

AT THE  
**INTERNATIONAL ARBITRATION CENTER**  
IN HO CHI MINH CITY, VIETNAM

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2009

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**BENEVOLENT HERITAGE, INC.**

*Claimant*

v.

**THE GOVERNMENT OF ROLGA**

*Respondent*

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**MEMORIAL FOR THE CLAIMANT**

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## **STATEMENT OF JURISDICTION**

There is no dispute as to the Arbitral Tribunal's jurisdiction to hear this matter. The Government of Rolga and Benevolent Heritage, Inc. have submitted the present dispute to the International Arbitration Center in accordance with Paragraph 10 of the Partnering Agreement Memorandum. The Parties have also agreed that the seat of the arbitration is in Ho Chi Minh City, Vietnam.

While numerous international interests and potential claims from other countries and entities not a party to this dispute exist, the matter before the Tribunal is a contractual dispute between the Government of Rolga and Benevolent Heritage, Inc., a Rolgan company, for salvage operations to be performed wholly within Rolga's territorial waters. As such, it is a domestic dispute governed by Rolgan Law.

## QUESTIONS PRESENTED

1. Whether the acts and/or omissions by the Government of Rolga interfered with Heritage's salvage rights and performance thereby constituting actual breach of the 1995 Partnering Agreement under Rolgan Law.
2. Whether the lack of compensation and/or distribution of artifacts constitute a breach of the Partnering Agreement under a reasonableness standard.
3. Whether Heritage's performance of its obligations pursuant to the 1995 Partnering Agreement is excused under the doctrine of frustration.
4. Whether Benevolent Heritage, Inc. has the exclusive rights to photographing and documenting the Coeur de l'Ocean.
5. Whether the calculation of profits and/or distribution of artifacts between the Parties is/are to be made solely on the basis of customary salvage legal principles.

## STATEMENT OF FACTS

The Coeur de l’Ocean, an Astorian warship, sank in 1800 off the coast of the city of Zamzala, which is now a part of Rolga. It was carrying precious goods stolen from the Sultan’s palace after the Astorian army conquered Zamzala.

On 7 November 1959, the Government of Rolga (“Rolga”) gained independence from Astoria. Rumors of sunken treasure lured treasure hunters into the Rolgan sea. Illegal treasure hunting activities and rampant lootings of historic wrecks became a problem.

Benevolent Heritage, Inc. (“Heritage”) is a salvage company incorporated under Rolgan Law with expertise in historic wrecks recovery. In 1990, when Heritage submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant historical wrecks, it received attention from Rolga as the operation involved the discovery of the Coeur de l’Ocean. Heritage performed extensive research and study of Astoria’s maritime records and predicted the vessel’s location off the coast of Rolga. On 1 June 1993, after years of survey, Heritage discovered the wreck of the Coeur de l’Ocean (“the Wreck”). The relevant Rolgan authority has approved all survey, recovery, or extraction projects involving historical objects or sites as required by Rolgan Law.

On 27 September 1995, Rolga and Heritage signed the Partnering Agreement Memorandum, setting forth the terms for the salvage of the Wreck and the conservation and documentation of artifacts recovered. Since then, many of the artifacts have been recovered, and some parts of the collection have been auctioned off to partly finance the costs of the project. Under the Sharing Arrangements provision, once the appraised value and the proceeds of sales of artifacts exceed USD \$45 million, Heritage is entitled to own and possess its relative share of the artifacts. Under the Merchandising Income provision, Heritage has the right to use the name

“Coeur de l’Ocean” for the sales and marketing of merchandise related to the Wreck, excluding the artifacts, for three percent of the gross sales of merchandising.

In 2000, Rolga began strengthening its cultural heritage protection by introducing a new economic plan. Riska Benti, Minister of Rolga Cultural Heritage, addressed the problems of illicit dealings, looting, and destruction of cultural property publicly. Rolga passed a law in the same year to protect wrecks of historical and cultural significance (“the 2000 Rolgan Law”). The law gives the Minister the authority and power to designate an area around a wreck site in Rolgan waters as a restricted area, at her discretion.

Next, Rolga entered into an agreement on the “Protection of Astorian Wrecks” with Astoria in 2001 (“the 2001 Agreement”). Under this agreement, Astoria transferred all its rights, title, and interest in its ancient vessels lying on or off the coast of Rolga to Rolga in hope that Rolga will do its best to preserve any objects recovered from its seabed for the benefit of mankind. Also, in the agreement, Rolga recognized that Astoria has a continuing interest in the recovered artifacts. The Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga (“Guiding Principles”) provide further clarification to the 2001 Agreement.

During this same time, Rolga granted Aquatic View, a specialized tour operator, a permit to organize exclusive underwater trips to view the Wreck. Aquatic View has sold 25 tickets at USD \$20,000 each. Aquatic View staff took photographs and video clips of the Wreck to post on its website as promotional materials for the tour. Aquatic View has also engaged a songwriter to write a song entitled “Coeur de l’Ocean” for a souvenir CD. These activities by Aquatic View have jeopardized Heritage’s television documentary deal with an International Broadcasting Company.

On 2 November 2001, Rolga signed the United Nations Educational, Social and Cultural Organization (“UNESCO”) Convention on the Protection of the Underwater Cultural Heritage (“UNESCO Convention”), which was ratified on 9 January 2005, and entered into force in Rolga on 2 January 2009. These actions prompted Heritage to reconsider its position under the Partnering Agreement.

By 2003, Heritage felt that further investment of effort, time, and money into the salvage operation would be harmful to the company. When the Parties finalized the distribution of artifacts recovered from the Wreck, Heritage asserted that Rolga unfairly distributed the artifacts. The artifacts salvaged by Heritage are currently in the custody of Rolga and have a value of over USD \$600 million.

## SUMMARY OF PLEADINGS

1. Rolga committed acts and/or omissions that interfered with Heritage's salvage rights and performance thereby constituting actual breach of the Partnering Agreement under Rolgan Law. Malaysian laws are applicable in this dispute and render the Partnering Agreement terminated. Rolga's 2001 Agreement with Astoria, ratification of the UNESCO Convention, and permit to Aquatic View constitute fundamental breaches of the Partnering Agreement. As such, the Partnering Agreement is void and Heritage is entitled to damages.
2. The lack of compensation and/or distribution of artifacts constitute a breach of the Partnering Agreement under a reasonableness standard. As a result of Rolga's failure to distribute Heritage's share of the artifacts, and disabling itself from compensating Heritage pursuant to the Partnering Agreement, Heritage may discontinue its operations and rescind such Agreement.
3. Heritage's performance of its obligations pursuant to the Partnering Agreement is excused under the doctrine of frustration. The doctrine of frustration excuses performance of a contract when performance is physically impossible or has become illegal. Aquatic View's underwater tour operations constitute physical impossibility. The laws Rolga passed after the formation of the Partnering Agreement render performance under the Agreement illegal.
4. Heritage has exclusive rights of photographing and documenting of the Coeur de l'Ocean. Heritage was granted exclusive rights under the Partnering Agreement. Even if the Agreement is void, courts have recognized exclusive photographing and documenting rights as part of the salvor's salvage rights.

