

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

2009

BENEVOLENT HERITAGE, INC.

Claimant

v.

THE GOVERNMENT OF ROLGA

Respondent

MEMORIAL FOR THE RESPONDENT

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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

- I. Whether Benevolent Heritage, Inc. has any rights related to the recovery of the Coeur de l’Ocean other than the contractual rights granted to it under the Partnering Agreement with Rolga.
- II. Whether the Government of Rolga committed any act or omission that interfered with Benevolent Heritage, Inc.’s contractual rights under the Partnering Agreement.
- III. Whether the Government of Rolga’s acts and/or omissions constitute anticipatory breach of the Partnering Agreement thereby justifying Benevolent Heritage, Inc.’s termination of its salvage operations.
- IV. Whether Benevolent Heritage, Inc.’s performance of its obligations under the Partnering Agreement with Rolga is excused under the doctrine of frustration.
- V. Whether Benevolent Heritage, Inc. enjoys exclusive rights of photographing or documenting of the Coeur de l’Ocean.
- VI. Whether Benevolent Heritage, Inc.’s compensation and share of the artifacts must be distributed pursuant to the Sharing Arrangements provided in the Partnering Agreement.

STATEMENT OF FACTS

In 1800, the Coeur de l’Ocean, an Astorian warship, sank after the Astorian army conquered and robbed Zamzala of its riches, including cargos of exotic goods, jewelry, war booty, etc. Zamzala is now a part of the Government of Rolga (“Rolga”).

On 7 November 1959, Rolga gained independence from Astoria. Rolga became popular for its collection of cultural and natural resources. Scattered in its waters are war wrecks and remnants of World War II. When technology advanced in the underwater scientific research and recovery in 1980s, treasure hunters were lured into the Rolgan sea as Zamzala’s trading history and documentation of war wrecks surfaced.

In 1990, Mr. Bernard Bodd, a major shareholder of a salvage company called Benevolent Heritage, Inc. (“Heritage”), submitted a proposal to the Rolga Cultural Heritage Committee for the recovery of wrecks belonging to the era of Astorian expansion and received attention from Rolga as it involved the discovery of the Coeur de l’Ocean (“Wreck”). On 1 June 1993, the Wreck was discovered approximately 10 nautical miles off the coast of Rolga. Rolgan authority has approved all survey, recovery, or extraction projects as required by Rolga.

On 27 September 1995, Rolga and Heritage signed the Partnering Agreement Memorandum (“Partnering Agreement”) setting forth principle terms concerning the exploration of the Wreck and the conservation and documentation of artifacts recovered from the shipwreck. Since then, many artifacts have been recovered by Heritage, but it was confirmed that many were destroyed due to Heritage’s poor handling. Parts of the collection recovered have been auctioned off at overseas auctions to finance the project.

In 2000, Rolga began strengthening its cultural heritage protection by introducing the new economic plan which promises more efforts in protecting its cultural resources. Riska

Benti, Minister of Rolga Cultural Heritage, recognized the duty and need to protect Rolga's cultural heritage and addressed the problems of illicit dealings, looting, and destruction of cultural property. Subsequently, a new law was passed to protect wrecks of historical and cultural significance to Rolga ("2000 Rolgan Law"). The law gives the Minister the authority to designate an area around a wreck site as a restricted area. Pressure continued to accumulate as the Rolgan Cultural Society began urging Rolga to designate the Wreck as restricted due to the fear that salvage activities would negatively impact the site; however, no such move has been made.

Rolga entered into an agreement on the "Protection of Astorian Wrecks" with Astoria in 2001 ("2001 Agreement"), whereby Astoria transferred all rights, title, and interest in its wrecked vessels lying on or off the coast of Rolga to Rolga in the hope that the recovered goods would be preserved for the benefit of mankind. Rolga recognized that Astoria has a continuing interest in the artifacts for historical and cultural purposes. The Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga ("Guiding Principles") provides guidance on the documentation, reporting, and maintenance of the artifacts.

Rolga also granted Aquatic View, a specialized tour operator, permission to organize exclusive underwater trips to view the wreck, which Aquatic View has sold 25 tickets at \$20,000 each. Aquatic View staff has been taking photographs, making video clips of the Wreck, and posting these materials on their website as promotional materials. Aquatic View has engaged a songwriter to write a song entitled "Coeur de l'Ocean" for a souvenir CD. Heritage complained that these activities have jeopardized its ongoing television documentary with an International

Broadcasting Company and has brought these issues up with the Rolgan Agency; however, there is no information on why the Agency was unable to deal with the complaints.

Rolga also participated in the negotiations initiated by the United Nations Educational, Social and Cultural Organization (“UNESCO”), which led to the adoption of the Convention on the Protection of the Underwater Cultural Heritage on 2 November 2001 (“UNESCO Convention”). Rolga ratified said Convention on 9 January 2005, which entered into force on 2 January 2009.

