

2009 LAWASIA MOOT COURT COMPETITION

**INTERNATIONAL CENTER FOR ARBITRATION**

**BENEVOLENT HERITAGE, INC.**

**(CLAIMANT)**

**v.**

**THE GOVERNMENT OF ROLGA**

**(RESPONDENT)**

**MEMORIAL FOR THE RESPONDENT**

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## STATEMENT OF JURISDICTION

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This arbitration tribunal has jurisdiction to hear this case as the Government of Rolga and Benevolent Heritage, Inc. gave their explicit consent by mutually deciding the seat of the arbitration in Ho Chi Minh City. Furthermore, Paragraph 10 of the Partnering Agreement Memorandum, signed on 27 September 1995, states that the differences, discrepancies and disputes between the parties are to be resolved by arbitration according to the Rules of the Kuala Lumpur Regional Center for Arbitration. As agreed, the award of the Arbitrators shall be final and binding on the parties.

## QUESTIONS PRESENTED

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- I. WHETHER ROLGA HAS INTERFERED WITH HERITAGE'S SALVAGE RIGHTS AND ITS PERFORMANCE UNDER THE 1995 PARTNERING AGREEMENT MEMORANDUM EVEN THOUGH ROLGA HAS FULLY COMPLIED WITH ALL ITS OBLIGATIONS.
- A. Whether the 2001 Agreement with Astoria reduced what Heritage was entitled to under the 1995 Agreement or hindered the actual operation in any way.
- B. Whether the ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage is inconsistent with the 1995 Agreement.
- C. Whether authorizing Aquatic View to organize diving trips to the wreck site including the taking of photographs interferes with Heritage's salvage rights and its performance under the 1995 Agreement.
- II. WHETHER HERITAGE ENJOYS EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE COEUR DE L'OCEAN WHEN NO SUCH RIGHTS WERE EVER GRANTED BY ROLGA.
- III. WHETHER THE 1995 AGREEMENT ENVISAGED THE DISTRIBUTION OF ARTIFACTS SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES WHEN THE CONTRACT HAS EXPLICIT LANGUAGE REGARDING DISTRIBUTION.

## STATEMENT OF FACTS

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This dispute involves the historic wreck of the *Coeur de l’Ocean*, which sailed as a military vessel of the colonial empire of Astoria but disappeared to the bottom of the sea more than 200 years ago. The soldiers on board had just robbed and burnt down the ancient trading city of Zamzala, which is now part of the territory of the State of Rolga (“Rolga”), and the ship was en route to another destination when it met a powerful monsoon and sank. According to the archival records, the ship was carrying a large amount of cargo at the time, including valuable war booty and various commercial shipments.

In 1959, Rolga separated from Astoria and became an independent State. Since then, it has prospered as a country rich in cultural and natural resources, attracting many tourists. Because of the extraordinary collection of war wrecks scattered in its maritime waters, it also draws many wreck divers from around the world.

In the 1980s, the technological advancement in underwater scientific research and recovery led to the rise of treasure hunting at sea. This led to illegal looting activities in Rolga’s territorial waters, causing much concern.

In 1990, Mr. Bernard Bodd of Benevolent Heritage, Inc. (“Heritage”), a well known salvor with expertise in historic wrecks, submitted a proposal to Rolga for the legal survey and recovery of the *Coeur de l’Ocean*. After extensive research, Heritage was successful in locating the wreck in 1993, about 20 kilometers off the coast in Rolga’s territorial waters. Heritage tried to convince Rolga to approve the project by showing some valuable articles that were recovered from the wreck. The proposal was eventually approved and the *Partnering Agreement Memorandum* (“1995 Agreement”) was signed on 27 September 1995 between Heritage and Rolga, thereby establishing the rights and duties of the parties concerning the recovery project.

Today, many of the artifacts have been recovered from the wreck of the *Coeur de l'Ocean*, and some parts of the collection have been auctioned off to partly finance the costs of the project, though many artifacts have been destroyed during the actual salvage operations due to Heritage's poor handling. The entire collection is yet to be revealed, but the National Museum held a maritime exhibition in 2000 to showcase some of the recovered artifacts, drawing excited responses from the public.