5. Since the Partnering Agreement is void, the calculation of profits and/or distribution of artifacts between Parties must be made solely on the basis of salvage legal principles. Under salvage principles, Heritage is entitled to compensation in an amount based on a substantial percentage of the value of the Wreck.

## PLEADINGS

### **1. ROLGA COMMITTED ACTS AND/OR OMISSIONS THAT INTERFERED WITH HERITAGE’S SALVAGE RIGHTS AND PERFORMANCE THEREBY CONSTITUTING ACTUAL BREACH OF THE PARTNERING AGREEMENT UNDER ROLGAN LAW.**

The Partnering Agreement at issue is a salvage contract, a type of service contract, between Rolga and Heritage (“Parties”) where they agreed to “the provision of a financial reward for the rescue of property from a maritime peril.”<sup>1</sup> When this contract was formed in 1995, its terms were compatible with Rolgan Law. Thus, Heritage began performance of its obligations under the contract. However, subsequently, Rolga has breached the Agreement by entering into the 2001 Agreement with Astoria, ratifying the 2001 UNESCO Convention in 2005, and granting Aquatic View a permit for underwater tours.

The cumulative effect of these acts and omissions gives rise to a serious breach of obligations by Rolga, which terminates the contract pursuant to the Term and Termination provision of the Partnering Agreement.<sup>2</sup> Under Rolgan Law, the Partnering Agreement is, therefore, rescinded.

#### **1.1. Malaysian laws and the common law tradition are applicable in this dispute and render the Partnering Agreement terminated due to Rolga’s fundamental breach.**

The *in pari materia* doctrine is an approach to statutory interpretation where different laws on the same subject are to be construed together and are presumptively interpreted

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<sup>1</sup> Maraist, Frank L. and Galligan, Thomas C., Jr., Admiralty in a Nutshell, 5<sup>th</sup> Ed., 134 (West 2005).

<sup>2</sup> Partnering Agreement, ¶ 8.

consistently such that the interpretations of one law could be relied upon to interpret the other.<sup>3</sup> Rolgan Laws are *in pari materia* with Malaysian laws on all issues except for being a “Monist” State.<sup>4</sup> Accordingly, Malaysian law is applicable in this dispute. Further, the record indicates that Rolga has a common law system,<sup>5</sup> and English law is utilized in Malaysian statutes.<sup>6</sup> The Civil Law Act of 1956 applies English Common Law to issues where no Malaysian laws have been established.<sup>7</sup>

The Contracts Act 1950 provides that Parties to a contract are obligated to “either perform, or offer to perform, their respective promises....”<sup>8</sup> When a party takes actions that are against the spirit of the contract and prevents the spirit of the contract from being accomplished,<sup>9</sup> it is a breach of contract. A fundamental breach, or a breach affecting “the root of the contract,” entitles the innocent party to treat a contract as repudiated and to rescind the contract.<sup>10</sup> In *Suisse Atlantique Socit d’Armement Maritime S.A. v. Rotterdamsche Kolen Centrale*, Lord Reid of the English Court of Appeal suggested:

...one way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made.<sup>11</sup>

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<sup>3</sup> “in pari material,” *Black’s Law Dictionary*, 8<sup>th</sup> Edition, (West 2004). See also William Eskridge, “Public Values in Statutory Interpretation.” 137 U. Pa. L. Rev. 1007, 1039 (1989) and William Buzbee, “The One-Congress Fiction in Statutory Interpretation.” 149 U. Pa. L. Rev. 171, 222 (2000).

<sup>4</sup> Clarifications, ¶ 8.

<sup>5</sup> *Id.* at ¶ 7.

<sup>6</sup> Civil Law Act 1956, §§ 3 and 5, Malaysia Act 67.3 and 67.5, 38 HKLJ 769, 778 Hong Kong Law Journal, “Corporate Law Reform and Some ‘Rule of Law’ Issues in Malaysia”.

<sup>7</sup> Loh Siew Cheang, *The Business Guide to Malaysia*, p. 17-19 (Butterworth-Heinemann Asia, 1997).

<sup>8</sup> Contracts Act 1950, § 38(1), Malaysia Act 136.38.

<sup>9</sup> Sir William Reynell Anson, Ernest Wilson Huffcut, *Principles of the English law of contract and of agency in its relation to contract*, P. 249; UNIDROIT Principles of International Commercial Contracts (2004) (“UNIDROIT Principles”) Art. 1.8, 5.1.3.

<sup>10</sup> *Suisse Atlantique Socit d’Armement Maritime S.A. v. Rotterdamsche Kolen Centrale*, [1967] 1 AC 361, Judgment 2 by Lord Reid; UNIDROIT Principles, Art. 7.3.1.

<sup>11</sup> *Id.*

In this dispute, “the root of the contract” is the commercialization of recovered artifacts and the sharing of profits generated. As evidenced by the Sharing Arrangements, the recovered artifacts were intended to be sold, and “*the proceeds of any sales of artifacts*” would be split between Heritage and Rolga.<sup>12</sup> [Emphasis added]. Further, if the value of the recovered artifacts exceeds USD \$45 million, Heritage was entitled to own and possess its relative share of the remaining artifacts, and the Parties would “endeavor to formulate a joint marketing plan for the placement and *sales* of the remaining artifacts.”<sup>13</sup> [Emphasis added].

Once the Partnering Agreement was signed, Heritage continued salvage operations until 2003.<sup>14</sup> The acts and omissions by Rolga, as discussed below, are incompatible with the Partnering Agreement and thus constitute a fundamental breach of the contract. Accordingly, Heritage is entitled to treat the contract as repudiated.

### **1.1.1. Rolga fundamentally breached the Partnering Agreement by signing the 2001 Agreement with Astoria.**

The 2001 Agreement and the Guiding Principles, which are meant to interpret the 2001 Agreement, contain several provisions which are contrary to the purpose of the Partnering Agreement. Under international law, bilateral treaties, such as the 2001 Agreement, are generally immediately binding upon those States who are parties to the agreement.<sup>15</sup> Thus, any interference with the Partnering Agreement caused by the 2001 Agreement could take place beginning on 6 November 2001 when the 2001 Agreement was signed.<sup>16</sup>

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<sup>12</sup> Partnering Agreement, ¶ 5.

<sup>13</sup> *Id.*

<sup>14</sup> Moot Problem, ¶ 12.

<sup>15</sup> György Haraszti, “Questions of international law, Volume 2” P. 18.

<sup>16</sup> Guiding Principles.

