

INTERNATIONAL CENTER OF ARBITRATION

2009

CASE CONCERNING THE SHIPWRECK COEUR DE L'OCEAN

BENEVOLENT HERITAGE INC

(CLAIMANT)

v.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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## **STATEMENT OF JURISDICTION**

The claimant, Benevolent Heritage Inc. and the respondent, the State of Rolga have agreed to bring any disputes regarding the 1995 Agreement before the International Center of Arbitration pursuant to Article 10 of the said agreement. Therefore the claimant and respondent have thus accepted the jurisdiction of the International Center of Arbitration pursuant to Rule 1 of the UNCITRAL Arbitration Rules.

## QUESTIONS PRESENTED

- I. WHETHER Rolga has interfered with Benevolent Heritage's rights and performance under the 1995 Agreement when it entered into an agreement with Astoria in 2001, ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operators to organize and make profits from visiting activities to the site including the taking of photographs.
  
- II. WHETHER the law of salvage grants Benevolent Heritage Inc. the exclusive rights of photographing and documenting the wreck Coeur de l' Ocean.
  
- III. WHETHER the calculation of profits and/or distribution of artefacts between the parties to be made solely on the basis of salvage legal principles.

## STATEMENT OF FACTS

Astoria, a colonial empire of the West, recorded numerous military expeditions to the East in the 17<sup>th</sup> century. One of the most renowned adventures was the journey by Coeur de l' Ocean by Captain Van Cleef in 1800 to conquer the ancient trading city of Zamzala, now part of the State of Rolga. The battle was won and the Astoria's army robbed the riches of the Sultan's palace. However, the vessel sank with all the commercial shipments and other war booty whilst on route to another destination.

Rolga gained independence from Astoria on 7<sup>th</sup> November 1959. In the 1980s, many treasure hunters were lured into the waters surrounding Rolga due to technological advancement in underwater scientific research and existence of old archival records in Astoria. The Historical and Cultural Society of Zamzala, a non-governmental organization situated in Rolga, reported rampant lootings of historic wrecks in the territorial waters of Rolga.

In 1990, Mr. Bernard Bodd, an Astorian salvor in Benevolent Heritage Inc with expertise in historic wrecks recovery submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant historical wrecks belonging to the Astorian era. The Rolgan law at that time requires relevant authority to approve survey or recovery projects involving historical objects or sites.

On 1<sup>st</sup> June 1993, Benevolent identified the wreck, Coeur de l' Ocean to be located exactly 12 nautical miles from Rolga's baseline but beyond a 10 nautical miles limit. In order to convince the relevant authority to approve the recovery project, Benevolent had recovered silver coins, confirmed by archaeologists as 'rare items' and gold bars as well as gold bullions and ingots. These findings have been described by the National Geographic as the most 'bedazzling underwater treasures' ever found, estimated to be worth USD \$1 billion.

The Government approved the project and signed the Partnering Agreement Memorandum (Appendix 1) on 27<sup>th</sup> September 1995.

Today, many of the artefacts have been recovered and parts of the collection were auctioned off at overseas to partly finance the costs of the project. A maritime exhibition was set up within the National Museum by the Government in 2000 to showcase some of the recovered artefacts from Coeur de l' Ocean.

A new law was enacted in 2000 to protect wrecks of historical and cultural significance to Rolga due to the influence of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage as Rolga participated during its negotiation process and voted in favour of its adoption in Paris on 2<sup>nd</sup> November 2001. The law provides, if a Minister is satisfied that any site in Rolga waters that proves to be, the site of a vessel and on account of historical, archaeological or artistic importance of the vessel, the site ought to be protected from unauthorized interference he may order to designate an area around the site as restricted area.

Following this, the Government of Rolga entered into an agreement on the "Protection of Astorian Wrecks" with the Government of Astoria in 2001. In the agreement, Astoria transfers to Rolga all its right, title and interest in the ancient wrecked vessels of the Astoria lying on or off the coast of Rolga.

The Government was questioned on the alleged involvement in the commercial exploitation of the artefacts recovered from the Coeur de l' Ocean. A government underwater archaeologist stationed on site confirmed that many of the artefacts were destroyed due to poor handling of objects. However, no such move to designate the site as a restricted area under the new law has been made so far.

The Government has given a permit to Aquatic View, a tour operator to organize exclusive underwater trips to view the wreck, Coeur de l' Ocean. The company has sold 25

tickets, priced at USD \$20,0000, taken photographs and made video clips of the wrecks as promotional materials for the exclusive trips and commercially marketed CDs of a song entitled 'Coeur de l' Ocean' as souvenirs. The activities of the tour operator according to Heritage Inc. jeopardized the ongoing television documentary deal with an International Broadcasting Company.

Due to the development regarding protection of underwater cultural heritage, the parties took steps at finalizing the distribution of artefacts recovered from the Coeur de l' Ocean. Heritage Inc. accused the Government of Rolga of unfair distribution of artefacts contrary to the 1995 Agreement. The dispute is brought before the International Center of Arbitration pursuant to article 10 of the 1995 Agreement.

## SUMMARY OF PLEADINGS

- I. The agreement with Astoria in 2001, the ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operators to organize and make profits from visiting the site which includes the taking of photographs interfered with Benevolent Heritage Inc. rights and performance under the 1995 Agreement. Benevolent Heritage Inc. has valid salvage rights and performance under the 1995 Agreement. The Agreement with Astoria on the disposition of the artefacts recovered and prohibition on commercial exploitation under the 2001 UNESCO Convention interfered with the claimant's right to distribute, sell or possess the artefacts under the 1995 Agreement. The act of Aquatic View, in making profits from the exclusive trips to the shipwreck interfered with Benevolent's right to use the name of Coeur de l' Ocean in association with sales and marketing of merchandises related to the shipwreck. The 2001 UNESCO Convention and the act of Aquatic View also interfered with Benevolent's right to salvage the shipwreck. Benevolent Heritage Inc. justified its means in the claim that the agreement with Astoria and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage cannot work retroactive even if it is in line with the new Rolgan Law.
  
- II. Benevolent Heritage Inc. has the exclusive rights of photographing and documenting the Coeur de l' Ocean under the law of salvage. Benevolent Heritage as the salvor and salvor in possession is granted with certain exclusive salvage rights which include exclusive photographing and documenting rights. The presence of other parties at the wreck site constitutes interference and prohibition of other parties from entering the wreck site by implication grants Benevolent Heritage Inc. with the exclusive

photographing and documenting rights. The salvage rights granted to Benevolent Heritage Inc. ensures their financial and economic interest. Benevolent Heritage Inc. also possesses the intellectual property rights which prevent the respondent or any other parties from taking pictures of the shipwreck.

- III. The calculation of profits between Benevolent Heritage Inc. and the government of Rolga are to be made solely on the basis of salvage legal principles. The law of salvage is applicable in the contract due to the salvage nature of the contract. Furthermore, the incorporation of the 1989 Salvage Convention into the 1995 Agreement also constitutes the inclusion of salvage law. As the law of salvage is incorporated into the agreement, the salvage legal principle applies in the calculation of profits and distribution of artefacts. Thus, the calculations of profits are to be made in accordance with the principles as stated out in the 1989 Salvage Convention. The award that should be awarded to Benevolent Heritage Inc. therefore has to take into consideration all the principles provided under the salvage legal principles.

