INTERNATIONAL ARBITRATION CENTRE

2009

MEMORANDUM FOR RESPONDENT

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.

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ABBREVIATION	**FULL CITATION**
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, 1886
Copyright Treaty	WIPO Copyright Treaty, 1996
Heritage Inc.	Benevolent Heritage Inc.
UNCLOS	United Nations Convention on the Law of the Sea (UNCLOS), 1982.
CPUCH	United Nations Convention on the Protection of the Underwater Cultural Heritage (Paris, 2nd November 2001)
Law of Treaties	Vienna Convention on the law of Treaties, 1969 (VCLT).
Salvage Convention	International Convention on Salvage, 1989.
The Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985.
UCH	The World Natural and Cultural Heritage Convention 1972.

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QUESTIONS PRESENTED

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

- The Arbitral Proceedings should continue.
- The Respondent has not breached the terms of the contract; rather, the Respondent has enabled the contract to be performed.
- The Respondent has not misconstrued or disregarded the express terms of the contract or any of the alleged, implied terms, of the contract.
- The Claimant is not entitled to rely on the general legal principles of Salvage law.
- The method of distribution suggested by the Respondent is not unfair and is in accordance with the relevant Bilateral Treaty and CPUCH articles.

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 effect 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 UNCLOS 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 of 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 their removal from contiguous zones as a breach of territorial laws.

[1] *Anglo-Norwegian Fisheries Case* I.C.J. (1951).

STATEMENT OF FACTS

In 1800 the City of Zamzala was part of the ancient Nation of Astoria. It should be noted however that the City of Zamzala is now part of the State of Rolga. During the 1800s the City of Zamzala was plundered with the attacking soldiers stealing riches and valuable property from the Sultan's Place in Zamzala, loading the stolen booty on board a ship named 'Coeur de l'Ocean'. The ship sailed from Zamzala and sank shortly thereafter with all stolen booty on board.

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 and wrecks had been targeted by illegal treasure hunters. In 1990 Mr Bernard Bodd, a renown sailor and a major shareholder in the Claimant, submitted a proposal to the Rolga Cultural Heritage Committee to survey and recover significant historical wrecks that relate to Astorian related activities in past years. The Claimant has expertise in the recovery of historic wrecks, the 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 1990 negotiations, and on 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). The Agreement accorded with the relevant and applicable law of Rolga.

The Claimant in compliance with Clause 3 of the Agreement had paid cash money to the Respondent by way of a license fee and a 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 had embarked on research and recovery of artefacts from the wreck of the 'Coeur de l' Ocean'. Some of the artefacts recovered have been sold with the proceeds put towards the cost of the project, with other artefacts in the care and custody of the Respondent. The Respondent has placed on public display in the National Museum some recovered artefacts.

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 of the need for the Respondent to protect its cultural heritage from being lost forever. At that time the Respondent 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. The Respondent has given authority to a tour operator for underwater viewing tours of the ‘Coeur de l’Ocean’, and this tour operator has commenced conducting tours to the site of the ‘Coeur de l’Ocean’.

The Claimant and Respondent embarked on finalising 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.

The Respondent objects to the Claimants assertions. The Respondent believes that by entering into the subsequent agreements and international conventions, the Respondent acted in the best interests of all parties concerned. The Respondent intends to distribute the artefacts in an equitable manner and in the best interests of humankind.

SUMMARY OF PLEADINGS

The Respondent and the Claimant entered into a 'Partnering Agreement' to which governs the commercial relationship between the parties in a venture to excavate artefacts from the 'Coeur de l' Ocean'. Prior to The Respondent entering into the 'Partnering Agreement' Rolga was party and a signatory to UNCLOS, under which Rolga is obligated to protect archaeological objects found at sea and shall co-operate for this purpose. The Respondent subsequently came to the understanding that Astoria still had ownership and title to the 'Coeur de l' Ocean'. Therefore, Rolga became a signatory to other international conventions, fulfilling its duties and obligations under the UNCLOS and at the same time allowing Rolga to present a more appealing and reliable offer to Astoria. This then led to the successful adoption of a bi-lateral treaty between Rolga and Astoria.