The first interference by the 2001 Agreement is the requirement that the artifacts not be distributed until a shipwreck is completely excavated.<sup>17</sup> This requirement would keep payment and transfer of the actual possession of the artifacts to Heritage until the entire Wreck was salvaged. In contrast, the Sharing Arrangements calls for the sale of the first USD \$45 million worth of artifacts – with Heritage entitled to 80% of the proceeds. Requiring the entire wreck to be salvaged will delay compensation to Heritage indefinitely.<sup>18</sup> This delay amounts to an undue hardship on Heritage because it would have to carry the costs of the operations over an extended period of time before being compensated.<sup>19</sup>

Second, where the Partnering Agreement calls for a division of the artifacts by monetary values or profits,<sup>20</sup> the Guiding Principles call for division by historic, educational, scientific, and international considerations.<sup>21</sup> Additionally, the distribution of goods under the 2001 Agreement would be dispensed by a committee that has sole discretion in deciding which goods could be separated from the collection.<sup>22</sup> The Partnering Agreement does not contain any such provision. Moreover, another requirement states, “unique or rare objects... should not be split or, if split, perfect replicas be made...,”<sup>23</sup> which means that Heritage would be limited in its possession of a variety of goods.

Finally, the requirement that all goods be cataloged and subject to laboratory treatment further delays the compensation of Heritage.<sup>24</sup> The Partnering Agreement does not have any

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<sup>17</sup> Appendix (2), Guiding Principles for the Determination of the Disposition of Materials From the Shipwrecks of Astoria off the Coast of Rolga (“Guiding Principles”), ¶ 7.

<sup>18</sup> See Chapter 14, George H. Reid, “Marine salvage: a guide for boaters and divers”.

<sup>19</sup> RESTRAINT OF TRADE AND THE RESTATEMENT (SECOND) OF CONTRACTS. 57 NYULR 669, 677 New York University Law Review; UNIDROIT Principles, Art. 6.1.1., 6.2.2.

<sup>20</sup> Partnering Agreement, ¶ 5.

<sup>21</sup> Guiding Principles, ¶ 1.

<sup>22</sup> *Id.* at ¶ 4.

<sup>23</sup> *Id.* at ¶ 2.

<sup>24</sup> *Id.* at ¶ 3.

provision for laboratory study of the recovered artifacts.<sup>25</sup> Study of underwater artifacts in labs can last for years, if not decades.<sup>26</sup> Any substantial delay in the compensation is a serious breach.<sup>27</sup>

The 2001 Agreement is fundamentally different than the Partnering Agreement. This difference was not envisioned when the contract was formed. Accordingly, since Rolga breached the Partnering Agreement, Heritage is entitled to rescind the contract.

### **1.1.2. Rolga's ratification of the UNESCO Convention constitutes a fundamental breach of the Partnering Agreement.**

Rolga is a member of the United Nations and signatory to the United Nations Charter.<sup>28</sup> The fundamental principles of international law embodied in the Charter of the United Nations were codified by the Vienna Convention on the Law of Treaties.<sup>29</sup> This Convention provides that the consent of a State to be bound by a treaty may be expressed by ratification,<sup>30</sup> and the treaty enters into force upon the provided date of entry into force or when the consent to be bound is obtained from all negotiating parties.<sup>31</sup> However, if a State expresses consent or signs a treaty before its entry into force, it is obligated to refrain from activities that would defeat the object or purpose of that treaty.<sup>32</sup> Thus, a State will have a legal obligation to generally follow a treaty that it signs until its entry into force when all provisions must be followed.

Rolga adopted the UNESCO Convention in 2001 and ratified it on 9 January 2005.<sup>33</sup>

There is no official information regarding the delay in Rolga's ratification of the UNESCO

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<sup>25</sup> See generally, Appendix (1), Partnering Agreement.

<sup>26</sup> See Chapter 1, Carol Ruppé, Jan Barstad, "International handbook of underwater archaeology".

<sup>27</sup> *Ssangyong Motor Distributors Ltd v. Daewoo Cars Ltd, Daewoo Corporation*, 1999 WL 33453544, High Court of Justice Queen's Bench, 23 April 1999; UNIDROIT Principles, Art. 7.1.1.

<sup>28</sup> Clarifications, ¶ 32.

<sup>29</sup> Vienna Convention on the Law of Treaties, (Vienna, 23 May 1969).

<sup>30</sup> *Id.* at Art. 14.

<sup>31</sup> *Id.* at Art. 24.

<sup>32</sup> *Id.* at Art. 18.

<sup>33</sup> Moot Problem, ¶¶ 9, 16.

Convention.<sup>34</sup> Moreover, Rolga is a monist state.<sup>35</sup> “A pure ‘monist’ state would permit international laws to be incorporated into domestic laws *without the need for further legislative action.*”<sup>36</sup> [Emphasis added]. A treaty signed by a monist state becomes binding automatically and is fully integrated into domestic law by ratification.<sup>37</sup> Thus, the UNESCO Convention became Rolgan Law on 9 January 2005.

“Underwater cultural heritage,” (“UCH”) as defined by the UNESCO Convention, “means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.”<sup>38</sup> The Coeur de l’Ocean’s contents have been underwater continuously since 1800,<sup>39</sup> well over 100 years. The Wreck’s contents provide traces of human existence because they were artifacts from the Sultan’s palace of Zamzala.<sup>40</sup> The salvage operations, conducted by Heritage, are to recover UCH. The UNESCO Convention is applicable here because the salvage operations are directed at UCH.<sup>41</sup>

Rolga’s accession to the UNESCO Convention constitutes a fundamental breach of the Partnering Agreement because the Convention prohibits commercial exploitation of UCH:<sup>42</sup>

...the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is *fundamentally incompatible* with the protection and proper

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<sup>34</sup> Clarifications, ¶ 14.

<sup>35</sup> Clarifications, ¶ 7.

<sup>36</sup> O’Hop, Paul A., Jr., “Hemispheric Integration and The Elimination of Legal Obstacles Under a NAFTA-Based System” 36 Harv. Int’l. L.J. 127, 261 (1995); Jordan J. Paust, “Self-Executing Treaties”, 82 Am. J. Int’l. L. 760 (1988).

<sup>37</sup> Steiner, Josephine, Woods, Lorna, and Twigg-Flesner, Christian, EU Law, 9<sup>th</sup> Ed. (Oxford University Press, 2006); Glossary compiled by Elias Farah, available online at: <http://www.oup.com/uk/orc/bin/9780199279593/01student/glossary/glossary.htm>; see also Corrado, Michael L., Comparative Constitutional Review: Cases and Materials, 187 (Carolina Academic Press, 2004).

<sup>38</sup> UNESCO Convention at Art. 1(1)(a).

<sup>39</sup> Moot Problem, ¶ 1.

<sup>40</sup> *Id.* at ¶¶ 1, 18.

<sup>41</sup> UNESCO Convention, Art. 1(6).

<sup>42</sup> *Id.* at Art. 2(7), Rule 2.

management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.<sup>43</sup>

On the contrary, the Sharing Arrangements provision of the Partnering Agreement provides that Heritage is entitled to a share of the profits from the sale of recovered artifacts along with the right to own and possess the remaining artifacts.<sup>44</sup> Preventing Heritage from being compensated is a fundamental breach of contract.<sup>45</sup>

The Respondent may argue that the UNESCO Convention does not prevent the sale of all artifacts from the Wreck. The Claimant disagrees and submits Exhibit One, herein incorporated by this reference, to show that in order to compensate Heritage for its share, goods protected as UCH under the UNESCO Convention would *have* to be sold.