## PLEADINGS

**I. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT WHEN IT ENTERED INTO AGREEMENT WITH ASTORIA IN 2001, RATIFIED THE 2001 UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE AND BY ALLOWING OTHER TOUR OPERATOR TO ORGANIZE AND MAKE PROFITS FROM VISITING ACTIVITIES TO THE SITE INCLUDING THE TAKING OF PHOTOGRAPHS.**

**A. The claimant has a right to its salvage rights and performance under the 1995 Agreement.**

**1. The respondent formed a salvage contract with the claimant under the 1995 Agreement which sets out the claimant's salvage rights.**

A salvage contract was formed when the respondent signed the 1995 Agreement<sup>1</sup> concerning the salvage operation of the shipwreck, Coeur de l' Ocean on 27<sup>th</sup> September 1995.<sup>2</sup> The International Convention on Salvage<sup>3</sup> defined salvage operation as any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.<sup>4</sup> The claimant has assisted the shipwreck and valuable sunken artefacts from further deterioration and loss due to rampant lootings in the territorial waters of the respondent.<sup>5</sup> In a salvage contract, the salvor acts to save the maritime property after entering into an agreement

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<sup>1</sup>Appendix I, Partnering Agreement Memorandum.

<sup>2</sup>Moot problem, ¶5.

<sup>3</sup>(adopted 28 April 1989, entered into force 14 July 1996), International Convention on Salvage, London, 1989 [hereinafter 1989 Salvage Convention].

<sup>4</sup>*Ibid*, Article 1(a).

<sup>5</sup>Moot problem, ¶3.

to use "best endeavours" to do so for a fixed fee, payment according to a schedule, or payment to be fixed by arbitration.<sup>6</sup>

2. The claimant's salvage rights and performance as provided under the 1995 Agreement are as follows:

- a. The claimant has the right to make arrangements for the conservation and the documentation of the artefacts that may be retrieved.<sup>7</sup>
- b. The claimant has a relative share in distribution, sales and possession of the recovered artefacts from the shipwreck.<sup>8</sup>
- c. The claimant has the right to use the name of the shipwreck, Coeur de l' Ocean in association with sales and marketing of the merchandise related to the shipwreck.<sup>9</sup>
- d. The claimant has the right to salvage the shipwreck, Coeur de l' Ocean for 20 years from the date the claimant commences operation.<sup>10</sup>

3. The claimant's salvage rights and performance are valid and binding as the respondent possessed the right to grant claimant those rights under the 1995 Agreement.

- a. The shipwreck, Coeur de l' Ocean has been abandoned by the original owner, Astoria.

Abandonment under the law of the sea is described as the act of deserting property without hope of recovery or intention in returning to the shipwreck.<sup>11</sup> The act

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<sup>6</sup>Newell D. Smith, *The Law of Salvage*, J.D, 1980 University of Puget Sound, 5 (1994); Herbert Baer, *Preface to the Third Edition to Admiralty Law of the Supreme Court*, at 575 (3<sup>rd</sup> edition 1979).

<sup>7</sup>*Supra* (n.1), Article 2.

<sup>8</sup>*Supra* (n.1), Article 5.

<sup>9</sup>*Supra* (n.1), Article 6.

<sup>10</sup>*Supra* (n.1), Article 8.

<sup>11</sup>*Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5<sup>th</sup> Circuit 1989); 3A Martin J. Norris, *Benedict on Admiralty: Law of Salvage* § 134, at 9-10 (7<sup>th</sup> edition 1991).

may be either express or implied.<sup>12</sup> However, due to maritime law's emphasis on the passage of time, an implied abandonment standard is particularly appropriate in the case of long lost historical shipwrecks.<sup>13</sup> It is also further stated in the *Martha's Vineyard* case that when a vessel is "so long lost", time can be presumed to have eroded any realistic claim of original title.<sup>14</sup> The shipwreck, Coeur de l' Ocean has been long lost for more than one hundred years<sup>15</sup> and hence it can be reasonably considered being abandoned.<sup>16</sup>

Factors such as the lapse of time<sup>17</sup> and non-use by the owner may give rise to an inference of intent to abandon.<sup>18</sup> The courts may also infer abandonment if the prior owner does not appear to assert ownership.<sup>19</sup> Upon discovery of the shipwreck, the original owner, Astoria did not bring any claim of title to the shipwreck.<sup>20</sup> As such, abandonment could be inferred from Astoria's said action.

b. The title of the shipwreck now vests legally on the respondent.

In 2001, the respondent entered into an agreement with Astoria in which Astoria rightfully transferred to the respondent all its rights, title and interest in the wrecked ancient vessels of Astoria lying on or off the coast of the state of Rolga to the

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<sup>12</sup>*Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1049, 1995 AMC 1665, 1673 (E.D. Va. 1995), aff'd, 99 F. 3d 1129 (4<sup>th</sup> Circuit 1996).

<sup>13</sup>*Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed to Be Nuestra Senora*, 569 F.2d 330, 337 (5<sup>th</sup> Circuit 1978).

<sup>14</sup>*Martha's Vineyard Scuba HQ v. Unidentified Vessel* 1988 AMC 1109, 1116, 833 F.2d 1065 (1<sup>st</sup> Circuit 1987)

<sup>15</sup>Moot problem, ¶1.

<sup>16</sup>Strati Anastasia, *The Protection of Underwater Cultural Heritage : An Emerging Objective of the Contemporary Law of the Sea*, Martinus Nijhoff Publishers, 176- 178, 1995 ; Paul S. Edelman, *Who Gets Treasure Recovered from Sea?*, N.Y.L.J.,Dec. 4, at 3 (1992).

<sup>17</sup>*Supra* (n.13); *Yukon Recovery, L.L.C. v. Certain Abandoned Prop.*, 205 F.3d 1189, 1194 (9<sup>th</sup> Circuit); *Chance v. Certain Artefacts Found and Salvaged From the Nashville*, 606 F. Supp. 801 (S.D.Ga. 1984), 775 F.2d 302 (11<sup>th</sup> Circuit 1985); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11<sup>th</sup> Circuit 1985); *Pierce v. Bemis (The Lusitania)*, 1 Q.B. 384, 389 [1986]; Kevin Berean, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels: How the Fourth Circuit Rocked the Boat*, 67 Brook. L. Rev. 1252 (2002); John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathon* 30 J. Mar.L. & Com. 205, 214-15 (1999).

<sup>18</sup>*Moyer v. Wrecked and Abandoned Vessel known as the Andrea Doria*, AMC 1021, 1027, 836 F.Supp. at 1099, 1105 (1994).

<sup>19</sup>*Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 464, 465 (4<sup>th</sup> Circuit 1992).

<sup>20</sup>*Supra* (n.2).

respondent.<sup>21</sup> As such, the title of the shipwreck is no longer in dispute. In addition, the claimant and the respondent have mutually agreed under the 1995 Agreement that the respondent shall at all time be considered the owner of the shipwreck.<sup>22</sup> Hence the respondent possessed the right to grant the claimant the salvage rights and performance under the 1995 Agreement.