Around this time, several developments took place. First, Rolga -- which was influenced by the development of the international legal regime protecting underwater cultural heritage that eventually became the *United Nations Convention in the Protection of the Underwater Cultural Heritage* ("UNESCO Convention") -- started to give more appreciation to its cultural heritage. Second, Rolga entered into an agreement with Astoria in 2001 on the "Protection of Astorian Wrecks," with the main objective of providing better protection to historic wrecks where both countries shared genuine historical and cultural interest. In the agreement, Astoria transferred "all its right, title and interest in and to wrecked ancient vessels of Astoria lying on or off the coast of Rolga and in and to any any articles thereof"<sup>1</sup> to Rolga. The agreement recognized that Astoria had "a continuing interest, particularly for historical and cultural purposes, in articles recovered from any of the vessels referred to in the Agreement."<sup>2</sup> An appendix to the agreement set forth certain "guiding principles" concerning preservation of recovered articles. Third, Rolga gave permit to a specialized tour operator named Aquatic View to organize exclusive underwater trips to view the wreck of the *Coeur de l'Ocean*. In addition to selling tickets, Aquatic View took photographs and made video clips as promotional materials to post on its website. Heritage complained about such activities to the Historic Monument Executive Agency, concerned that

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<sup>1</sup> *Moot Problem*, ¶ 9.

<sup>2</sup> *Id.*

they might jeopardize its ongoing television documentary deal with an International Broadcasting Company, but it has not received any response. On the other hand, Heritage has not claimed that the activities of Aquatic View have interfered with the actual salvage operation in any way.

Around 20003, the parties took steps at finalizing the distribution of recovered artifacts, but Heritage ultimately accused Rolga of “unfair distribution of artifacts” in violation of the 1995 Agreement. Currently, the artifacts remain in the custody of Rolga.

Pursuant to Heritage’s request for arbitration, the dispute now stands before the tribunal of the International Arbitration Center.

## SUMMARY OF PLEADINGS

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I. ROLGA HAS FULLY COMPLIED WITH ITS OBLIGATIONS AND HAS NOT INTERFERED WITH HERITAGE'S SALVAGE RIGHTS AND ITS PERFORMANCE UNDER THE 1995 AGREEMENT.

Rolga's compliance with the 1995 Agreement cannot be contested by the mere fact that Rolga entered into an agreement with Astoria because the agreement did not interfere with the relative percentage allocation under the agreed sharing arrangements nor with the actual salvage operation itself. Furthermore, the ratification of the *UNESCO Convention* did not interfere with Heritage's legal rights because its entry into force in 2009 could not have affected the salvage operations that took place prior to 2003. Even if the UNESCO Convention does apply to the 1995 Agreement, it does not necessarily stand in contradiction with the 1995 Agreement because the particular prohibitions in the Convention do not apply to the recovery project of the *Coeur de l'Ocean*. Lastly, allowing Aquatic View to organize diving trips to the wreck site did not interfere with Heritage's rights because the 1995 Agreement only granted a non-exclusive right to use the name "*Coeur de l'Ocean*" for selling and marketing merchandise. Heritage also fails to provide evidence of interference with the actual operations on the wreck or the wreck itself that may have arisen from the rights of tour operations granted to Aquatic View. Therefore, Rolga has not interfered with the rights of Heritage in any way but rather have fully complied with the provisions of the 1995 Agreement.

II. ROLGA NEVER GRANTED HERITAGE THE EXCLUSIVE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L'OCEAN.

There is no language in the 1995 Agreement itself that grants, either explicitly or implicitly, the exclusive photographing and documenting rights to Heritage. Even without the 1995 Agreement, salvage rights do not include the right to exclude others from visiting the wreck site to photograph the wreck. Furthermore, there remains a public policy concern in granting exclusive right to photograph the wreck, because it would have an effect paramount to allowing Heritage to copyright the wreck itself, which certainly has not been recognized in the international copyright arena.

III. THE 1995 AGREEMENT NEVER ENVISAGED THE DISTRIBUTION OF ARTIFACTS SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES.

The 1995 Agreement comes under the principles of contract law. The sharing arrangements encapsulate the entire contractual relationship between Rolga and Heritage regarding the matter. Thus, as a fully integrated contract, it cannot be contradicted or supplemented in any way. According the language of the 1995 Agreement, Heritage was to receive monetary award worth approximately forty percent of the total value of the artifacts.

Alternatively, if this Tribunal is dissatisfied with the monetary award to Heritage, the artifacts could also be distributed, allowing Heritage to keep forty percent of the total value of the artifacts while also allowing Rolga to preserve its valuable cultural heritage for historical, educational and scientific purposes.