The negotiation of the bi-lateral treaty and international conventions was a necessary step to bring the 'Partnering Agreement' into an executable manner. If these steps had not been taken, the Respondent would not have been able to give the Claimant the rights and title to artefacts recovered; *Nemo dat quod non habet*[2].

Rolga, after taking these steps, is able to grant legal title and ownership to the recovered artefacts, bringing business efficacy to the contract. The Respondent's actions have at all times been in the best interests of all parties.

[2] Translated as; No person gives what he or she does not possess. A person cannot assign a greater interest than the interest possessed.

The 'Partnering Agreement' does not expressly or impliedly provide for the Claimant to have exclusive rights in relation to photography and the filming of a documentary. The 'Partnering Agreement' impliedly suggests the opposite. The reference to 'joint marketing' suggests it is a joint effort. Joint in no way suggests that one party should enjoy rights to the exclusion of the other.

The Respondent has had to act in accordance with its international obligations, one of which is to promote archaeological findings to the public in a safe and secure manner. The Respondent, by acting in such a manner and complying with its international duties and obligations, successfully entered into an agreement with Aquatic View. Aquatic View enables the public the opportunity to visit the 'Coeur de l' Ocean' in a regulated and controlled manner. Aquatic View furthermore generates a revenue stream for the Respondent, which also benefits the Claimant. The revenue generated from Aquatic View is used instead of the money deposited by the Claimant for the Respondent's expenses. Thus, the Claimant receives a greater amount via the deposit made with the Respondent.

The application of salvage legal principles is not expressly or impliedly envisaged by the 'Partnering Agreement'. There is a commercial agreement between the Respondent and the Claimant which specifies the relevant proportions that each party is to be allocated when distributing the recovered artefacts, via reference to the aggregate value achieved. Furthermore, the application of a commercial contract negates the application of salvage law principles.

PLEADINGS

I. The Respondent has not interfered with the Claimant's rights or performance Under the Agreement by entering into the Astorian agreement.

A. The Respondent ratified the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) on 10 February 1993.

(i) UNCLOS Article 303(1)

'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose'.

The Respondent and the Claimant executed the 'partnering memorandum' in 1995; thus, UNCLOS applies to 'the Agreement'. From instructions, Rolga and Astoria are both member States to UNCLOS. Therefore under Article 303(1) Rolga and Astoria both have a duty to protect objects of an archaeological and historic nature and shall co-operate for this purpose. Rolga was under a duty and obligation to facilitate international cooperation prior to entering into the agreement with the Claimant. The Respondent is a monist State, and thus, the Respondent's international obligations are automatically incorporated into domestic law.

It is also submitted that nowhere in the agreement does it expressly or impliedly prevent the Respondent from entering into further agreements and or negotiations regarding 'The Coeur de l' Ocean'.

B. ***Nemo dat quod non habet***

(i) The Respondent cannot give what it does not have

The Respondent subsequently came to the understanding that ownership of the 'Coeur de l' Ocean' remained with Astoria, its country of origin. Therefore, the agreement between the Respondent and the Claimant would have given no more than a maritime and possessory lien, respectively, over artefacts recovered from the 'Coeur de l' Ocean'.

Without the subsequent agreement between the Respondent and Astoria, the Respondent would not have had ownership or title to the objects recovered from the 'Coeur de l' Ocean'; *Nemo dat quod non habet*. Therefore, the subsequent agreement is in the best interests of both parties.

In *Bradley v. H. Newsom Sons & Co*[3] it was stated; '*In terms of salvage law, the vessel was then to be regarded as derelict that is in no sense inconsistent with its original owners' retention of title to it*'. Thus, Astoria retained title to the 'Coeur de l' Ocean'.

C. The agreement followed the successful adoption of the CPUCH.

(i) The successful adoption of the CPUCH allowed and encouraged the bi-lateral treaty.

[3] (1919) AC 16 Finlay L.C. at [27]

As previously submitted, the Respondent needed to obtain ownership over the artefacts in order for the contract between the Claimant and the Respondent to become executable. Thus, for the agreement between the Respondent and the Claimant to be effective the Respondent had to undertake certain measures to promote and encourage Astoria to be party to the dealings.