**B. The respondent has interfered with the claimant's salvage rights under the 1995 Agreement by entering into an agreement with Astoria in 2001.**

The respondent entered into an agreement with Astoria in 2001 with the main objective of providing a better protection to historic wrecks.<sup>23</sup> The agreement has to be read together with the guiding principles for the determination of disposition of materials from the shipwreck.<sup>24</sup>

1. The claimant's right to make arrangement for the conservation of the artefacts recovered has been interfered.

The Astorian Agreement emphasizes on the immediate chemical conservation and stabilization in the laboratory as soon as the artefacts are recovered.<sup>25</sup> Priority also must be given to the treatment of artefacts before any distribution is made.<sup>26</sup> The 1995 Agreement provides the arrangement for the conservation of artefacts to be between the claimant and the respondent.<sup>27</sup> The Astorian Agreement provides the cost or recovery including treatment is likely to exceed the intrinsic value or antiquarian sale value of material recovered.<sup>28</sup> In the 1995 Agreement, the claimant has placed a

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<sup>21</sup>Moot problem, ¶9.

<sup>22</sup>*Supra* (n.2).

<sup>23</sup>*Supra* (n.21).

<sup>24</sup>Appendix II, Guiding principles.

<sup>25</sup>*Supra* (n.24), Article 3.

<sup>26</sup>*Ibid.*

<sup>27</sup>*Supra* (n.1), Article 2.

<sup>28</sup>*Supra* (n.24), Article 1.

deposit of USD \$100,000 for conservation.<sup>29</sup> As such, the claimant has the right to be included in the arrangement for conservation of artefacts without involving Astoria.

2. The claimant's right to distribution, sales and possession of the artefacts has been interfered.<sup>30</sup>
  - a. The respondent's obligation under the Astorian Agreement contradicts with the 1995 Agreement.

The respondent is obliged to deposit representative collections in the National Museums or Museums of Astoria and Rolga.<sup>31</sup> In addition, rare objects found cannot be distributed during the process of recovery until the whole excavation is complete to ensure rare and unique representative collections are deposited to the museums.<sup>32</sup> The claimant is therefore deprived of its rights from getting a complete series of the artefacts recovered and rare items which only has one set of collection as the respondent is obliged to deposit them to the museum. The claimant's right to the artefacts in the distribution, sales and possession would be interfered as it diminished its share under the sharing arrangement of the 1995 Agreement.

- b. The Agreement with Astoria imposes strict regulation on the disposition of materials recovered.

The artefacts recovered should be best regarded as an entity rather than division into parts. If it is to be apportioned between two or more institutions, there are two principles to be followed. Firstly, the total assemblage should be capable of reassembly to allow further statistical and scholarly analysis and secondly, for unique or rare objects, the assemblage should not be split and if it is split, perfect replicas

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<sup>29</sup>*Supra* (n.1), Article 3.

<sup>30</sup>*Supra* (n.8).

<sup>31</sup>*Supra* (n.28).

<sup>32</sup>*Supra* (n.24), Article 7.

must be made to complete the assemblage.<sup>33</sup> This regulation complicates the distribution of artefacts to the claimant according to the sharing arrangement of 20-80, 50-50 and 60-40.<sup>34</sup> The claimant will also be bound by the Astorian Agreement to reconstitute the original assemblage for scholarly research whenever needed.<sup>35</sup>

- c. The committee appointed under the Astorian Agreement has the discretion to review the distribution of recovered artefacts.<sup>36</sup>

The claimant's relative share in the artefacts has been interfered as the distribution of artefacts will be under the discretion of the committee. The claimant was given the rights to the artefacts and yet was not involved in the choosing of the committee. The respondent recognizes that Astoria has a continuing interest in the artefacts recovered from the shipwreck. This therefore, indicates that there will always be interference from Astoria that prejudices the claimant's rights under the 1995 Agreement.

**C. The respondent has interfered with the claimant's salvage rights and performance under the 1995 Agreement by ratifying the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.**<sup>37</sup>

The respondent as a state party to the convention has an obligation to take measures to prohibit the use of their territory with regards to any activity directed at underwater cultural heritage<sup>38</sup> which is not in conformity with the said convention.<sup>39</sup> Hence, the claimant's rights under the 1995 Agreement shall be interfered in any parts that are not in conformity with the 2001 UNESCO Convention.

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<sup>33</sup>*Supra* (n.24), Article 2.

<sup>34</sup>*Supra* (n.8).

<sup>35</sup>*Supra* (n.33).

<sup>36</sup>*Supra* (n.24), Article 4.

<sup>37</sup>(adopted 2 November 2001, entered into force 2 January 2009) [hereinafter the 2001 UNESCO Convention].

<sup>38</sup>Hereinafter UCH.

<sup>39</sup>*Supra* (n.37), Article 15.

1. The claimant's right to sell the artefacts has been interfered.<sup>40</sup>

Article 2(7) of the 2001 UNESCO Convention prohibits UCH to be commercially exploited. The concept of UCH refers to that part of the cultural heritage which is found underwater<sup>41</sup> and refers to all traces of human existence having a cultural, historical or archaeological character for at least 100 years.<sup>42</sup> The very coveted Coeur de l' Ocean which sunk in the 19<sup>th</sup> century falls in this category.<sup>43</sup> Commercial exploitation is not defined in the said convention but was further elaborated under the Annex Rule of the 2001 UNESCO Convention that UCH shall not be traded, sold, bought or bartered as commercial goods.<sup>44</sup> The prohibition of commercial exploitation has interfered with the claimant's contractual basis of gaining profits after conducting the salvage operation. The claimant conducted the salvage operation on commercial principles and is motivated by economic consideration. This can be seen as the respondent provides the claimant incentives under the sharing arrangements,<sup>45</sup> right to make profits from merchandising income<sup>46</sup> and allowed some parts of the artefacts to be auctioned off overseas.<sup>47</sup> Interference can be inferred when the respondent failed to formulate a joint marketing plan for the sales and placement of the artefacts that was envisaged under the 1995 Agreement.<sup>48</sup> As such, the claimant loses its right to sell the artefacts and receive its share of profits under the sharing arrangement after all the efforts in salvaging the shipwreck.

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<sup>40</sup>*Supra* (n.8).

<sup>41</sup>*Supra* (n.16), Strati Anastasia at 10.

<sup>42</sup>*Supra* (n.37), Article 1.

<sup>43</sup>*Supra* (n.15).

<sup>44</sup>*Supra* (n.37), Annex Rule 2.

<sup>45</sup>*Supra* (n.8).

<sup>46</sup>*Supra* (n.9).

<sup>47</sup>Moot problem, ¶6.

<sup>48</sup>*Supra* (n.8).

2. The claimant's right to salvage the shipwreck for 20 years has been interfered.<sup>49</sup>
  - a. The 2001 UNESCO Convention provides in situ preservation for UCH.