## PLEADINGS

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### I. ROLGA HAS NOT INTERFERED WITH HERITAGE'S SALVAGE RIGHTS AND ITS PERFORMANCE UNDER THE 1995 PARTNERING AGREEMENT

#### MEMORANDUM

The 1995 Agreement between Rolga and Heritage establishes the rights and obligations of the parties and sets forth the principal terms concerning the recovery project of the historical wreck *Coeur de l'Ocean*. Since entering into the agreement, Rolga has fully complied with its all its obligations. However, Heritage alleges Rolga's interference with Heritage's rights under the 1995 Agreement without identifying any specific provisions that Rolga has apparently violated. Instead, Heritage merely makes objections to international treaties and agreements that Rolga entered into after its 1995 Agreement, and presumes that these agreements may cause Rolga to violate its obligations under the 1995 Agreement. More specifically, Heritage points out three agreements that supposedly interfere with its rights under the 1995 Agreement: (A) the 2001 Agreement with Astoria, (B) the ratification of the UNESCO Convention, and (C) granting Aquatic View the right to organize exclusive underwater trips to the *Coeur de l'Ocean*. However, as shown below, there is nothing in any of these agreements that would require Rolga to violate any contractual obligations.

- A. The 2001 Agreement with Astoria did not reduce what Heritage was entitled to Under the 1995 Agreement or hindered the actual operation in any way.

Under its 2001 agreement with Rolga, Astoria transferred "all its rights, title and interest in and to wrecked ancient vessels of the Astoria lying on or off the coast

of Rolga and in and to any articles thereof”<sup>3</sup> to Rolga. The agreement obligates Rolga to do “its best to preserve any objects recovered from its seabed for the benefit of mankind.”<sup>4</sup> Rolga also recognized that Astoria has a “continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in the Agreement.”<sup>5</sup> The attached *Guiding Principles* aim to guide the disposition of recovered materials in ways that will most benefit mankind. These documents, as a whole, indicate Rolga’s attitude as a nation toward its underwater cultural heritage rather than affecting the actual sharing arrangements or Heritage’s salvage operations.

**1. The 2001 Agreement does not interfere with the sharing arrangements established in the 1995 Agreement.**

The agreement with Astoria does not violate Heritage’s salvage rights because it does not interfere with the percentage allocation of the artifacts between Rolga and Heritage. The parties agreed in Paragraph 5 of the 1995 Agreement that Heritage will be awarded a certain share of the “aggregate amount of the appraised values and/or selling prices of the artifacts, net of agreed selling expenses” relative to the value of the artifacts recovered. In this case, the aggregate appraised value for the artifacts alone exceed five hundred million dollars, which currently stands at USD 616,298,000 - excluding those artifacts whose values have not yet been determined. According to the distribution table set forth below at page 24, Heritage is entitled to forty percent of the total value. However, this percentage would have to be reduced by (1) the value of the artifacts destroyed during the salvage operations due to the poor handling by Heritage’s employees, and (2) the selling expenses incurred for the

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<sup>3</sup> *Moot Problem*, ¶ 9.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

overseas auction sales, as Heritage is solely responsible for such expenses pursuant to the agreement.<sup>6</sup> Because these reductions were already contemplated at the time of the 1995 Agreement, nothing in the agreement with Astoria or the attached *Guiding Principles* reduces or takes away what Heritage was promised under that agreement.

**2. The 2001 Agreement did not interfere with the actual salvage operation.**

The agreement with Astoria did not interfere with the actual salvage operation that Heritage was carrying out on the wreck of the *Coeur de l'Ocean*. Heritage did not identify or report any incidents of physical interference arising from this agreement. Furthermore, the agreement with Astoria was entered into some six years after the recovery activity commenced. Inferences show that by then, the bulk of the operation had been carried out already, as the parties were taking steps to finalize the distribution of the recovered artifacts by the eighth year.

**3. The 2001 Agreement was more political in nature.**

The agreement with Astoria was more political and ceremonial in nature following Rolga's independence from Astoria in 1959. It represented the establishment of comity between the two countries and the willingness to cooperate in the future. Thus, the agreement had a more political color and nuance than any other purposes.