From the facts, the agreement followed the successful adoption of the CPUCH by Rolga. Rolga strengthened its cultural heritage appreciation as a '*symbol of nationhood*'. Such a change was influenced by the development of an international legal regime protecting underwater cultural heritage, particularly the negotiations initiated by United Nations Educational Social and Cultural Organization (UNESCO), subsequently leading to CPUCH. Clearly, it was a necessary action to give business efficiency to the contract between the Respondent and the Claimant to which many changes and developments had to be undertaken.

II. The Respondent has not interfered with the Claimant's rights or performance by ratifying the 2001 CPUCH Convention

A. The CPUCH is applicable to the 'Coeur de l' Ocean'

CPUCH was entered into after the contract between the Claimant and the Respondent had been made. The CPUCH does not have a retroactive clause and pursuant to the Law of Treaties, the relevant Conventions are not retroactive. However, even without a retroactive clause in the CPUCH, the Convention will still be applicable as the contract was being carried out at the time of signing the CPUCH[4].

[4] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) p142

(i) CPUCH Article 1

'*Means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously for at least 100 years*'

It can be seen from the facts that the 'Coeur de l' Ocean' has clearly been under water continuously for well over 100 years. Therefore the CPUCH is applicable to the 'Coeur de l' Ocean'.

B. The Respondent had prior International duties and obligations before entering into contract with the Claimant

(i) CPUCH Article 6

(1) *'State parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character'.*

It is submitted that as the Respondent is under a duty to co-operate and protect objects of an archaeological and historical nature under Article 303(1) of UNCLOS. The Respondent had

acted in accordance with its duties by implementing and ratifying CPUCH. Therefore, the Respondent's obligations to enact and implement such measures existed prior to the 1995 'Partnering Agreement'.

The facts state that Rolga and Astoria are both member States to UCH. Therefore under Article 6 of the CPUCH, Rolga and Astoria have acted in accordance with the treaties objectives and promoted its universal character and application.

(2) '*The parties to such bilateral, regional or other multilateral agreements may invite states with a verifiable link, especially a cultural historical or archaeological link, to the underwater cultural heritage concerned to join such agreements*'.

Furthermore, as Astoria has a verifiable link with the Coeur de l' Ocean it cannot be said that the Respondent has acted in anyway other than in good faith. A bi-lateral treaty has been entered into between the two States that share a significant cultural heritage. The facts state that National Geographic has described the find as the most '*bedazzling underwater treasures ever found today*' with an estimate worth more than USD $1 billion. It would be seen as completely inequitable for Rolga to have neglected Astoria from such a cultural and heritage rich find. Astoria has every right to be included and invited to participate in the excavation of the 'Coeur de l' Ocean'.

(ii) CPUCH Article 5

'*Each state party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage*'.

Rolga, in accordance with Article 5 and other international obligations, is under a duty to prevent and mitigate any adverse effects that might arise from activities under its jurisdiction to the 'Coeur de l' Ocean'.

CPUCH Article 15

'*States parties shall take measures to prohibit the use of their territory, including their maritime ports as well as artificial islands, installations and structures under their exclusive jurisdiction or control in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention*'.

The facts state that the waters surrounding Rolga have lured treasure hunters into the area, and although the war wrecks are not so much affected by the amateur 'souvenir collecting divers', other wrecks have been the targets of illegal treasure hunting. There have been reports of rampant lootings of historic wrecks in the territorial waters of Rolga due to the lack of policing in maritime areas, and the lack of awareness of the significance of the artefacts to the country. Rolga is an extremely popular destination among wreck divers from

around the world. In the mid 1980s middlemen were seen to have approached local fishermen to seek information regarding artefacts trapped during trawl-net fishing and information regarding their locations.

The Respondent has taken steps to increase the protection of its waters for a long period of time. An example of this is the listing of several Rolgan Islands under the 1972 World Natural and Cultural Heritage Convention due to their rich biodiversity and ecosystem values.

Subsequently, Riska Benti, Minister of the Rolgan Cultural Heritage had conducted a study and reviewed the inadequacies of legal mechanisms to address the problems of illicit dealings, lootings and destruction of cultural property. In a speech before the committee the minister stated that:

'*It is the duty of every civilized nation to protect its cultural heritage from unlawful and destructive human interferences. It is only from our understanding of the past, done by scientific and in a scholarly manner, can we preserve our heritage for our future generation. Unlike the case of the natural resources, cultural heritage is finite and once destroyed, the very 'capsule' containing our history will be lost forever*'.