Article 2(5) of the 2001 UNESCO Convention provides that in situ preservation of UCH shall be considered as the first option before allowing any activities directed at the UCH.<sup>50</sup> Activities directed at UCH shall be authorized in a manner consistent with the protection of UCH.<sup>51</sup> Since the claimant's salvage contract operates on commercial principles, it is therefore not consistent with the purpose of the 2001 UNESCO Convention. The respondent has passed a new law in late 2000 due to the influence of the 2001 UNESCO Convention in which the Minister may order to designate an area around the site of archaeological importance as a restricted area.<sup>52</sup> It is also stated that the Rolgan Cultural Society was fearful on the impact of salvage activities on the shipwreck.<sup>53</sup> The claimant's right to continue salvaging the shipwreck for 20 years would then be interfered as the 1995 Agreement concerning the salvage operation of the shipwreck is governed by Rolgan Law.<sup>54</sup>

**D. The respondent interfered with the claimant's salvage rights and performance under the 1995 agreement by allowing Aquatic View to organize and make profits by organising exclusive underwater trips, including photographing.**

1. The respondent has interfered with the claimant's right to conduct the salvage operation.

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<sup>49</sup>*Supra* (n.1), Article 8.

<sup>50</sup>*Supra* (n.37), Article 2(5).

<sup>51</sup>*Supra* (n.37), Annex Rule 1.

<sup>52</sup>Moot problem, ¶8.

<sup>53</sup>Moot problem, ¶10.

<sup>54</sup>*Supra* (n.1), Article 9.

In the case of *R.M.S. Titanic v. Haver*<sup>55</sup>, it is illustrated that when a tour expedition appears to be on the site at the time the salvage operations are being conducted, the salvor may be forced to abort its salvage plans due to safety purposes. In that case, there was evidence of an incident where visitors bumped up against the hull of the ship causing damages to the shipwreck.<sup>56</sup> In this present case, there is also a risk where the visitors might bump into the equipment used in salvaging the shipwreck and cause harm to themselves and also the claimant who is conducting the salvage operation. In addition to that, the tour operator may use powerful lights to illuminate the ship and to enable them to take photographs for the benefit of the sea tourist which could damage the ship if they were to go too closely to the ship.<sup>57</sup> Hence, the visits by the tour operator would interfere with the claimant's right to salvage the shipwreck.

2. The claimant's right to make arrangement for documentation of artefacts recovered has been interfered.

Aquatic View has been taking photographs and video clips for their website as promotional materials for the exclusive underwater trips.<sup>58</sup> The claimant has an ongoing television documentary deal of artefacts recovered from the shipwreck with the International Broadcasting Company.<sup>59</sup> The act of Aquatic View promoting the shipwreck in their website and also organizing underwater trips to the wreck site would then jeopardised the documentary deal. The claimant's right would be interfered as the public has the option to watch from the website and as well as visiting the wreck site.

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<sup>55</sup>*R.M.S. Titanic, Inc. v. Haver*, 171 F. 3d 943, 951 (4<sup>th</sup> Circuit 1999).

<sup>56</sup>*Ibid.*

<sup>57</sup>*RMS Titanic, Inc. c. The Wrecked and Abandoned Vessels* 1996 WL 650135(E.D. Va).

<sup>58</sup>Moot problem, ¶11.

<sup>59</sup>*Ibid.*

3. The claimant's right to use the name of Coeur de l' Ocean as a merchandising income has been interfered.<sup>60</sup>

Aquatic View has produced CDs of a song entitled "Coeur de l' Ocean" which is commercially marketed as souvenirs. The act of Aquatic View interfered with the claimant's right to make profits using Coeur de l' Ocean's name under the 1995 Agreement.<sup>61</sup> It is unreasonable to the claimant as the respondent granted the right to use the name Coeur de l' Ocean with a condition that the claimant has to pay an equal fee of 3% of its gross sales of merchandises and yet allowed Aquatic View to produce such CDs. The claimant's right will be interfered with the production of the CD's by Aquatic View and thus causing the claimant to earn less and still have to pay to the respondent 3% of its sales.

**E. The 2001 UNESCO Convention and the agreement with Astoria has interfered with the 1995 Agreement by applying retroactively.**

Retroactive laws or ex-post facto law means laws which were made after the act is done.<sup>62</sup> Article 28 of the Vienna Convention<sup>63</sup> provides that unless a different intention appears from the treaty or is otherwise established, the provisions of the treaties do not bind a party for any act or fact which took place before the date of the entry of the treaty.<sup>64</sup> In this case, the ratification of the 2001 UNESCO Convention and the agreement with Astoria<sup>65</sup> only comes into play after the respondent signed the 1995 Agreement with the claimant.<sup>66</sup> The respondent has interfered with the

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<sup>60</sup>*Supra* (n.1), Article 6.

<sup>61</sup>*Ibid.*

<sup>62</sup>Joseph Story: *A familiar exposition of the Constitution of the US*: published by Harper & Brothers, 1865, original from the University of California; 144, Digitalized 21 Nov (2007).

<sup>63</sup>(adopted 23 May 1969, entered into force 27 Jan 1980) Vienna Convention on the Law of Treaties between states and international organizations or between international organizations, 1986.

<sup>64</sup>*Ibid.*

<sup>65</sup>*Supra* (n.24).

<sup>66</sup>*Supra* (n.1).

claimant's salvage rights and performance under the 1995 Agreement when they applied the new obligation of the 2001 UNESCO Convention and the agreement with Astoria into the new Rolgan law. Rolgan law was agreed to be the governing law of the 1995 Agreement<sup>67</sup> but this does not include the new Rolgan law that was passed in 2000 following the adoption of the 2001 UNESCO Convention as it ceased to exist at the time of the contract's entry.<sup>68</sup>

## II. THE CLAIMANT HAS THE EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE COEUR DE L' OCEAN.

### A. The law of salvage provides the claimant exclusive rights to photographing and documenting.

1. The claimant has the exclusive salvage rights as they are the salvor-in-possession.
  - a. The claimant has fulfilled the requisite element necessary to qualify as a salvor in possession.

Exclusivity of salvage rights are granted when the elements of a salvor-in-possession are established.<sup>69</sup> Three elements are needed to be fulfilled in order for a salvor to qualify as a salvor-in-possession which are a) due diligence, b) ongoing effort and c) the prospect of success in recovering sunken artefacts.<sup>70</sup> In the present case, the claimant qualifies as salvors-in-possession as the operations have been conducted diligently where the claimant has conducted extensive research for years

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<sup>67</sup>*Supra* (n.1), Article 9.

<sup>68</sup>Moot problem, ¶8.

<sup>69</sup>*R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, (“Titanic I”), 924 F. Supp. 714 (E.D. Va. 1996) [Hereinafter ‘Titanic I’].