Under the UNESCO Convention, the bulk of the items recovered from the Wreck would fall under the definition of UCH. The silver coins with Astorian marks make up the bulk of the find from the Wreck.<sup>46</sup> Such coins would likely be considered object of “prehistoric character” under Article 1 of the UNESCO Convention. Since the value of the coins exceeds USD \$500 million, there is no way to sell a portion of the find without selling some of the coins.<sup>47</sup>

As discussed above, for Heritage, the primary objective of the Partnering Agreement is to salvage the artifacts from the Wreck and profit from the commercialization of the same. Heritage’s compensation and rights under the Partnering Agreement are fundamentally different from what Heritage had envisioned with the application of the UNESCO Convention and 2001 Agreement. Therefore, Rolga’s actions are contrary to the terms of the Partnership Agreement, and, as a result, breached the Agreement.

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<sup>43</sup> *Id.* at Rule 2.

<sup>44</sup> Partnering Agreement, ¶ 5.

<sup>45</sup> (1868-69) L.R. 4 C.P. 123, *Crane v. Powell*, Court of Common Pleas.

<sup>46</sup> Further Clarifications, ¶ 18.

<sup>47</sup> Value of coins is determined by multiplying quantity of coins (50,000) by each item’s value (USD\$10,000).

### **1.1.3. Rolga fundamentally breached the Partnering Agreement by granting a permit to Aquatic View.**

The Trade Marks Act 1976 defines a “mark” to include “...a brand [or]...a name.”<sup>48</sup> The Act also provides that where a trademark is granted, by lawful contract, to any person to use the trademark for all or any of the goods or services in respect of which the trademark is registered, that person may be entered on the Register as a registered user of the trademark.<sup>49</sup> Further, “where a person has been registered as a registered user of a trademark, the use of that trademark by the registered user within the limits of his registration...*shall be deemed not to be use by any other person.*”<sup>50</sup>

The contract with Aquatic View is a fundamental breach of the intellectual property rights of Heritage. In, *RMS Titanic v. Wrecked Vessel*, a seminal case on the intellectual property rights of salvors, the court found that any photography or videography of a shipwreck site without the expressed consent of the salvor of the wreck was an irreparable harm to the salvor.<sup>51</sup> The court reasoned that the salvor has expended a great deal of energy, resources and skills into finding and salvaging the wreck, this amounted to rights beyond just the salvaged goods that the salvor would take in recovery.<sup>52</sup> The rights to market and merchandise a shipwreck were seen by the justices in *RMS Titanic* to be a substantial right of the salvor.<sup>53</sup> Moreover, photographs could be marketed like any other physical artifact and, therefore, the rights to images, photographs, videos, and the like belonged to the salvage company.<sup>54</sup>

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<sup>48</sup> Trade Marks Act 1976 § 3, Malaysia Act 175.3.

<sup>49</sup> *Id.* at § 48(1), Malaysia Act 175.48.

<sup>50</sup> *Id.* at § 48(5), Malaysia Act 175.48.

<sup>51</sup> See *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Here, the Partnering Agreement was lawfully entered into by the Parties in 1995, and it provides that “[Rolga] has granted the right to use the name “Coeur de l’Ocean” in association with [the] sales and marketing of merchandise (exclusive of artifacts) related to the wreck of Coeur de l’Ocean.”<sup>55</sup> Assuming all the procedural requirements to register the mark have been satisfied under the Trade Marks Act 1976 since there are no facts to the contrary, Heritage became the registered user of the name “Coeur de l’Ocean” on 27 September 1995. Under Malaysian law as cited above, the use of this name cannot be used by any other person, including the tour operator, Aquatic View. Aquatic View’s souvenir CD contains a song entitled “Coeur de l’Ocean,”<sup>56</sup> and this violates Heritage’s exclusive use of the trademark as provided under the Partnering Agreement.

Heritage, as licensee of the name Coeur de l’Ocean, is “entitled to restrain by injunction the use in [Rolga] in the course of trade and without the proprietor's consent of the trademark which...is identical with or nearly resembles the proprietor's mark...where the use is likely to deceive or cause confusion.”<sup>57</sup> Since Aquatic View is using the name licensed to Heritage, Heritage is entitled to an injunction to prevent confusion between its merchandise and that of Aquatic View. The Trade Marks Act 1976 also provides the following provision governing infringement proceeding where there is an agreement between the registered user of a trademark, Heritage, and the registered proprietor of the trademark, Rolga:

“...the registered user is entitled to call upon the registered proprietor to take proceedings for infringement of the trademark, and *if the registered proprietor refuses or neglects to do so within two months after being so called upon, the registered user may institute*

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<sup>55</sup> Partnering Agreement, ¶ 6.

<sup>56</sup> Moot Problem, ¶ 11.

<sup>57</sup> Trade Marks Act 1976, § 70B, Malaysia Act 175.70B.

*proceedings for infringement in his own name as if he were the registered proprietor and shall make the registered proprietor a defendant.*<sup>58</sup>

The record reveals that Heritage has brought this issue, along with others concerning the activities conducted by Aquatic View, to Rolga's attention. However, the Rolgan Historic Monument Executive Agency has been unable at the time of the complaint in 2001 to deal with the matter.<sup>59</sup> It has been over two months since Heritage called upon Rolga to institute proceedings for infringement; therefore, Heritage hereby initiates proceedings against Rolga.

Further, Rolga's refusal and neglect in dealing with this issue constitute a fundamental breach of the Partnering Agreement because Aquatic View's use of the mark impacts Heritage's potential income generated by the sales and marketing of merchandise related to the wreck. The "Merchandising Income" provision provides that Heritage would pay Rolga a fee of three percent of its gross sales of merchandise that utilizes the name "Coeur de l'Coean."<sup>60</sup> By permitting Aquatic View to continue using the mark, Rolga is inherently affecting Heritage's rights under the Partnering Agreement because Heritage's profit would be reduced.

Furthermore, the contract with Aquatic View interferes with the salvage operation as undertaken by Heritage. Again, in the case of *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, the opinion states that any third-party actor that encroaches on a shipwreck site will result in lost profits and impaired performance on the part of the salvor.<sup>61</sup> Salvage operations are often intricate tasks, requiring the exclusive control of the shipwreck site.<sup>62</sup> The presence of outside parties can lead to reduced safety of the salvors, potential accidents, and disruption of the

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<sup>58</sup> *Id.* at § 51(1).

<sup>59</sup> Moot Problem. ¶ 11.

<sup>60</sup> Partnering Agreement, ¶ 6.

<sup>61</sup> See *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1996) A.M.C. 2497.

<sup>62</sup> See Chapter 14, George H. Reid, "Marine salvage: a guide for boaters and divers".

artifacts contained in a wreck site.<sup>63</sup> Dangerous work conditions such as these have the potential to lead to increased insurance costs, and add additional safety overhead that would incur additional cost on Heritage.

The contract with Aquatic View represents a serious impingement on the potential profits that Heritage might see as a result of the salvage of the Wreck. The name value of the instant Wreck is tied to the public's interest. Thus, any unlicensed use would have the potential to seriously diminish the potential marketing and merchandising compensation of Heritage.