In conclusion, because the 2001 Agreement with Astoria does not affect the percentage distribution as prescribed by the 1995 Agreement and does not hinder the actual salvage operations, there is no interference with Heritage's rights.

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<sup>6</sup> *Partnering Agreement Memorandum*, ¶ 7 [hereinafter *the Memorandum*].

B. The ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage did not interfere with Heritage’s salvage rights and its performance under the 1995 Agreement.

The UNESCO Convention is an international treaty adopted during the UNESCO General Conference in 2001. It aims to protect underwater cultural heritage from illegal lootings and destruction by explicitly prohibiting all forms of commercial exploitation.<sup>7</sup> For the purposes of this Convention, “underwater cultural heritage” means “all traces of human existence having a cultural, historical or archaeological character which have been... under water... for at least 100 years.”<sup>8</sup> The wreck of the *Coeur de l’Ocean* falls under the definition of underwater cultural heritage, as it has been under water for more than 200 years. Even so, the application of this Convention did not interfere with the rights of Heritage because not only did the Convention enter into force much later, but it also is not in conflict with the 1995 Agreement.

**1. The Convention’s entry into force did not occur until 2009.**

A State’s ratification of an international treaty is only the first step towards making it effective within a State. Although ratification is an expression of a State’s intent to be legally bound by the treaty, the treaty takes effect only upon the date of “entry into force,” when a sufficient number of countries have ratified the treaty.<sup>9</sup> In the case of the UNESCO Convention, the treaty was determined to enter into force “three months after the date of the deposit of the twentieth instrument,”<sup>10</sup> which was 2 January 2009. Considering that the parties were already taking steps to finalize the

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<sup>7</sup> United Nations Educational, Scientific and Cultural Organization Convention on the Protection of the Underwater Cultural Heritage 2001 art. 2 para. 7, 41 I.L.M. 40 [hereinafter *UNESCO Convention*].

<sup>8</sup> *Id.* at art. 1, para (1)(a).

<sup>9</sup> ANTONIO CASSESE, *INTERNATIONAL LAW* 172 (Oxford University Press 2005).

<sup>10</sup> *UNESCO Convention*, *supra* note 7, at art. 27.

distribution of artifacts around 2003, it can be inferred that the salvaging activities were over nearly six years before the Convention came into effect. Thus, the UNESCO Convention could not and did not have any legal effect on the salvage operation while it was being carried out.

## **2. The UNESCO Convention is not inconsistent with the 1995 Agreement.**

The prevailing public opinion seems to be that the project is a commercial exploitation of the historical wreck and therefore directly in contravention of the UNESCO Convention. However, it is actually in the public interest to legally recover the cultural heritage and use it for historical, educational and scientific purposes, rather than leaving it on the seabed to be destroyed and irretrievably lost by decay, elements of the sea, or by illegal lootings. Rolga is handling and managing the artifacts in the most responsible way and intends to keep them together to the extent possible for the benefit of mankind. Therefore, even if the implementation of the 1995 Agreement was governed by the UNESCO Convention, it would not amount to a violation of the treaty.

To summarize, the UNESCO Convention does not have any legal effect on Heritage's rights. However even if it did, the Convention is not inconsistent with the 1995 Agreement because the recovery project of the *Coeur de l'Ocean* does not fall within the meaning of "commercial exploitation" as prohibited by the Convention.

- C. Rolga's authorization of Aquatic View to organize diving trips to the wreck site, including the taking of photographs, did not interfere with Heritage's salvage rights and its performance under the 1995 Agreement.

### **1. The right granted to Aquatic View was never granted to Heritage.**

Rolga's authorization of Aquatic View to organize exclusive underwater trips

to view the wreck does not interfere with any right that Heritage was granted under the 1995 Agreement. According to Paragraphs 5 and 6 of the 1995 Agreement, the only rights given to Heritage under the Agreement were a share of the value of the artifacts and a non-exclusive right to use the name “*Coeur de l’Ocean*” for “sales and marketing of merchandise (exclusive of artifacts) related to the wreck of *Coeur de l’Ocean*”. The fact that Heritage agreed to pay a fee to use the name indicates that the right was non-exclusive. Also, there is no provision in the 1995 Agreement that mentions anything about photographs or underwater tours. In that respect, it is irrelevant that Aquatic View sold tickets for money or that it claims exclusive rights to underwater tours, because the term “merchandise” in Paragraph 6 is not broad enough to cover underwater tours. The word only refers to “a movable object involved in trade or traffic”<sup>11</sup> and excludes “intangibles”<sup>12</sup> like service. Therefore, the permit given to Aquatic View does not reduce any of the right that Heritage was granted under the 1995 Agreement.