<sup>70</sup>*Ibid*; *Supra* (n.12), Bemis at 1051; *Moyer v. Wrecked & Abandoned Vessel, ANDREA DORIA*, 836 F. Supp. 1099, 1106 (D.N.J. 1993); Fletcher-Tomenius, P., O’Keefe, P.J., Williams, M. “Salvor in Possession: Friend or Foe to Marine Archaeology?” 912 *International Journal of Cultural Property* (Oxford Univ. Press, 2002).

and were successful in locating the site of the shipwreck.<sup>71</sup> The salvage project has also been ongoing from the period of locating the shipwreck up to the salvaging of the shipwreck.<sup>72</sup> The third element which is the prospect of success has also been established where the claimant has retrieved certain valuable artefacts which were confirmed by government archaeologist to be in mint condition and estimations were made that the artefacts from the shipwreck were worth approximately USD 1 billion.<sup>73</sup>

- b. The claimant's exclusive salvage rights include exclusive rights to photographing and documenting the Coeur de l' Ocean.

Under the law of salvage, a salvor who qualifies as a salvor in possession has exclusive salvage rights.<sup>74</sup> This includes exclusive photography rights whereby other parties are prohibited from capturing any image or photograph of the shipwreck.<sup>75</sup> In light of the above, the claimant who qualifies as a salvor in possession therefore has the exclusive photography rights over the Coeur de l' Ocean and other parties including Aquatic View are prohibited from capturing any image or photograph of the shipwreck.

2. The presence of other parties constitute interference and restriction from visiting the wreck site by implication grants the claimant with exclusive photographing and documenting rights.
  - a. The principle of stare decisis does not apply.

Although the US Appeals Court in *R.M.S. Titanic v Haver*<sup>76</sup> reversed the previous judgement of the District Court and allowed other parties to visit and view

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<sup>71</sup>Moot problem ¶4 and ¶5.

<sup>72</sup>Moot problem, ¶5 and ¶6.

<sup>73</sup>*Ibid.*

<sup>74</sup>*Supra* (n.55) *Haver*, 1999.

<sup>75</sup>*Supra* (n.57) *Titanic*, 1996.

<sup>76</sup>*R.M.S Titanic Inc. v. Haver*, 528 U.S. 825 (1999).

the wreck site, this does not annul the decision of the district court. In an English case, Lord Denning stated that international law knows no rule of stare decisis.<sup>77</sup> Thus the principle that was stated in *Haver*<sup>78</sup> may still be applied.

- b. The action of Aquatic View causes interference towards the salvors ongoing operation.

The US Supreme Court in *Haver* which reversed the decision of the District Court, expressly provides that other parties are allowed to visit, view and photograph the images of Titanic and its wreck site as long as these activities does not constitute as interference with the salvors salvage effort and their rights.<sup>79</sup> A serious risk of irreparable harm is posed by the presence of tourist within the area of the Coeur de l' Ocean because it creates a situation in which possession and control over the shipwreck would be impossible to monitor.<sup>80</sup> The location of the Coeur de l' Ocean on the seabed is also a factor to be considered. Given the conditions in underwater photography, divers interested to photograph the wreck would have to approach it from a close angle, thus causing “*significant risk of interference with or injury to the wreck itself*.”<sup>81</sup> Furthermore, the court in *Haver* stated that due to the dark surroundings of the shipwreck, the mere permitting of a third party to view the shipwreck constitutes interference to the salvage operation.<sup>82</sup> As a result, no other person is entitled lawfully to intrude as long as the salvage operations still continue.<sup>83</sup>

In relation to the present case, the claimant’s salvage operation was ongoing during the period when Aquatic View took photographs to promote their underwater

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<sup>77</sup>*Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.).

<sup>78</sup>*Supra* (n.55) *Haver*, 1999.

<sup>79</sup>*Supra* (n.76) *Haver*, 1999.

<sup>80</sup>*Treasure Salvors v Unidentified Wrecked and Abandoned Sailing Vessel* (1981) 640 F.2d 560 at 567.17.

<sup>81</sup>*Bemis v R.M.S Lusitania* 884 F.Supp. 1042 (1995).

<sup>82</sup>*Supra* (n.55) *Haver*, 1999.

<sup>83</sup>*Ibid.*

trips.<sup>84</sup> The restriction of other parties to enter the shipwreck site and cause interference as the claimants salvage operation continues implies the granting of exclusive photographing and documenting towards the claimant.

3. The salvage rights granted ensures the financial interest of the claimant.
  - a. The exclusive photography and documenting rights ensures the economic rights of the claimant.

In the case of *Haver*, the court held that the grant of exclusive photographic rights would be the best means to preserve the economic rights of the salvors, the historic interest in the shipwreck and the public's interest in the ship.<sup>85</sup> The court further granted an injunction prohibiting others from photographing the shipwreck in *Titanic I*<sup>86</sup> as it may pose a severe and negative impact on RMST's<sup>87</sup> various deals for exclusive broadcasts with documentary and news networks.<sup>88</sup> Clearly, the court has granted RMST a right which extended beyond the traditional law of salvage.<sup>89</sup> In the present case, the claimant has the legal right to document the shipwreck<sup>90</sup> and has consequently collaborated with the International Broadcasting Company for an ongoing television documentary of the shipwreck.<sup>91</sup> The respondent's action in allowing other parties to take photographs and make video clips regarding the shipwreck would severely jeopardize the claimant's deal with the said International

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<sup>84</sup>*Supra* (n.58).

<sup>85</sup>*Ibid*; *Supra* (n.55); Barbara T. Hoffman, Sailing On Uncharted Waters: The US Law of Historic Wrecks, Sunken Treasure and the Protection of Underwater Cultural Heritage, Convegno Internazionale Sulla Cooperazione nel Mediterraneo per la Protezione del Patrimonio Culturale Subacqueo, Siracusa, Italy, (3 – 5 April 2003).

<sup>86</sup>*Supra* (n.57) *Titanic*, 1996.

<sup>87</sup>*Supra* (n.55) *Haver*, 1999.

<sup>88</sup>*R.M.S. Titanic v. Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624, 628 (E.D. Va. 1998).

<sup>89</sup>*Ibid*.

<sup>90</sup>*Supra* (n.1), Article 2.

<sup>91</sup>*Supra* (n.58).

Broadcasting Company.<sup>92</sup> As such, this constitutes an intrusion by Aquatic View towards the claimant's extended salvage rights.

The court in *MDM Salvage*<sup>93</sup> and *Andrea Doria*<sup>94</sup> took into consideration the extensive effort invested in the project by the party in awarding the plaintiff rights over photographs and videotaping.<sup>95</sup> The court considered the salvors' independent historical research and capital investment into the project.<sup>96</sup> In light of the above, the claimant has similarly invested extensive effort in the project as the salvors by conducting historical research<sup>97</sup> on the location of the Coeur de l' Ocean and by providing the capital investment in paying all the expenses of the project.<sup>98</sup> Thus, taking into consideration the extensive efforts by the claimant, it is necessary for them to be awarded the exclusive photography rights over the wrecked vessel.

b. The claimant has intellectual property rights over the Coeur de l' Ocean.

The possessory right to photographic images of a shipwreck is better justified as an incorporation of principles of intellectual property into the salvors' rights as granted by the salvage law.<sup>99</sup> In the case of *Haver*<sup>100</sup>, the court held that a salvor in possession possess intellectual property right over the shipwreck.<sup>101</sup> Since photographs can be marketed like any other physical artefacts, the right to images, photographs, videos and the like belonged to *RMST*.<sup>102</sup> Clearly, salvage rights has

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<sup>92</sup>*Ibid.*

<sup>93</sup>*MDM Salvage v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. at 310, 1987 AMC 537 (S.D Fla. 1986).