**1.2. Due to Rolga's fundamental breach of the Partnering Agreement, the Agreement is void, and Heritage is entitled to damages.**

The Contracts Act 1950 provides that the Party rightfully rescinding contract is entitled to compensation for any damages which he has sustained through the non-fulfillment of the contract.<sup>64</sup> Alternatively, the Act also provides the following provision concerning the compensation for damages caused by a breach of contract:

“When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.”<sup>65</sup>

Here, as discussed above, Rolga has fundamentally breached the Partnering Agreement by its actions and omissions. Thus, Heritage is entitled to rescission of the contract and to compensation that it would have received had the contract been performed to completion.

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<sup>63</sup> *Id.*

<sup>64</sup> Contracts Act 1950, § 76, Malaysia Act 136.76.

<sup>65</sup> *Id.* at § 74(1)

## **2. THE LACK OF COMPENSATION AND/OR DISTRIBUTION OF ARTIFACTS CONSTITUTE A BREACH OF THE PARTNERING AGREEMENT UNDER A REASONABLENESS STANDARD.**

Under the Partnering Agreement, Heritage's obligation is to perform the salvage operations to recover the artifacts of the Coeur de l'Ocean. Rolga's obligation is to compensate Heritage pursuant to the Sharing Arrangements, which includes the distribution of artifacts recovered from the wreck. The contract, however, does not specify a time upon which each party must perform its obligations.

The Contracts Act 1950 provides that "where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time," and the question of reasonableness is a question of fact in each particular case.<sup>66</sup>

### **2.1. Rolga's failure to distribute the artifacts to Heritage pursuant to the Sharing Arrangements under the Partnering Agreement constitutes an anticipatory breach.**

Heritage had salvaged the Wreck between 1995 and 2003. During that time, Heritage recovered over USD \$616 million worth of artifacts. Under the Partnering Agreement, once Heritage salvaged over USD \$45 million, it became eligible to own and possess a share of the salvaged goods.<sup>67</sup> Even though Rolga could estimate the value of the artifacts and distribute them to Heritage, to date, it has not done so. It is unreasonable to expect a company to work without payment for eight or nine years, despite payment being possible.

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<sup>66</sup> *Id.* at § 47; see also UNIDROIT Principles, Art. 6.1.1., 7.3.3.

<sup>67</sup> Partnering Agreement, ¶ 5.

Despite steps being taken to finalize the distribution of artifacts recovered from the wreck of Coeur de l’Ocean in 2003, Rolga still currently has custody of the recovered artifacts.<sup>68</sup> Even though the Partnering Agreement does not specify a time upon which performance is required, it has been approximately six years since Heritage requested the distribution, and that is not a “reasonable time” under any standard.

**2.2. Rolga disabled itself from compensating Heritage under the Partnering Agreement by assenting to the UNESCO Convention and the 2001 Agreement affecting the potential distribution and commercialization of the recovered artifacts.**

The Contracts Act 1950 also provides the following provision concerning anticipatory breach: “When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract....”<sup>69</sup>

In *Finmark Consultants v. Development & Commercial Bank*, the court held that when the time for performance had not arrived, the breach of contract on the part of the party who has disabled himself from performing constitutes an anticipatory breach.<sup>70</sup> The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean, which typically requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.<sup>71</sup>

In 2000, after the Partnering Agreement was formed, Rolga began strengthening its cultural heritage appreciation.<sup>72</sup> This change was influenced by the development of international legal regime initiated by UNESCO and a change in society’s mindset regarding the protection of

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<sup>68</sup> *Id.* at ¶ 12.

<sup>69</sup> Contracts Act 1950, § 40, Malaysia Act 136.40.

<sup>70</sup> *Finmark Consultants v. Development & Commercial Bank*, [1994] 3 MLJ 193, 206-07.

<sup>71</sup> *Pacific Carriers Ltd v BNP Paribas*, [2004] 218 CLR 451 at 461-462; UNIDROIT Principles, Art. 4.1, 4.2.

<sup>72</sup> Moot Problem, ¶ 7.

UCH.<sup>73</sup> Rolga participated in the negotiation process of the UNESCO Convention and voted in favor of its adoption in Paris on 2 November 2001.<sup>74</sup> Rolga also has bolstered its credibility at UNESCO by introducing the new economic plan which promises more efforts to be undertaken in protecting and ensuring sustaining use of its cultural resources.<sup>75</sup>

Moreover, Rolga passed a new law in late 2000 which gives the Minister of Rolga Cultural Heritage the authority and power to designate an area around a wreck site in Rolgan waters as a restricted area, at her discretion.<sup>76</sup> Minister Riska Benti addressed the problems of illicit dealings, looting, and destruction of cultural property in her speech, and recognized the duty and need to protect Rolga's cultural heritage because, unlike natural resources, cultural heritage is finite.<sup>77</sup> Following the 2000 Rolgan Law, Rolga also entered into an Agreement with Astoria on the "Protection of Astorian Wrecks" in 2001, with the principle objective of both countries' genuine shared interest in providing better protection to historic wrecks, and endeavoring to best preserve any objects recovered for the benefit of mankind.<sup>78</sup>

During this time, Rolga was questioned in many forums concerning the commercial exploitation of the artifacts recovered from the Coeur de l'Ocean. In fact, there were calls from various quarters to quit activities motivated by the commercial exploitation of cultural objects. In particular, the Rolgan Cultural Society, due to fear that salvage activities would impact both the wreck and the site of the Coeur de l'Ocean, urged Rolga to designate the wreck site as a restricted area pursuant to the new 2000 Rolgan Law.

All of these acts and omissions committed by Rolga following the formation of the Partnering Agreement demonstrate that it has disabled itself from performing under the contract

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<sup>73</sup> *Id.* at ¶¶ 7 and 12.

<sup>74</sup> Clarifications, ¶ 13.

<sup>75</sup> Moot Problem, ¶ 7.

<sup>76</sup> *Id.* at ¶ 8.

<sup>77</sup> *Id.* at ¶ 7.

<sup>78</sup> *Id.* at ¶ 9.

before the time its performance is due, and thus this constitutes an anticipatory breach of contract.

**2.3. Since Rolga has not and can not compensate Heritage under the Partnering Agreement, Heritage may rescind the Agreement and discontinue salvage operations.**

The Court in *Fercometal Sarl v. Mediterranean Shipping Co.* held that in the face of such wrongful repudiation of contractual obligations in anticipation of the time for performance, the innocent party has two choices: (1) to affirm the contract by treating it as still in force, or (2) treat the contract as finally and conclusively discharged.<sup>79</sup>

Accordingly, due to Rolga's anticipatory repudiation, Heritage has chosen to discontinue its performance under the Partnering Agreement, treat the contract as breached and discharged, and seek damages.