CPUCH Article 2(4)

'States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect

underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities'.

Clear action had to be taken by Rolga, in order to fulfil its treaty obligations and establish, to Astoria, that all dealings are in the best interests of the parties. Rolga has taken necessary action to safeguard the cultural heritage the 'Coeur de l' Ocean'. These measures are clearly in conformity with the Convention.

Preamble to the CPUCH states:

The preamble to an international Convention is significant. Article 31(2) of *The Vienna Convention on the Law of Treaties* states that this is part of the context in terms of which treaties are to be interpreted. Thus the Preamble should be seen as establishing general principles to guide interpretation.

'*An integral part of the cultural heritage of humanity…responsibility therefore rests with all States*'

The Respondent has taken actions which are in conformity with not only Article 15 of the Convention, but in conformity with the Convention as a whole; The 'Coeur de l' Ocean'*' is an integral part of the cultural heritage of humanity*'. The 'Coeur de l' Ocean' travelled from the West to the East, nation to nation, and there are many artefacts to which there may still be verifiable links from a larger international radius than solely Rolga and Astoria.

III. The Respondent has not interfered with the Claimant's rights or performance by allowing the tour operators to organise wreck diving's to the wreck site including the taking of photographs.

A. The Respondent has acted in conformity with the CPUCH

(i) CPUCH Article 20

'*Each state party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention*'.

The Respondent has acted in conformity with its duties and obligations under the CPUCH by allowing Aquatic View an exclusive permit to conduct underwater tours around the area of the 'Coeur de l' Ocean'. By doing so the Respondent has taken all practicable measures to raise the public awareness of the value and cultural significance of the 'Coeur de l' Ocean'.

(ii) CPUCH Rule 7

'*Public access to in situ underwater cultural heritage shall be promoted*'

Clearly, the Respondent has acted in accordance with the CPUCH. The tours that Aquatic View have been permitted to undertake have allowed the public access to the ‘Coeur de l’ Ocean’ in a controlled and regulated manner.

(iii) The Respondent has acted in accordance with their obligations and in the best interests of all parties.

Allowing tour operators to organise wreck dives conforms with treaty obligations. It prevents and stops unauthorised wreck diving. Given that there is a tour operator, there is no need for a black market in underwater activities as people are given the opportunity to see the ‘Coeur de l’ Ocean’ and are not forced to find their own methods.

The tour operations are conducted and regulated in a professional manner. It is difficult to comprehend how the taking of photographs by people in an underwater shell could have interfered with the performance of the contract between the Claimant and the Respondent. It is submitted that the Claimant’s assertion of rights to photographic material is a separate issue from the performance of the Contract and that the two are substantially different matters. It is further submitted that this assertion by the Claimant is merely a mechanism employed to provide an alternative reason to avoid the Contract if their ‘exclusive rights’ submission is not entertained.

It is submitted that the Aquatic View venture is in the best interests of all parties. The Claimant, in accordance with paragraph 3 of the ‘Partnering Agreement Memorandum’, has deposited $1,250,000 with the Respondent to cover government costs should revenue not exceed

expenditure. The inclusion of Aquatic View allows the Respondent and the Claimant to obtain a source of revenue regardless of the end result. The revenue generated from Aquatic View minimises the government's outgoings which, evidentially, stops the refundable deposit from decreasing, and furthermore enables more money to be expended on underwater heritage in the future.

IV. The Claimant does not enjoy exclusive rights of photography and film documenting of the Coeur de l' Ocean.

A. The contractual terms of the 'Partnering Agreement' do not expressly or impliedly confer any exclusive rights to the The Coeur de l' Ocean at all.

(i) Paragraph 5 of the 'Partnering Agreement': Sharing arrangements

As there is no express terms in the 'Partnering Agreement' conferring exclusive rights to the photography and film documentation of the 'Coeur de l' Ocean', it is submitted that part 5 of the 'Partnering Agreement' does not confer any implied terms conferring exclusive rights to the Claimant.