<sup>94</sup>*Supra* (n.18), *Moyer* at 1099, (D.N.J. 1993).

<sup>95</sup>*Ibid*; *Supra* (n.93).

<sup>96</sup>*Ibid.*

<sup>97</sup>*Supra* (n.47).

<sup>98</sup>*Supra* (n.1), Article 7.

<sup>99</sup>Stern, Justin S., Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks, 68 Fordham L. Rev. 2489.

<sup>100</sup>*Supra* (n.55) *Haver*, 1999.

<sup>101</sup>*Supra* (n.88), *R.M.S. Titanic* (1998); Rachel Lin, Salvage Rights & Intellectual Property : Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S Titanic? Tulane Maritime Law Journal, 494 (Vol. 23 1999).

<sup>102</sup>*Ibid*, *Titanic*; Rachel Lin at 495.

been widened so as to include intellectual property rights.<sup>103</sup> As the claimant is a salvor in possession, the salvage rights granted to them would also include intellectual property rights towards the images, photographs and videos of the Coeur de l' Ocean.<sup>104</sup>

The court further stated where a historic salvor has spent time, effort and expense to its salvage operations, the salvor would be depending upon a just compensation.<sup>105</sup> This includes the marketing images of the shipwreck as the photographs of the shipwreck are as profitable and has to be protected like the other artefacts.<sup>106</sup> Therefore it is equitable to grant the original salvor exclusive intellectual property rights in the images of the shipwreck.<sup>107</sup> In light of the above, through the principle of equity, the claimant who has spent time, effort and expense towards its salvage operations should be granted with exclusive intellectual property rights in the images of the Coeur de l' Ocean.<sup>108</sup>

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

#### **A. The law of salvage is applicable in the 1995 Agreement.**

1. Due to the salvage nature of the contract, the principles of salvage law is integrated into the contract.

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<sup>103</sup>*Supra* (n.57), *R.M.S. Titanic* (1996); David Seanor, *The Case with the Midas Touch*, 76 A.B.A. J., 50 (May 1990).

<sup>104</sup>*Ibid.*

<sup>105</sup>*Ibid.*

<sup>106</sup>*Ibid.*

<sup>107</sup>Bederman and Prowda; Kathryn Walker Tubb, Neil Brodie, *Illicit Antiquities : The Theft of Culture and The Extinction of Archaeology*, Routledge, 152 (2002).

<sup>108</sup>*Supra* (n.2).

The contractual duties of parties to a salvage operation co-exist with the modern salvage rules.<sup>109</sup> Salvage principles continue to exist without further analysis or clarification, despite the presence of a contract.<sup>110</sup> Presently a large number of salvage services are regulated by agreement<sup>111</sup>, but they do not cease to be salvages.<sup>112</sup> They are still applied in accordance with the maritime law of salvage.<sup>113</sup> In light of the above, even though the salvage service conducted by the claimant is regulated by the 1995 Agreement<sup>114</sup>, it does not cease to be salvage. Therefore, the salvage legal principles are incorporated into the agreement.

2. The incorporation of the 1989 Salvage Convention into the agreement constitutes the inclusion of salvage law.

The 1989 Salvage Convention lays down the principles of salvage law.<sup>115</sup> The application of salvage law into salvage agreements have been further enshrined in the 1989 Salvage Convention. Where the 1989 Salvage Convention applies, law has favoured the supremacy of salvage law.<sup>116</sup> A monist state maintains that international law and municipal law be regarded as manifestation of a single conception of law.<sup>117</sup> The monist theory insists upon a unitary of international law and domestic law.<sup>118</sup> According to Oppenheim International Law, in the event of any conflict between

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<sup>109</sup>Olivia Lennox-King, Laying the Mark to Port and Starboard: Salvage Under Duress and Economic Duress at Contract Law, Australian and New Zealand Maritime Law Journal, ANZMLJ 5, Vol 21, No 1 (2007).

<sup>110</sup>*Ibid.*

<sup>111</sup>*Admiralty Commissioners v Valverda* (Owners), AC 173, 202 [1938].

<sup>112</sup>*Ibid*; Kennedy and Rose, *The Law Of Salvage*, Chapter 1, 346 (6<sup>th</sup> edition 2002); *The William Lushington* (1850) 7.

<sup>113</sup>*Supra* (n.111).

<sup>114</sup>*Supra* (n.1).

<sup>115</sup>Alexandra Mandaraka-Sheppard, *Modern Admiralty Law: With Risk Management Aspects*, Cavendish, 634, (1<sup>st</sup> edition 2001).

<sup>116</sup>*Supra* (n.109), Olivia Lennox.

<sup>117</sup>Hersch Lauterpacht, *International Law Collected Papers*, Cambridge University Press, 1978.

<sup>118</sup>Malcolm N. Shaw, *International Law* (5<sup>th</sup> edition 2003).

international law and municipal law, international law prevails as it is higher in hierarchy according to monism.<sup>119</sup>

In this case, it has been expressly stated that the 1995 Agreement shall be governed by Rolgan Law,<sup>120</sup> and being a Monist State<sup>121</sup> that ratified the 1989 Convention<sup>122</sup>, the law of salvage is incorporated and thus applied to the contract.

**B. The claimant has successfully fulfilled the requirements for a valid salvage claim.**

The law of salvage lays down the concept that a salvor who voluntarily rescues another's property, is entitled to a reward for his service.<sup>123</sup> Therefore, the law of salvage is rather focused to saving and preserving a property from peril, damage and loss.<sup>124</sup> For a claim of salvage to succeed, it has to fulfil three elements which are the ship or property is in marine peril, a voluntary act conducted by the salvor to save the ship, and also success in whole or in part in saving the property.<sup>125</sup> The claimant's performance in salvaging the shipwreck, Coeur de l' Ocean<sup>126</sup> and recovering significant historical artefacts from the shipwreck<sup>127</sup> fulfilled all the above requirements. Firstly, the act of the claimant is in fact a voluntary one where the claimant offered to render their services to the respondent in locating the shipwreck and also recovering the artefacts.<sup>128</sup> Secondly, the shipwreck, Coeur de l' Ocean is in

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<sup>119</sup>Oppenheim International Law, Vol 1 (9<sup>th</sup> edition 1993).

<sup>120</sup>*Supra* (n.54), Article 9.

<sup>121</sup>Further Clarifications, ¶7.

<sup>122</sup>Moot Problem, ¶17.

<sup>123</sup>*Colombus-America Discovery Group v. The Unidentified Wrecked & Abandoned Sailing Vessel, S.S Central America*, No CIV.A.87-363-N, 1993 WL 580900, at \*10 (E.D. Va. Nov. 18, 1993); D.Peltz, Robert, *Salvaging Historic Wrecks*, 25 Tul. Mar. L.J. 1 (2000-2001).

<sup>124</sup>*Ibid.*

<sup>125</sup>*Supra* (n.17), Klein.

<sup>126</sup>*Supra* (n.1).

<sup>127</sup>*Supra* (n.47).