**3. HERITAGE'S PERFORMANCE OF ITS OBLIGATIONS PURSUANT TO THE PARTNERING AGREEMENT IS EXCUSED UNDER THE DOCTRINE OF FRUSTRATION AND HERITAGE IS ENTITLED TO DAMAGES.**

The actions taken by Rolga rendered Heritage's performance under the Partnering Agreement both physically and legally impossible, which render the Agreement void. Contracts Act 1950 provides that when a contract becomes void, "any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."<sup>80</sup> Here, the Partnering Agreement became void after Heritage has already performed its obligations and was successful at recovering over sixty percent of the wreck. Evidently, Rolga has received "advantage under the contract" and thus is

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<sup>79</sup> *Fercometal Sarl v. Mediterranean Shipping Co.*, [1989] AC 788, 805.

<sup>80</sup> Contracts Act 1950, § 66, Malaysia Act 136.66; see also UNIDROIT Principles, Art. 7.4.1.

bound “to make compensation for it” to Heritage. As discussed below, Heritage’s performance is excused, the Partnering Agreement is void and Heritage is entitled to damages.

### **3.1 The doctrine of frustration excuses performance of a contract when performance is physically impossible or has become illegal.**

The doctrine of frustration, a recognized tenant of Malaysian Law, operates to excuse further performance of a contract.<sup>81</sup> Frustration occurs when a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render a thing radically different from that which was undertaken by the contract.<sup>82</sup> The principle test for determining the frustration of a contract was laid out in *Davis Contractors Ltd. v. Fareham Urban District Council*: “The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: it is not, then it is at an end.”<sup>83</sup> The Contracts Act 1950 refines the doctrine of frustration, specifying the frustrating acts as follows:

A contract to do an act which, after the contract is made, becomes *impossible*, or by reason of some event which the promisor could not prevent, *unlawful*, becomes void when the act becomes impossible or unlawful.<sup>84</sup>

The courts have interpreted the frustration section from the Contracts Act to postulate two instances that frustrate a contract: (1) an event or a change in the circumstances which renders a contract physically impossible of performance, or (2) an event of supervening illegality.<sup>85</sup> The doctrine of frustration has been applied very narrowly and requires that the

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<sup>81</sup> Contracts Act 1950, § 57, Malaysia Act 136.57.

<sup>82</sup> *Eastacres Development v. Fatimah Mutallip & Anor*, 7 M.L.J. 371, 388 (2000).

<sup>83</sup> *Contractors Ltd. v. Fareham Urban District Council*, AC 696, 721 (1956), restated in *Singapore Woodcraft Manufacturing Co v. Mok Ah Sai*, 2 MLJ 166, 167 (OCJ Singapore 1969).

<sup>84</sup> Contracts Act 1950, § 57, Malaysia Act 136.57; see also UNIDROIT Principles, Art. 7.2.2.(a).

<sup>85</sup> *Eastacres Development*, 7 M.L.J. at 387; see also *Yee Seng Plantations v. Kerajaan Negeri Terengganu & Ors*, 3 M.L.J. 699, 709 (2000); see also UNIDROIT Principles, Art. 7.1.7.

nature of the contract must be *fundamentally altered* before it could be considered frustrated and incapable of performance.<sup>86</sup> Here, under both the common law and statutory tests for frustration, the purpose of the contract has become impossible. Therefore, Heritage's performance has been excused.

### **3.2. Aquatic View's underwater tour operations constitute physical impossibility.**

In *R.M.S. Titanic v. Wrecked and Abandoned Vessel* (1998), the court agreed with R.M.S. Titanic that "if another vessel outside of their expedition was on the site shuttling tourists down to the wreck, it would threaten their operation [because] it would not be safe for two submersibles to be exploring the wreck at the same time."<sup>87</sup> R.M.S. Titanic may be forced to abort its salvage plans in the interests of safety.<sup>88</sup> Thus, the salvor-in-possession has the right to salvage the wreck free from the interference of others.<sup>89</sup>

By granting Aquatic View a permit to conduct underwater trips to view the wreck of *Coeur de l'Ocean*<sup>90</sup>, Rolga makes it physically impossible, due to the interests of safety, for Heritage to perform its salvage operations and this would make the Partnering Agreement fundamentally altered.

### **3.3. Rolga's accession to the UNESCO Convention renders Heritage's performance of its obligation illegal.**

Rolga's ratification of the UNESCO Convention constitute a "supervening illegality," and thus render Heritage's performance under the Partnering Agreement impossible. Contracts Act 1950 provides that the object of an agreement is unlawful if it is forbidden by a law or it is of

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<sup>86</sup> *Eastacres Development*, 7 M.L.J. at 389.

<sup>87</sup> *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, 9 F.Supp.2d 624, 631, 635-36 (1998).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also UNIDROIT Principles, Art. 7.1.2.

<sup>90</sup> Moot Problem, ¶ 11.

such a nature that, if permitted, it would defeat any law.<sup>91</sup> Every agreement of which the object is unlawful is void.<sup>92</sup>

Article 303 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”) imposes a duty on States “to protect objects of an archaeological and historical nature found at sea.”<sup>93</sup> Pursuant to Article 3 of the UNCLOS, Rolga established a 12 nautical mile territorial waters.<sup>94</sup> Since the wreck site of the Coeur de l’Ocean was within this limit, Rolga had jurisdiction over the wreck site and had the right to salvage the wreck objects in fulfillment of its duty despite not being the owner of the vessel.

The Government of Astoria was the rightful owner of the vessel as it was an Astorian warship. However, Astoria transferred all its rights, title, and interest in its wrecked ancient vessels lying on or off the coast of Rolga to Rolga under the 2001 Agreement in hope that Rolga will do its best to preserve any objects recovered from its seabed for the benefit of mankind.<sup>95</sup> As a result, Rolga has both the jurisdiction over the wreck and the ownership of the same. Rolga fulfills this duty to protect objects of archaeological and historical nature found at sea by ratifying the UNESCO Convention.

The UNESCO Convention prohibits trading, selling, buying or bartering of UCH as commercial goods but permits archaeological services that are in compliance with the terms of the UNESCO Convention.<sup>96</sup> As discussed in Part 1, commercial exploitation also does not comply with the Convention’s general principle of “preserv[ing] underwater cultural heritage for the benefit of humanity,”<sup>97</sup> or the objective to deposit, conserve, manage UCH in a manner that

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<sup>91</sup> Contracts Act 1950, § 24(a), (b), Malaysia Act 136.24.

<sup>92</sup> *Id.*

<sup>93</sup> UNCLOS (Montego Bay, 10 December 1982).

<sup>94</sup> *Id.* at Article 3.

<sup>95</sup> Moot Problem, ¶ 9.

<sup>96</sup> 2001 UNESCO Convention, at Art. 2(7), and Rule 1.

<sup>97</sup> *Id.* at Art. 2(3).

ensures its long-term preservation.<sup>98</sup> The primary objective of the Partnering Agreement is to salvage and sell goods from the wreck, which if permitted would now defeat the UNESCO Convention. As such, the Partnering Agreement is void.