## **2. The authorization of Aquatic View’s activities did not interfere with Heritage’s salvage operation or the wreck itself.**

Interference with actual salvage operations can take two forms: (1) interference with the salvor’s active operation, or (2) interference with the wreck itself.<sup>13</sup> First, interference with the salvor’s active operation takes place when a third party is at the wreck site at the same time as the salvor. Due to safety reasons, as well as various delicate equipments involved, the salvor may be forced to give up its plans of operation, incurring additional expenses for his aborted plans. Second, the

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<sup>11</sup> BLACK’S LAW DICTIONARY (Westlaw) [hereinafter *Dictionary*]

<sup>12</sup> *Id.*

<sup>13</sup> *R.M.S. Titanic, Inc. v. The Wrecked And Abandoned Vessel*, 9 F. Supp. 2d 624, 635 (E.D.Va. 1998) [hereinafter *R.M.S. Titanic*]

interference with the wreck itself occurs when a third party gets very close using powerful lights in order to see and take photographs due to the darkness caused by the depth and location of the wreck. By getting so close to the wreck, the third party may damage the wreck itself or the artifacts yet to be recovered. Because the salvor-in-possession has the duty to protect the historical and archaeological value of the wreck itself, it constitutes interference even if the salvor does not have ownership over the wreck. In the case of R.M.S. Titanic, the wreck was buried two and a half miles deep underwater in the North Atlantic Sea. The salvor claimed damage to the wreck when it discovered a propeller protector of a modern submersible on the spoiled part of the wreck.<sup>14</sup> In the instant case, it is doubtful that the depth and condition of the wreck's location is similar to that of R.M.S. Titanic, since it is located in the territorial waters of Rolga, mere 12 nautical miles away from the coast. Furthermore, Heritage has not claimed or identified any specific instances of Aquatic View's activities that hindered its salvage operation in recovering artifacts, or which resulted in damage to the wreck.

Therefore, there is insufficient evidence for Heritage to allege an interference with its performance rights under the 1995 Agreement, especially when no exclusive right has been granted to Heritage at all.

**II. HERITAGE DOES NOT ENJOY THE EXCLUSIVE RIGHT OF  
PHOTOGRAPHING AND DOCUMENTING THE *COEUR DE L'OCEAN*  
WHEN NONE WAS EVER GRANTED BY ROLGA**

A. Rolga never granted Heritage such exclusive right in the 1995 Agreement.

Nothing in the language of the 1995 Agreement explicitly or implicitly gives

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<sup>14</sup> *R.M.S. Titanic*, *supra* note 13, at 636 n.11.

Heritage the exclusive right to photograph and document the wreck of *Coeur de l'Ocean* that it asserts. As can be seen in the text itself, Rolga only granted Heritage the right to use the name "*Coeur de l'Ocean*" in association with "sales and marketing of merchandise" on the condition of paying Rolga three percent of the gross sales.<sup>15</sup> Although the word "exclusive" does appear here, it does so only to limit Heritage's right and to make clear that their right to sell and market is exclusive of artifacts.<sup>16</sup> Nowhere else in the contract appears the word "exclusive" that may even imply such rights to Heritage. Therefore, since the parties are strictly bound by the terms of the contract, and the language of the 1995 Agreement never granted any kind of exclusive rights, let alone the exclusive right to photograph and document the wreck, Heritage does not enjoy the exclusive rights it asserts before this tribunal.

B. The exclusive right to photograph and visit the wreck is not included in the salvage right.

Traditionally, the right granted to a salvor-in-possession was essentially a right to salvage without interference from any rival salvors.<sup>17</sup> However, due to the recent development of advanced modern technologies, new issues have emerged concerning the rights that are included in salvage rights.<sup>18</sup> In this respect, *R.M.S. Titanic* was the groundbreaking case that dealt with the issue of whether salvage rights also included the right to exclude others from visiting the wreck site to photograph the wreck.<sup>19</sup> The simple answer is no, that the right granted to the salvor-in-possession does not include such right. Although the appellate court's decision

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<sup>15</sup> *The Memorandum*, ¶ 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Hener v. US*, 525 F. Supp. 350, 357 (D.C.N.Y. 1981).