Part 5 of the 'Partnering Agreement' states 'the parties will endeavour to formulate a joint marketing plan'. A joint marketing plan clearly suggests that neither party should have exclusive rights to the 'Coeur de l' Ocean'. 'Joint' in this context clearly expresses an intention that both

parties should work together. In no way can 'joint' be construed as to conferring rights on one party to the exclusion of the other.

Article 31(1) of the Law of Treaties states:

A Treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, 'joint' should be given its natural and ordinary meaning.

(ii) 'Joint marketing' includes rights of photography and film documentation:

In *R. M. S. Titanic v Wrecked and Abandoned Vessel*[5], the Court held that the R.M.S. Titanic had rights as salvor in possession. These rights include the sole and exclusive right to photograph the wreck. The court noted that '*video sales, film documentaries and television broadcasts are inventive marketing ideas that R.M.S. must resort to since it is not selling the artefacts, and it is clear that the presence of another in the marketplace would diminish these rights'*.

The Court found that in a case such as this allowing another salvor to take photographs of the wreck, and the wreck site, is akin to allowing another salvor to physically invade the wreck and take artefacts themselves. Thus, the court concluded that '*since photographs can be marketed like any other physical artefact...the rights to images, photographs, videos, and the like belong to R.M.S.*'.

[5] 9 F.Supp.2d 624 (1998)

Therefore, it has been held that '*video sales, film documentaries and television broadcasts are inventive marketing ideas*'. This evidences that the wording 'joint marketing' in paragraph 5 of the 'Partnering Agreement' includes photography and film documentation rights. Thus, it is to be undertaken 'jointly' and not exclusively by either party.

(iii) The Claimant is under a commercial agreement

The Claimant does have other sources of revenue as they are in a commercial contract which specially proportions and allocates the recovered artefacts to the respective parties. This agreement has been mutually and freely agreed upon. Further, the proportions have been allocated in regard to the aggregate value of the artefacts and therefore the Claimant entered into the agreement with a full understanding of the value awarded to the relevant proportion achieved.

In *R. M. S. Titanic v Wrecked and Abandoned Vessel*[6] R.M.S. Titanic was granted such an award by the Court as they had no other source of revenue; the artefacts were for exhibition, not for sale. Titanic undertook their venture with no guaranteed or fixed amount of return on their investment. This is distinguishable from the present case.

Titanic did not sell any artefacts for profit, whereas in the present case the Claimant held an overseas public auction. The Claimant does not in any way have to rely on the exclusive rights of photography or film documentation to generate revenue. The Claimant is under a commercial

[6] 9 F.Supp.2d 624 (1998)

agreement to which they had full awareness of its terms and conditions, rights, duties, liabilities and obligations.

The revenue received by the Respondent is allocated to be used instead of the monies deposited by the Claimant. Therefore, the Claimant is 'jointly' receiving such revenue.

V. The distribution of artefacts solely on the basis of salvage legal principles was not envisaged by the 1992 Partnering Agreement Memorandum.

A. The existence of a contract between the parties rebuts any assertion that salvage law was envisaged by the parties.

(i) International Convention on Salvage Article 6

'*This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication*'

The Respondent and the Claimant have a contract governing the salvage operations of the 'Coeur de l' Ocean'. Therefore, the *International Convention on Salvage* is not applicable to the relevant salvage operations.

(ii) The salvage service provided by the Claimant was not voluntarily rendered without any pre-existing obligation arising from contract

The United States Court of Appeals in *R. M. S. Titanic Inc v Harvor*[7] stated *'to establish a salvage claim for compensation and reward a person must demonstrate that he has rendered aid to a distress ship or its cargo in navigable waters to the service was voluntarily rendered without any pre-existing obligation arising from contract or otherwise to the distress ship or property, and the service was useful by affecting salvage of the ship or its cargo in whole or in part*'.

Therefore, as the Claimant is still under a pre-existing obligation arising from contract, a claim for compensation and award under salvage legal principles should not be awarded.

B. The contractual terms of the 'Partnering Agreement' do not expressly or impliedly give effect so as to distribute artefacts 'solely' or in part, on the basis of salvage legal principles.

(i) Paragraph 5 of the 'Partnering Agreement': Sharing arrangements; the express terms of the contractual agreement.