Additionally, the Parties formed the Partnering Agreement before Rolga's involvement with the adoption of the UNESCO Convention; therefore, the Partnering Agreement preexisted and was lawful at formation. The Contracts Act 1950 provides that:

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. ...and [w]here one person has promised to do something which he knew...and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.<sup>99</sup>

Here, the Partnering Agreement became void when the distribution of artifacts pursuant to the Sharing Arrangements became unlawful, or impossible to perform, under the UNESCO Convention. The ratification of this Convention was not known to Heritage. On the contrary, Rolga, having been involved in the early stages of negotiation, voting for the adoption of such Convention and later ratifying it, had knowledge of its future ramification. Accordingly, Rolga must make compensation to Heritage for the loss sustained by Rolga's non-performance of the contract, in other words, Rolga's inability to distribute the artifacts pursuant to the Partnering Agreement.

Under the Vienna Convention, Rolga's signing of the UNESCO Convention demonstrates that Rolga consented to be bound by the convention in 2001, giving rise to an

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<sup>98</sup> *Id.* at Art. 2(6).

<sup>99</sup> Contracts Act 1950, § 57(2), Malaysia Act 136.57; see also UNIDROIT Principles, Art. 7.2.2.(a), 7.3.3.

obligation to refrain from violating the object or purpose of the convention<sup>100</sup> at that time. Since Rolga is a monist nation and Rolga was obligated to not defeat the purpose of the UNESCO Convention, Heritage also was obligated to not defeat the purpose of the convention from 2001. Although the terms of the UNESCO Convention were not enforceable until the entry into force in 2009,<sup>101</sup> Rolga and its citizens were under a good faith obligation to comply with the purpose of the UNESCO Convention, namely to preserve UCH. Heritage complied with this obligation by ceasing salvage operations in 2003.

Further, since Rolga intended to protect UCH by signing the UNESCO Convention and the 2001 Agreement and passing the 2001 Rolgan Law, Rolga could not reasonably expect Heritage to continue its salvage operations in disregard of the laws that Rolga had enacted. In order to preserve UCH, the Council of Europe stressed the importance of immediate compliance with the UNESCO Convention.<sup>102</sup> Heritage's contractual obligations were excused when the legal obligation to preserve UCH became active in 2001.

In sum, Heritage's non-performance must be excused under the doctrine of frustration and the Partnering Agreement must be rendered void due to illegality.

#### **4. THE PARTNERING AGREEMENT GIVES HERITAGE THE EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L'OCEAN.**

The 1989 Salvage Convention, which governs salvage operations, does not grant any rights other than the salvor's right to "a reward" or compensation.<sup>103</sup> However, since the "Convention shall apply to any salvage operations save to the extent that a contract otherwise

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<sup>100</sup> Vienna Convention on the Law of Treaties, Art. 18 (Vienna, 23 May 1969).

<sup>101</sup> Further Clarifications, ¶ 28.

<sup>102</sup> See Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage; Recommendation 1486 (2000) of the Parliamentary Assembly of the Council of Europe on Maritime and Fluvial Cultural Heritage.

<sup>103</sup> International Convention on Salvage (London, 28 April 1989).

provides expressly or by implication,”<sup>104</sup> other rights may be granted by way of a contract between the parties.

#### **4.1. Heritage has exclusive rights of photographing and documenting of the Coeur de l’Ocean under the Partnering Agreement.**

The Partnering Agreement sets forth, “...amongst other things, the... methodologies to be employed...in the conservation and documentation of any artifacts that may be retrieved from the shipwreck.”<sup>105</sup> The “Project Plan” provision is excessively vague and leaves much to be interpreted. Even though the Partnering Agreement does not specify a method of documentation, it also does not foreclose the possibility of Heritage documenting the Coeur de l’Ocean by means of an ongoing television documentary deal with an International Broadcasting Company.<sup>106</sup>

The Copyright Act 1987 is the only law which governs copyright matters in Malaysia, which came into force on 1 December 1987.<sup>107</sup> Copyright law protects the various *expressions* of an idea and not the idea itself.<sup>108</sup> Thus, in order to be protected, the work or idea “must have been written down, recorded or otherwise reduced to material form.”<sup>109</sup> The types of works eligible for protection under the Copyright Act 1987 are (a) literary works, (b) musical works; (c) artistic works; (d) films; (e) sound recordings; and (f) *broadcasts*.<sup>110</sup> Clearly, the ongoing television documentary deal that Heritage has with the International Broadcasting Company is eligible for protection under the Act.

The Act further provides that “copyright in a broadcast shall be the *exclusive right* to control in Malaysia the recording, the reproduction, and the rebroadcasting...of the

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<sup>104</sup> *Id.* at Article 6(1).

<sup>105</sup> Partnering Agreement, ¶ 2.

<sup>106</sup> Moot Problem, ¶ 11.

<sup>107</sup> Loh Siew Cheang, *The Business Guide to Malaysia*, 211 (Butterworth-Heinemann Asia, 1997).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, see also Copyright Act 1987, §§3, 7, Malaysia Act 332.3 and 332.7.

broadcast.”<sup>111</sup> Further, “the copyright in a television broadcast shall include *the right to control the taking of still photographs* from such broadcasts.”<sup>112</sup> Copyright is infringed by any person who, without the consent or license of the owner of the copyright, exhibits the work in public for the purpose of selling, letting for hire, or by way of trade.<sup>113</sup> Heritage’s copyright is infringed by Aquatic View staff’s taking of photographs and making video clips to post on their website as promotional materials for their underwater tours, without the consent or license from Heritage.

#### **4.2. Courts have recognized exclusive photographing and documenting rights as part of the salvor’s salvage rights.**

Even though courts in countries such as the United Kingdom, the United States, and South Africa have been skeptical of expanding the salvors’ traditional rights to include intellectual property rights,<sup>114</sup> they have noted the importance of video sales, film documentaries, and television broadcasts as inventive marketing ideas that the salvors must resort to obtain funds since they are not selling the artifacts.<sup>115</sup> The court in *R.M.S. Titanic v. Wrecked Vessel* (1998) reasoned that even if barred from personally diving to the wreck, participants in the photographic expedition would have the opportunity to view and experience the wreck when the salvor aired its live television broadcast from the wreck site.<sup>116</sup>

Consequently, Heritage is entitled to exclusive rights of photographing and documenting of the Coeur de l’Ocean. This right has been infringed by Rolga’s failure to prohibit Aquatic View from the taking of photographs and video clips. Pursuant to the Copyright Act 1987, in an

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<sup>111</sup> Copyright Act 1987, § 15(1), Malaysia Act 332.15.

<sup>112</sup> *Id.* at § 15(3).

<sup>113</sup> Copyright Act 1987, § 36(2), Malaysia Act 332.36.

<sup>114</sup> Tan Twan Eng, Can Intellectual Property Rights Form a Part of the Salvors’ Traditional Rights, and Can a Balance be Achieved Between Them? The Position of English, American and South African Salvors in Light of the Recent Decisions in the ‘R.M.S. Titanic’ Cases in the United States of America, 76 (Univ. of Cape Town, 2008). Available online at <http://web.uct.ac.za/depts/shiplaw/theses/twan-eng.pdf>.

<sup>115</sup> *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, (1996) A.M.C. 2497, 2499.