<sup>18</sup> Rachel J. Lin, *Salvage Rights and Intellectual Property: Are Copyright and Trademark Rights included in the Salvage Rights to the R.M.S. Titanic?*, 23 Tul. Mar. L. J. 483 (1999).

<sup>19</sup> *R.M.S. Titanic*, *supra* note 13, at 635.

stands, the lower court had a different opinion, and it is beneficial to compare the analysis of both courts. The lower court had determined that salvage rights included such right, that “allowing another ‘salvor’ to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves,” since the salvor was not selling the artifacts like traditional salvors and needed other sources of obtaining income.<sup>20</sup> Instead of financing the operation through the sale of artifacts, the salvaging company had held various exhibitions, sold licenses to sell ship-related merchandise and had successfully aired a television program.<sup>21</sup> The basis for this decision lay on the policy that saving imperiled maritime property<sup>22</sup> is always in the public interest.<sup>23</sup> Since the company was not commercially benefitting from the operation, the court felt it was right to compensate for the time, money, effort, and the risk the company was undertaking and to encourage continued operation.<sup>24</sup> However, such expansion of salvage right was checked by the appellate court when it published its opinion stating that the court was “aware of no case in the United States or in the body of *jus gentium*[, which refers to the “law which natural reason has established and all nation use”]...<sup>25</sup> that has expanded salvage rights to include this type of right.”<sup>26</sup> It expressed its disbelief that the law of salvage would include such right as to give salvors “exclusive image recording rights in yet to be saved property.”<sup>27</sup> The court pointed out that the lower court’s decision was deviating from the underlying purpose of salvage law, which is

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<sup>20</sup> *R.M.S. Titanic Inc. v. Wrecked and Abandoned Vessel*, 1996 A.M.C. 2497, 2499 [hereinafter *R.M.S. Titanic 1996*].

<sup>21</sup> *R.M.S. Titanic*, *supra* note 13, at 628.

<sup>22</sup> *Cobb Coin Co. v. Unidentified Wrecked and Sailing Vessel*, 569 F. 2d 330, 337 (Treasure Salvors I).

<sup>23</sup> *R.M.S. Titanic*, *supra* note 13, at 637 (citing NORRIS, 3A BENEDICT ON ADMIRALTY § 1 (7th ed. 1997)).

<sup>24</sup> *Id.* at 639.

<sup>25</sup> *Dictionary*, *supra* note 11.

<sup>26</sup> *R.M.S. Titanic v. Haver*, 1999 A.M.C. 1330, 1358 [hereinafter *Haver 1999*].

<sup>27</sup> *Id.*

“to encourage the assistance to ships and their cargos in distress.”<sup>28</sup> As the opinion stated, such expansive right would run counter to the policy if it was more profitable for the salvor to leave the wreck in place and take advantage of photographs and public viewing than to carry out salvage operations. Also, it emphasized that “a property right does not normally include the right to exclude viewing and photographing of the property when it is located in a public place.”<sup>29</sup> That would only be achievable if the property was in a private location where the owner could exert control. In addition, the court expressed its concern of possibly altering the law of salvage and risking its “uniformity and international comity.”<sup>30</sup> Accordingly, even without the language of the 1995 Agreement, it is evident that Heritage does not have the exclusive right to photograph and document the Coeur de l’Ocean through its status as the salvor-in-possession.

C. Granting exclusive right to photograph and document the wreck is equivalent to allowing a copyright of the wreck itself.

Though not obvious, granting the exclusive right to take photographs and document the wreck will be paramount to allowing Heritage to copyright the wreck itself, which is not possible under the *1886 Berne Convention for the Protection of Artistic and Literary Works* (“*Berne Convention*”). Rolga is a party to this convention, which is an international treaty that aims to protect literary and artistic works from international copyright violations. Usually, photographs or documentaries of a sunken shipwreck would be qualified to be protected under Article 2(1) of the *Berne Convention*, which protects “every production in the literary, scientific and artistic

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1369, n.5.

<sup>30</sup> *Id.* at 1369, n.5.

domain, whatever may be the mode or form of its expression, such as... cinematographic works... photographic works.” However, the wreck would not be able to be copyrighted because the photographer did not create the wreck itself.<sup>31</sup> If Heritage had the right to exclude others from taking photographs of the *Coeur de l’Ocean*, it would essentially have a copyright of the wreck itself. Thus, Heritage may be rightly entitled to exclusive right of all the photographic and documentary work that it produces in relation to the wreck, but nothing more.