<sup>128</sup>*Ibid.*

marine peril as it was in danger of being targets of illegal treasure hunters.<sup>129</sup> Thirdly, the claimant has accomplished success in salvaging the wreck as many of the artefacts were able to be recovered.<sup>130</sup> Success is a necessary requirement to prove a salvage claim.<sup>131</sup>

**C. The 1989 Salvage Convention is applicable in the distribution of artefacts and calculation of profits.**

It has been stated in the case of *Allseas Maritime* that there is no specific or precise formula in calculating a salvage award.<sup>132</sup> Instead, it depends highly on the circumstances of each case.<sup>133</sup> However, the principles to be taken into consideration in distributing the artefacts and calculating the profits are envisaged under Article 13 of the 1989 Salvage Convention.<sup>134</sup> The aim of giving out the award is mainly to induce seamen to embark on such undertakings to save lives and property.<sup>135</sup> This convention has been ratified by the respondent, thus, it is binding on the state of the respondent.<sup>136</sup>

1. **The sharing arrangement should be modified as the award allocated to the claimant is a degree far too small.**

The 1989 Salvage Convention shall apply save to the extent it is expressly or impliedly stated otherwise by the agreement.<sup>137</sup> Therefore the 1989 salvage conventions method for fixing the salvage reward does not apply to the extent that the

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<sup>129</sup>*Supra* (n.5); Bruce E. Alexander, *Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations*, 20 J. Mar. L. & Com. 1, 14 (1989).

<sup>130</sup>*Supra* (n.5).

<sup>131</sup>*Supra* (n.125).

<sup>132</sup>*Allseas Maritime, S.A. v. M/V Mimosas*, 812 F.2d 243, 246 (5<sup>th</sup> Circuit 1987).

<sup>133</sup>*Ibid.*

<sup>134</sup>*Supra* (n.3), Article 13.

<sup>135</sup>*Supra* (n.19), *Columbus*.

<sup>136</sup>*Supra* (n.122).

<sup>137</sup>*Supra* (n.3), Article 7.

parties contract on a different basis.<sup>138</sup> In the present case, through Article 6 of the International Convention of the 1989 Salvage Convention, the convention method for fixing a salvage award would not apply as the method for fixing the award is clearly expressed in the 1995 Agreement through the sharing arrangements.<sup>139</sup> However, nothing in Article 6 of the 1989 Salvage Convention shall affect the application of article 7 of the said convention. Therefore the contract may be annulled or modified if the payment provided for under the contract is an excessive degree too small for the services actually rendered.<sup>140</sup> The sharing arrangement provided in the agreement is too small for the service rendered by the claimant. The larger the service rendered and the more artefacts the claimant recovers, causes the claimant to receive less from the sharing arrangement.<sup>141</sup>

Therefore, as the payment provided for in the contract is an excessive degree too small, the terms of the contract may be modified or annulled by the provisions of the 1989 convention. Thus, the distribution of the artefacts and the calculation of profits are to be made solely on the basis of the salvage legal principles.

2. The calculation of profits and distribution of artefacts are to be in accordance with the 1989 Salvage Convention.
  - a. The 1989 Salvage Convention sets out the factors for fixing a reward.

The Supreme Court of the United States in *Blackwall*,<sup>142</sup> laid down the principle that the act of salvage has to be one that is successful in order for the salvor to claim for the reward. This principle is often referred to as “no cure, no pay” which

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<sup>138</sup>*Ibid*; Martin Davis, *Whatever Happened to the Salvage Convention 1989?*, 39 J. Mar. L. & Com. 463, October (2008).

<sup>139</sup>*Supra* (n.57).

<sup>140</sup>*Supra* (n.3), Article 7.

<sup>141</sup>*Supra* (n.57).

<sup>142</sup>*Blackwall*, 77 U.S. 1, 12 (1869).

has now been incorporated into Article 13 of the 1989 Salvage Convention.<sup>143</sup> The criteria provided for under the 1989 Salvage Convention are a) the salvaged value of the vessel and the property, b) the measure of success obtained by the salvors, c) the nature and degree of the danger the salvaged property was exposed, d) the skill and efforts of the salvors in salvaging the vessel and other property as well as the promptness of the services rendered, e) the time used and losses incurred by the salvors and f) the risk of liability and other risks run by the salvors or their equipment.<sup>144</sup>

**D. In the alternative, the calculation of profits should be made solely on the basis of salvage legal principles as the law of salvage is incorporated in the agreement.**

1. The factors which are taken into consideration in remunerating the award are fulfilled by the claimant.

The Supreme Court in *Blackwall* laid down six factors to be taken into consideration when determining a salvage award. Firstly, the court has to consider the labour expended by the salvors in rendering their salvage service. In this case, the claimant has done extensive research and study to find the shipwreck.<sup>145</sup> Furthermore, the claimant has also conducted endless surveys for years until they finally found the Coeur de l' Ocean shipwreck. The second factor to be considered is the promptitude, skill and energy displayed in rendering the service and saving the property. Often, a professional salvor is entitled to a more liberal award than a chance salvor.<sup>146</sup> Mr. Bernard Bodd, who is a major shareholder in Heritage Inc, is a well-known salvor

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<sup>143</sup> *Ibid.*

<sup>144</sup> *Supra* (n.3), Article 13.

<sup>145</sup> *Ibid.*

<sup>146</sup> *B. V. Bureau Wijsmuller v. United States* 702 F. 2d, 333, 339.

with expertise in recovering historic wrecks.<sup>147</sup> As a professional salvor that possesses more skills, the claimant is entitled to a more liberal award.<sup>148</sup> The third factor is the value of the property employed by the salvors in rendering their service, and the danger to which such property was exposed to.

The fourth factor is the risk incurred by the salvors in securing the property from impending peril. The court in *Columbus America Discovery Group*<sup>149</sup> noted that anytime a ship goes to sea, there is danger faced by the ship and the persons aboard.<sup>150</sup> In the present case, the claimant has spent long days expanding to years in search and recovery of the shipwreck. By going out to sea, and salvaging the wreck, the claimant has exposed themselves to some course of danger and risk in securing the shipwreck. The fifth factor is the value of the property saved. The value of property the claimant has recovered from the shipwreck *Coeur de l' Ocean* includes countable artefacts that are high in value ranging from thousands to million US dollars.<sup>151</sup> Furthermore, the National Geographic has also estimated the treasures would be worth more than USD \$ 1 billion.<sup>152</sup>

The last factor to be taken into account is the degree of danger from which the property was rescued. The *Coeur de l' Ocean* wreck was in danger of illegal treasure hunting activities.<sup>153</sup> Due to the salvage activities conducted by the claimant, all the artefacts were able to be recovered safely. In *Colombus-America Discovery Group v. Atlantic Mutual Insurance Co.*<sup>154</sup> the Fourth Circuit added a seventh factor in setting the proper award for the salvage of the ship *S.S. Central America*, which was the

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<sup>147</sup>Moot problem, ¶4.

<sup>148</sup>*Supra* (n.57), *Titanic* (1996).

<sup>149</sup>*Supra* (n.19), *Columbus*, at 468.