<sup>116</sup> *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, 9 F.Supp.2d 624 (1998).

action for infringement, all such relief by way of damages, injunction, etc. shall be available to the plaintiff<sup>117</sup>, here, Heritage.

**5. SINCE THE PARTNERING AGREEMENT IS VOID, THE CALCULATION OF PROFITS AND/OR DISTRIBUTION OF ARTIFACTS BETWEEN PARTIES MUST BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES.**

Heritage is entitled to compensation for performance of its salvage operations and successful recovery of artifacts. Such compensation should be determined as discussed below.

**5.1. Traditional salvage legal principles apply because the Partnering Agreement is void.**

The 1989 Salvage Convention provides the basis for salvage legal principles, which entitles salvors to compensation or “rewards”.<sup>118</sup> This Convention is applicable in this dispute because Rolga became a party either by ratification or acceptance. However, “this Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication.”<sup>119</sup> Here, since the Partnering Agreement has been rescinded and void as discussed above, Heritage’s compensation or “rewards” must be made solely based on the basis for salvage legal principles.

**5.2. Under salvage law, Heritage is entitled to compensation in an amount based on a substantial percentage of the value of the Wreck.**

In *Bemis v. R.M.S. Lusitania*, the court allowed plaintiff salvor to keep all of the contents he had salvaged under the law of finds and thus denied his request for a salvage award.<sup>120</sup> Here, on the contrary, the law of finds is not applicable as the Coeur de l’Ocean had not been

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<sup>117</sup> Copyright Act 1987, § 37(1), Malaysia Act 332.37.

<sup>118</sup> International Convention on Salvage (London, 28 April 1989).

<sup>119</sup> *Id.* at Article 6(1).

<sup>120</sup> *Bemis v. R.M.S. Lusitania*, 884 F.Supp.1042, 1053 (1995).

abandoned. Thus, salvage law is applicable, and a salvage award could be appropriately determined instead of an award of physical possession of the salvaged goods.

The United States federal district court in *International Aircraft Recovery v. The Unidentified, Wrecked and Abandoned Aircraft* held that plaintiff, a salvage company, was entitled to receive a proper salvage award determined by the court if the salvaged item, a rare Navy airplane that had been lost at sea, was to be placed in a museum in trust for the people of the United States.<sup>121</sup> Similarly, here, the commercialization of the recovered artifacts is prohibited by law, the distribution of the items are prohibited as they belong to the State and are to be kept in national museums. Therefore, Heritage is entitled to a salvage award.

An award for salvage “generally far exceeds a mere remuneration *pro opera et labore* (for work and labor) because the award is intended not only as a reward for the specific salvor, but as an inducement to other salvors to render similar services.<sup>122</sup> In setting a salvage award, the Supreme Court has evaluated the following “main ingredients” in fixing an award for salvage:

- (1) The labor expended by the salvors in rendering the salvage service;
- (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property;
- (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
- (4) The risk incurred by the salvors in securing the property from the impending peril;
- (5) The value of the property saved; and

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<sup>121</sup> *International Aircraft Recovery v. The Unidentified, Wrecked and Abandoned Aircraft*, 54 F.Supp.2d 1172, 1182 (1999).

<sup>122</sup> *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d 450, 468 (1992).

(6) The degree of danger from which the property was rescued.<sup>123</sup>

Where the salvage remuneration is relatively small for operations in which only a few of these elements exists, a large reward is given where all or many of these are found to exist.<sup>124</sup>

Here, the labor expended by Heritage in rendering the salvage operations in this case is considerable as Heritage performed extensive research and study of records at the maritime archives of Astoria even prior to the formation of the Partnering Agreement.<sup>125</sup> Thereafter, Heritage also spent years of endless survey to ascertain the location and identity of the Coeur de l’Ocean.<sup>126</sup> Additionally, Heritage complied with the “Fees and Deposits” provision under the Partnering Agreement whereby it has to fund the expense of the operation.<sup>127</sup> The record does not allude to any delay in Heritage’s performance once the Partnering Agreement was formed.

National Geographic has described the find as the most “bedazzling underwater treasure ever found today” and estimated its value to be worth more than USD \$1 billion.<sup>128</sup> Thus far, the value of the salvaged artifacts is estimated over USD \$600 million.<sup>129</sup>

Under salvage law, Heritage should be entitled to the majority of the value recovered. Heritage posits that damages in the amount of USD \$463.5 million are fair and accurate – this is based on what Heritage would receive if the entire USD \$1 billion Wreck was recovered. Heritage respectfully requests that it be distributed its fair share of the goods that have already been recovered (under the Sharing Agreement this would be valued at USD \$379,798,000) and that it be paid expectation damages for the balance (the remainder of the USD \$463.5 million in requested relief) of its share based on the USD \$1 billion assessment given by National

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<sup>123</sup> *Id.*

<sup>124</sup> The Right Honorable Lord Justice Kennedy, A Treatise on The Law of Civil Salvage, p. 133, 2<sup>nd</sup> Ed. (Stevens and Sons, 1907).

<sup>125</sup> Moot Problem, ¶ 5.

<sup>126</sup> *Id.*

<sup>127</sup> Partnering Agreement, ¶ 3.

<sup>128</sup> *Id.*

<sup>129</sup> Clarifications, ¶ 18.

Geographic. Heritage proposes that it be given the following items as their quantity diminishes the uniqueness and rarity as defined under the UNESCO Convention: silver coins valued in the amount of USD \$200 million, one-third of the swords, one dagger and the balance in value of Heritage's actual right of possession to be determined fairly by the Arbitral Tribunal.<sup>130</sup>

Heritage feels this distribution arrangement would be fair and equitable. This arrangement does not ask for anything more than what was Heritage's rights for compensation under the Sharing Arrangements.

Alternatively, if the Arbitral Tribunal decide that the Sharing Arrangements are enforceable, Rolga should distribute to Heritage the gold ingots and bullion, gold bars, silver ingots, copper planks, indigo, tobacco, silver container, bronze forks, silver pendant, comb, olives and pickles, unknown liquid, ornaments, elephant tusks, cannon balls, and spices. Any additional amount owed over the value of these goods should be paid in cash damages.

Claimant Heritage Inc., also respectfully requests that it be absolved from any further obligation under the 1995 Partnering Agreement; since it has become unlawful for Heritage to carry out such a salvage operation in Rolgan water, Claimant Heritage request that its obligations be terminated. The Partnering Agreement as envisioned cannot be possibly carried out do to changes in the law and developments in the political climate in Rolga. It would be impossible for the contract to come to a termination on its own terms; thus, the Claimant asks the Arbitral Tribunal dissolve the Partnering Agreement.

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<sup>130</sup> Partnering Agreement, ¶ 5.

## **CONCLUSIONS AND PRAYER FOR RELIEF**

Claimant Benevolent Heritage, Inc. respectfully enters the following prayer for relief:

1. Distribution of the particular artifacts as discussed above.
2. Monetary damages for the balance of the amount of \$463,500,000.00 after the value of the actual goods distributed has been deducted.
3. Absolving Heritage of any further duty under the 1995 Partnering Agreement.