**III. THE DISTRIBUTION OF ARTIFACTS SOLELY ON THE BASIS OF SALVAGE  
LEGAL PRINCIPLES WAS NOT ENVISAGED BY THE 1995 PARTNERING  
AGREEMENT MEMORANDUM BECAUSE THE CONTRACT EXPLICITLY  
PROVIDES FOR THE DISTRIBUTION**

A. The 1995 Agreement is a completely integrated contract.

According to the common law of contracts, there are two categories of contracts: *completely integrated contract* and *integrated contract*. A *completely integrated contract* excludes all other agreements, whether oral or written, and encapsulates the entire contractual relationship between the parties.<sup>32</sup> If particular terms are stated in the contract, this will tend to show that the parties intended to include everything about it. Nothing that will contradict or supplement the term of the contract will be allowed. On the other hand, an *integrated contract* is the final expression of only one or more terms of the agreement.<sup>33</sup> Since it does not aim to cover the entire agreement, it is possible to supplement the agreement. In the instant case, the 1995

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<sup>31</sup> Lin, *supra* note 18, at 492.

<sup>32</sup> *Hercules & Co., Ltd. v. Shama Restaurant Corp.*, 613 A.2d 916, 929 (D.C. 1992).

<sup>33</sup> RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981).

Agreement was a completely integrated contract, which represented the complete and exclusive statement between Rolga and Heritage. Especially Paragraph 5 is dedicated entirely to the sharing arrangements, which indicates that both parties intended to include everything regarding the distribution. There is no explicit or implicit language, in this paragraph or anywhere else in the Agreement, that implies that the distribution of artifacts will be solely on the basis of salvage legal principles. Because the 1995 Agreement is a completely integrated contract that has to be confined to its four corners, Heritage cannot claim anything that either contradicts supplements the 1995 Agreement.

- B. Under the sharing arrangement of the 1995 Agreement, Heritage is entitled to monetary award of its relative share of the value of artifacts.

The language of the Agreement, specifically in Paragraph 5, says that the parties will share with respect to “the aggregate amount of the appraised values *and/or* selling prices of the artifacts (emphasis added),” which is followed by the distribution table. The disjunctive in the quoted language indicates that if either the appraised values or the selling prices of the artifacts satisfy a certain range, the parties will be awarded its relative share of the total value of the artifacts. In this case, the appraised value alone has exceeded six hundred million dollars, which initially entitles Heritage to 40% of the total value. On the other hand, the language beneath the distribution table in Paragraph 5 says that “once the aggregate amount of the appraised values for the artifacts *and* the net proceeds of any sales of artifacts exceed forty-five million dollars, Heritage will be entitled to own and possess its relative share of the remaining artifacts (emphasis added).” The conjunctive in the quoted language requires that both the appraised values for the artifacts *and* the net proceeds

of any sales to independently exceed \$45 million in order for Heritage to qualify for the artifacts themselves. Although the amount of the net proceeds from the auctions is unknown, we can infer that it does not exceed \$45 million, since only some parts of the collection have been sold. Since the net proceeds of the sale falls below \$45 million, the condition has not been satisfied, and Heritage will only be entitled to monetary award for its service of salvage operation rather than receiving its share of the artifacts themselves. The reward then, pursuant to the distribution chart, is 40% of \$616,298,000 (the total aggregate value of the items whose values have been determined), which would be \$246,519,000, less the selling expenses that have been expended for the overseas auction<sup>34</sup> and less the value of the artifacts that Heritage destroyed during the actual salvage operations through poor handling.

C. Alternative method of distribution

If this tribunal is dissatisfied with awarding monetary award to Heritage, this is an alternative method for distributing the value of the artifacts between the parties. Currently, the aggregate value of the value-determined artifacts stands at \$616,298,000. However, the selling prices of the artifacts that have been sold off at overseas auction and the costs that have been expended for the sale have not been specifically identified, as mentioned earlier. Since the aggregate amount as mentioned in Paragraph 5 cannot be calculated, the distribution of the artifacts whose value has not yet determined will be shared *in specie*. According to the 1995 Agreement, Rolga is entitled to 60% and Heritage is entitled to 40% of the total value of the recovered artifacts.