As there are no express terms in the 'Partnering Agreement' to substantiate the claimant's assertions, it is submitted that the wording of Paragraph 5 in the 'Partnering Agreement' evidences that there are also no implied terms to substantiate the claimant's assertions.

Paragraph 5 of the 'Partnering Agreement' clearly, and in express terms, governs the method of distribution to be employed at the time of distribution. The agreement allocates a certain

[7] 1999 AMC 1330.

percentage to each party via reference to the aggregated value which has been achieved. This is a commercial agreement to which the parties have willingly and knowingly, under full awareness of such terms, have agreed upon and have acted in accordance with, throughout the performance of the contract.

(ii) The existence of the contract and the express terms contained within clearly negate any intention by the parties that the contract contained implied terms suggest that the distribution of artefacts should be solely based upon salvage law principles.

The claimant's assertion can be rebutted by the express mention of 'solely' in their contention. The claimant entered into an agreement which contains an express term agreeing upon the method of distribution. Given the express distribution method agreed upon does not envisage salvage legal principles, 'Solely' in this context would suggest that the claimant wishes to use the salvage law distribution method completely and to the exclusion of any other distribution method. Evidentially this assertion would render paragraph 5 of the 'Partnering Agreement' nonexistent. Clearly, this assertion could not be entertained.

C. The claimant has not acted in accordance with salvage legal principles

(i) International Convention on Salvage Article 8

'*The salvor shall owe a duty to the owner of the vessel or other property in danger to carry out the salvage operations with due care*'

It has been confirmed by a government underwater archaeologist stationed on the site that many of the artefacts including Chinese porcelain were destroyed due to poor handling of objects. Thus, due care has not been taken by the Claimant

(ii) CPUCH Article 4

'*Excludes the application of the laws of salvage and finds to CPUCH however salvage may be authorized by competent authorities if it is conducted in full conformity with the Convention and ensures that any recover of the underwater cultural heritage achieves its maximum protection*'

The claimant has not acted with due care. The claimant is also engaged in a commercial contract. Thus, it is submitted that the claimant has not acted in accordance with salvage legal principles. Therefore, it would be inequitable for the claimant to assert that the principles to which they have not acted in accordance with should apply.

In *Simon v Taylor*[8] the Court stated: '*The evidence is clear that what the four divers did was motivated not by an intention to salvage for the benefit of the owners of the submarine and the cargo but solely for their own benefit. The four divers did not render any service in the nature of salvage services. In my view the four divers are not slavers and are not entitled to salvage reward*'.

[8] (1975) 2 Lloyd's Rep 338 Chua J at [345]

It is submitted that the claimants have not undertaken their actions so as to constitute a status of salvor, and therefore, salvage law should not apply.

VI. Suggested distribution

A. Distribution in accordance with the 'Partnering Agreement'

The estimated aggregate value of the artefacts to be distributed to date is: $63,789,000, and this is exclusive of the non-determined value of other items. Therefore, in accordance with the 'Partnering Agreement' the Claimant would have been allocated 50%; $31,894,500, minus 3% for sales utilising the name the 'Coeur de l' Ocean' and minus the value of the destroyed artefacts due to poor handling.

Given the most valuable pieces were included amongst the destroyed artefacts as a result of negligent behaviour, 10% of the Claimant's share of Chinese porcelain should be allocated to the Respondent in compensation. The Claimant will most likely use the name the 'Coeur de l' Ocean' to sell its relative share as the use of the phrase 'artefacts from the Coeur de l'Ocean' is likely to encourage a greater number of buyers than a simple 'artefacts found'.

Therefore it is submitted that the Claimant Would have most likely come out of the agreement with $31,894,500 (50% of $63,789,000) – 3% (Sales utilising the name Coeur de l' Ocean) - 3,000,000 (30,000,000 – 10%), amounting to about $27,970,000.

