286

REMEDIES

The Claimant does not seek any valuable consideration or award for compensation or restitution that is greater than that to which they are entitled under the Agreement.

The appraised value of artefacts recovered by the Claimant is about USD\$166M.

This places the aggregate value range, under Article 5 of the Partnering Agreement Memorandum, in item (ii) whereby the Claimant and the Respondent will share equally the value and/or selling prices of the artefacts at 50% each.

The Claimant wishes to emphasise that they have operated the Agreement, at all times, in good faith. The Claimant wishes to emphasise that they wish to participate in, and conclude, this Arbitration in good faith.

CONCLUSIONS ON THE MERITS

Pursuant to the Partnering Agreement Memorandum the Respondent has breached the contract and is liable for such breach.

The Claimant is entitled to avoidance of the contract on the basis that the breach was fundamental.

There has been no offer by the Respondent to cure the breach.

PRAYER FOR RELIEF

The Claimant respectfully requests the Tribunal to find that:

1. The Respondent is bound by the arbitration agreement contained in the Partnering Agreement Memorandum.
2. The actions of the Respondent by the inclusion of other parties into the exclusive arrangements agreed for the sale and marketing of the wreck of the ship 'Coeur de l'Ocean', and the artefacts therefrom, have constituted a fundamental breach of the Partnering Agreement Memorandum.
3. This fundamental breach then authorises the Claimant to avoid the contract and to be entitled to the payment of profits as agreed between the parties at the time of the making of the contract.