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<sup>34</sup> *The Memorandum*, ¶ 5(iii).

## &lt;ALTERNATIVE DISTRIBUTION TABLE&gt;

No	Item	Heritage (40%)		Rolga (60%)	
		Quantity	Value (USD \$)	Quantity	Value (USD \$)
1	Gold Ingots and Bullions	144	7,200,000	216	10,800,000
2	Gold Bars	40	6,000,000	60	9,000,000
3	Silver Ingots	280	5,600,000	420	8,400,000
4a	Silver coins with Astorian marks	20,000	200,000,000	29,718	297,180,000
4b	Silver coins (instead of rare items)	282	2,820,000	0	0
5	Copper planks	80	400,000	120	600,000
6	Indigo	80 chests	Not yet determined	120 chests	Not yet determined
7	Tobacco	4 tons	Not yet determined	6 tons	Not yet determined
8	Bronze cannon with Astorian marks	0	0	2	Not yet determined
9	Silver container	0	0	1	10,000
10	Bronze forks	0	0	4	8,000
11	Silver pendant	0	0	1	15,000
12	Comb	0	0	2	Not yet determined
13	Olives and pickles	0	0	3 jars	Not yet

					determined
14	Unknown Liquid	0	0	1 bottle	Not yet determined
15	Ornaments	2	10,000	3	15,000
16	Elephant tusks	20	40,000	30	60,000
17	Cannon balls	5	Not yet determined	7	Not yet determined
18 a	Chinese porcelains - mint	4,000	20,000,000	6,000	30,000,000
18 b	Chinese porcelains	4,000	4,000,000	6,000	6,000,000
19	Swords bearing some Arabic words	23 pieces	460,000	34 pieces	680,000
20	Silver daggers with precious stones	0	0	2	7,000,000
21	Spices	28 bottles	Not yet determined	42 bottles	Not yet determined
	<b>TOTAL</b>		<b>246,519,000</b>		<b>369,779,000</b>
	<b>Actual Aggregate Value</b>				
	<b>According to</b>		<b>246,519,200</b>		<b>369,778,800</b>
	<b>Distribution %</b>				

The artifacts should be distributed in this way because within the relative share that is entitled to Rolga, it has an obligation “to protect objects of an archaeological and historical nature found at sea” pursuant to Article 303(1) of the United Nations Convention on the Law of the Sea, as well as its agreement with Astoria. As a government, Rolga does not consider the artifacts on the basis of monetary value, because they act as a “window in time... to an earlier era.”<sup>35</sup> They are “rich in historic detail and offer significant insights into the time when their vessels ruled the high seas.”<sup>36</sup> Thus, due to the historical, educational and scientific considerations that Rolga must take into account, it would be most desirable for the government to keep the representative collection of the artifacts. Consequently, such collection would include statistical samples and the relatively rare, or even unique, articles. They will be properly deposited in National Museums for public view and made readily available for scholarly analysis and study. To substitute for those articles, Rolga has been more than willing to give up some of its share of other artifacts, silver coins in particular. In this instance, there is no unfairness of distribution as the values of the distributed artifacts are very close to the relative percentages of the actual aggregate amount. In fact, Heritage is awarded a slightly greater value than its fair share.

In conclusion, because Rolga seeks to pursue the disbursement of proper shares in the artifacts according to the agreement reached between Rolga and Heritage, and it is also willing to compensate Heritage for the lack of award *in specie*, there has been no instance of “unfair distribution of artifacts” by Rolga.

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<sup>35</sup> *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 310 (S.D. Fla. 1996).

<sup>36</sup> Robert D. Peltz, *Salvaging Historic Wrecks*, 25 Tul. Mar. L. J. 1, 6 n.12 (2000).

## CONCLUSION AND PRAYER FOR RELIEF

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In light of the above submissions, Counsel for the government of Rolga respectfully requests this Tribunal to find that:

- Rolga did not interfere with Heritage's salvage rights and its performance under the 1995 Agreement by entering into Agreement with Astoria, by ratifying the UNESCO Convention and by allowing Aquatic View to organize wreck divers to the wreck site, including the taking of photographs;
- Heritage does not enjoy the exclusive rights of photographing and documenting of the wreck;
- The distribution of artifacts solely on the basis of salvage legal principles was not envisaged by the 1995 Agreement.

Respectfully submitted,  
Counsel for the Respondent