<sup>150</sup>*Supra* (n.57), *Titanic* (1996); *Supra* (n.103) David Seanor.

<sup>151</sup>Moot problem, ¶2.

<sup>152</sup>*Supra* (n.2).

<sup>153</sup>*Supra* (n.5).

<sup>154</sup>*Supra* (n.19), *Columbus*, at 468.

degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salvaged.<sup>155</sup> All these factors have been incorporated into Article 13 of the 1989 Salvage Convention<sup>156</sup> with certain modifications.<sup>157</sup> Having met all the factors above the claimant is entitled to a salvage award.

The schedule below shows the total of the appraised value of the items recovered from the Coeur de l' Ocean wreck:

No	Item/ Articles/ Objects	Quantity	Appraised Value of each Item (in US Dollars)	Total
1	Gold Ingots and Bullions	360	USD 50,000	USD 18,000,000
2	Gold Bars	100	USD 150,000	USD 15,000,000
3	Silver Ingots	700	USD 20,000	USD 14,000,000
4	Silver Coins with Astorian marks	50,000	USD 10,000	USD 500,000,000
5	Copper planks	200	USD 5,000	USD 1,000,000
6	Indigo	200 chests	Yet to be determined	-
7	Tobacco	10 tons	Yet to be determined	-
8	Bronze Cannon with Astorian	2	Yet to be determined	-

<sup>155</sup> *Ibid.*

<sup>156</sup> *Supra* (n.3) Article 13.

<sup>157</sup> *Ibid.*

	marks			
9	Silver Containers	1	USD 10,000	USD 10,000
10	Bronze forks	4	USD 2,000	USD 8,000
11	Silver pendant	1	USD 15,000	USD 15,000
12	Comb	2 pieces	Yet to be determined	-
13	Olives and pickles	3 jars	Yet to be determined	-
14	Unknown Liquid	1 bottle	Yet to be determined	-
15	Ornaments	5 pieces	USD 5,000	USD 25,000
17	Cannon balls	12	Yet to be determined	-
18	Chinese porcelains	20,000 pieces	Those in mint condition (10,000 pieces) were appraised at USD 5,000 each. The remaining at USD 1000 each.	USD 60,000,000
19	Swords bearing some Arabic words	57 pieces	USD 20,000	USD 1,140,000
20	Silver daggers with precious stones.	2 pieces	USD 3.5 mil.	USD 7,000,000
21	Spices	70 bottles	Yet to be determined.	-
				USD 616,298,000

2. The additional factors considered by the court are applied to the claimant.

In the *Columbus America*<sup>158</sup> case, it has been discussed long and thoroughly on how the calculations of the reward are to be made. In that case, a statement of evidence from Micheal J. Anderson, an expert on the costs of salvage and also the proper award to be given concluded that the plaintiff should be awarded with 95 percent of the net sales value.<sup>159</sup> He further stated that even the lowest share that can be awarded to a salvor is 80%. As a rule, the award should be between 80%-90%.

Furthermore, the court in *Cobb Coin*<sup>160</sup> decided for the proper award to the salvor for the salvage of such artefacts which are uniquely valuable beyond their monetary worth. The salvor is entitled to an award *in specie*, which is the artefact themselves.<sup>161</sup>

**E. The proper award for the profits and the distribution of artefacts granted to the claimant should be made after taking into consideration the factors as stated above.**

The claimant has endured all the expenses in carrying out the salvage act and also spent considerable time, effort, and money in their attempt to salvage the shipwreck. By taking into account the additional factors; the lowest share that the claimant should be awarded with in regards to the monetary value of the salvaged property is at least 80% of the total amount of the items recovered, 80% out of USD 616,298,000 equals to USD 493,038,400. The percentage awarded to the salvors increases as the depth of the shipwreck increases.<sup>162</sup> Depending on the depth of the

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<sup>158</sup>*Columbus-America Discovery Group*, U.S. Dist. 18482, 1. 1993.

<sup>159</sup>*Ibid.*

<sup>160</sup>*Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540, 557, 1983 AMC 1018, 1040 (S.D. Fla. 1982) [Hereinafter *Cobb Coin II*].

<sup>161</sup>*Ibid.*

<sup>162</sup>*Supra* (n.158) *Columbus-America*.

Coeur de l' Ocean shipwreck, the proper award that should be awarded to the claimant by taking into consideration the *Columbus America* case, is 80% to 90% of the net value which is equal to USD 493,038,400 to USD 554,668,200.

Furthermore, by applying the principle in *Cobb Coin* in regards to the artefacts that are recovered from the Coeur de l' Ocean which are unique<sup>163</sup> and yet to be determined the value,<sup>164</sup> an award *in specie* must be awarded to the claimant. It is an award of artefacts to the claimant which would have stayed lost and unknown to the world if not for the efforts of the claimant in salvaging it.<sup>165</sup>

By applying Article 7 of the 1989 Salvage Convention, the sharing arrangements in the agreement must be modified.<sup>166</sup> The claimant must at least receive 80% from the net value of the total amount recovered and an award *in specie*.

**F. The loss suffered and expenditures incurred allows the claimant to rely on the salvage legal principles in distributing the artefacts.**

The Privy Council in *Bird and Others v. Gibb and Others*<sup>167</sup> considered a salvor's expenditure and loss in determining the award to be given. On appeal, Sir James Hannen who is a judge in the said case held that it is also important to take into account the damage and loss the salvor has sustained.<sup>168</sup> The claimant has suffered durable loss when the respondent gave permit to Aquatic View to organize the underwater trips to view the shipwreck. This has interfered with the claimant's ongoing television documentary.<sup>169</sup> In respect of the expenses of the project, it is clear from the 1995 agreement that the claimant is responsible for all the expenses in

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<sup>163</sup>*Supra* (n.24).

<sup>164</sup>Moot problem, ¶12, Clarifications, ¶18.

<sup>165</sup>*Supra* (n.160), *Cobb Coin*, at 540, ¶33.

<sup>166</sup>*Supra* (n.1), Article 5.

<sup>167</sup>*Bird and Others v. Gibb and Others* 8 App. Cas. 559 (1833).

<sup>168</sup>*Ibid*, at 563-564.

<sup>169</sup>*Supra* (n.58).

conducting the salvage activities.<sup>170</sup> The claimant has also, successfully rendered their salvage services and this entitles them to a larger amount of reward taking into account the high expenses they incurred.

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<sup>170</sup>*Supra* (n.1), Article 7.

## PRAYER FOR RELIEF

Benevolent Heritage Inc. prays to this tribunal to:

- a. *Declare* that the act of Rolga entering into an agreement with Astoria in 2001, ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operator to organize and make profits from visiting activities to the site which include the taking of photographs has interfered with Benevolent Heritage Inc. rights and performance under the 1995 Agreement.
  
- b. *Declare* that, in conducting the salvage services on the Coeur de l' Ocean, the law of salvage grants Benevolent Heritage Inc. the exclusive rights of photographing and documenting the wreck Coeur de l' Ocean.
  
- c. *Declare* that, the calculation of profits between the parties to be made solely on the basis of salvage legal principles.

Respectfully submitted,  
Counsels for the Claimant.