B. Distribution in accordance with Rolga/Astoria agreement

(i) The Bi-lateral treaty between Rolga and Astoria overrides and replaces the 'Partnering Agreement' between the Respondent and the Claimant

As submitted, the Respondent needed to enter International conventions and act in accordance with their relevant principles. This afforded Rolga the opportunity to enter into the bi-lateral treaty with Astoria, which led to the transfer of title and ownership of the 'Coeur de l' Ocean' and all its possessions to Rolga. Without such a treaty and agreement, there would not be any contract to enforce between the Respondent and the Claimant as Rolga did not have ownership or title to the 'Coeur de l' Ocean'. Therefore, to bring the agreement between the Respondent and the Claimant into an executable manner, both the Respondent and the Claimant are bound by the distribution method determined by the bi-lateral Treaty.

(ii) International Convention on Salvage 1989 Article 5

'*This Convention shall not affect any provisions of national law or any international Convention relating to salvage operations by or under the control of public authorities*'.

The distribution of artefacts is to be in accordance with the bilateral treaty between Rolga and Astoria. Therefore, the International Convention on Salvage 1989 should not apply.

(iii) UNCLOS Article 149

‘*All objects of an archaeological and historical nature found in the area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the state or country of origin, or the state of cultural origin or the state or historical and archaeological origin*’

Therefore, the method of distribution should be in accordance with UNCLOS principles, as the distribution will be for the benefit of mankind as a whole, giving everyone with an interest in such culture a chance to see and appreciate such an extraordinary and rare find. The opportunity afforded to the public at large far outweighs the interests of either party to the dispute.

C. Suggested resolution and distribution method

Rolga and Astoria have agreed to the bi-lateral treaty with regard being had to the best interests of all parties and the preservation of cultural heritage. The Claimant is a commercial entity with a view to profit. Rolga and Astoria have agreed to distribute the artefacts in accordance with the importance of the individual pieces and their relationships to one another, not the commercial value of the individual items.

It is suggested that if the quantity of each item (excluding the Chinese porcelains) exceeds the number of 2, the Claimant receives 1 piece of each item with the rest distributed equally between Rolga and Astoria to be placed in their national museums. Replicas can be made of items that do not have a quantity of 2 or more for the Claimant

The Claimant is to receive 50% of the Chinese porcelains with the remaining 50% distributed equally between Rolga and Astoria. The Claimant receives $30,000,000 (50% of $60,000,000) plus 1 item of each artefact and a perfect replica of items to which there is no more than 2. Heritage Inc, therefore, receives $2,000,0000 more than it would under the 'Partnering Agreement' ($27,970,000) and a collection to which Heritage Inc, can donate or sell to a museum of its choice. The Claimant will also receive any monies remaining from the initial deposits made with the Respondent.

Aquatic View have recorded a video to advertise their tours which has saved the Respondent expenditure and in turn decreased expenditure for the Claimant An advertising video for a $20,000 tour and photographs taken by tourists will have an insignificant impact, if any at all, to a television documentary which can be broadcasted internationally. The Respondent will grant Heritage Inc, with the exception of Aquatic View and its patrons, an exclusive right to all video and photographic material of the 'Coeur de l' Ocean' for a period of 12 months, which is more than enough time for the Claimant to make a documentary and broadcast internationally before any other.

Rolga and Astoria, receive a complete original collection for each of their national museums and $15,000,000 of Chinese porcelains each. The suggested method is for the benefit of humankind while also taking into account, as far as practicably possible, the best interests of both parties in a fair and equitable manner.

CONCLUSIONS ON THE MERITS

The Respondent has not breached the Partnering Agreement Memorandum. The actions taken by the Respondent has allowed the 'Partnering Agreement' to continue.

The subsequent dealings by the Respondent has allowed the Respondent to assert legal title to the recovered artefacts and therefore allowed the Respondent to legally execute the contract.

The Respondent has acted in the best interests of all parties. The Respondent has therefore acted in good faith and is not in breach of the 'Partnering Agreement'.

The Respondent has made a fair, just and reasonable offer as to the distribution of the recovered artefacts.

PRAYER FOR RELIEF

The Claimant respectfully requests the Tribunal to find that:

1. The Respondent has not breached the 'Partnering Agreement' in any manner. The actions taken by the Respondent were in the best interests of all parties and were necessary steps taken to allow performance of the contract.
2. The actions by the Respondent were in good faith and have brought business and financial efficiency to the contract.
3. The suggested resolution and distribution method submitted by the Respondent in clause VI (C) of the Respondent's memorandum be legally enforced and binding between the Claimant and the Respondent.