These actions and society’s change in mindset regarding the protection of underwater cultural heritage prompted Heritage to reconsider its position. Heritage felt that further investment of effort, time, and money into the operation would be harmful, and in 2003 ceased operations. The Parties took steps at finalizing the distribution of artifacts, and Heritage accused Rolga of unfair distribution. This dispute began and is now brought before the International Arbitration Center pursuant to Paragraph 10 of the Partnering Agreement.

SUMMARY OF PLEADINGS

- I. Heritage has no rights concerning the Wreck other than the contractual rights granted to it by the Partnering Agreement with Rolga. Rolga has jurisdiction over the Wreck, which was not lost nor abandoned. Further, Rolga has full possessory and ownership rights of the Wreck under the 2001 Agreement with Astoria.

- II. Rolga did not commit any act or omission that interfered with Heritage's contractual rights. Rolga is a Monist state, therefore treaties entered into force against it become automatically binding and fully integrated into domestic law. Under applicable laws, which include Malaysian laws and the common law tradition, Rolga did not commit a serious breach of the Partnering Agreement by (1) by ratifying the UNESCO Convention, (2) by entering into the 2001 Agreement with Astoria, or (3) by permitting Aquatic View to conduct underwater tour operations to view the Wreck.

Quite the contrary, the 2001 Agreement with Astoria strengthens Rolga's rights in the Wreck. Even though the UNESCO Convention became automatically binding and fully integrated into Rolga law, the Convention did not enter into force until after Heritage had already ceased performance. Rolga has exclusive right to regulate and authorize activities directed at underwater cultural heritage. Thus, Rolga has the authority to enter into contracts with companies like Aquatic View concerning the wreck site of the Coeur de l' Ocean. Moreover, there is no exclusivity provision under the Partnering Agreement with Heritage that prohibits such agreement with Aquatic View.

- III. Rolga's acts and/or omissions do not constitute anticipatory breach of the Partnering Agreement therefore Heritage's termination of its salvage operations was unjustified.

Rolga's performance had not yet become due at the time Heritage ceased performance.

Despite the increasing political pressure concerning the protection of underwater cultural heritage, Rolga had not done anything to give Heritage the apprehension that it would not abide by its contractual obligations.

- IV. Heritage's performance of its obligations under the Partnering Agreement with Rolga was *not* excused under the doctrine of frustration. Such doctrine requires that the nature of the contract be *fundamentally altered* before it could be considered frustrated and incapable of performance. Rolga's implementation of new laws did not render Heritage's performance legally impossible. The 2000 Rolgan Law under the new economic plan did not affect Heritage's performance. The requirements of the UNESCO Convention are not contrary to the Partnering Agreement. The 2001 Agreement with Astoria actually empowers Heritage's salvage operations.
- V. Heritage does not enjoy exclusive rights of photographing or documenting of the Wreck. The salvor's traditional salvage rights provided by the 1989 Salvage Convention do not include intellectual property rights. Courts have been skeptical of expanding the salvor's traditional salvage rights to include intellectual property rights. The Partnering Agreement does not explicitly grant Heritage any photographing rights or exclusive documenting rights.
- VI. Heritage's compensation and share of the artifacts must be distributed pursuant to the Sharing Arrangements provided by the Partnering Agreement, and not on the basis of salvage legal principles.

PLEADINGS

I. HERITAGE HAS NO RIGHTS CONCERNING THE COEUR DE L'OCEAN OTHER THAN THE CONTRACTUAL RIGHTS GRANTED TO IT BY THE PARTNERING AGREEMENT WITH ROLGA.

The United Nations Convention on the Law of the Sea (hereinafter "1982 UNCLOS") was created amongst State Parties to the Convention on all issues relating to the law of the sea.¹ Rolga became a State Party to the 1982 UNCLOS by ratification on 10 February 1993.² Thus, such Convention is applicable.

a. Rolga has Jurisdiction Over the Wreck Site of the Coeur de l'Ocean.

Article 303 of the 1982 UNCLOS imposes a duty on States "to protect objects of an archaeological and historical nature found at sea."³ Article 3 provides States the right to establish the extent of its territorial sea up to a limit not exceeding 12 nautical miles from the State's baselines.⁴

The exact location of the Wreck is 12 nautical miles from Rolga's shore.⁵ Since the wreck site is within the 12-nautical-mile limit, Rolga has jurisdiction over the Wreck and has the right to salvage the Wreck objects in fulfillment of its duty to protect cultural heritage despite not being the owner of the vessel.

b. Rolga has Full Possession and Ownership of the Coeur de l'Ocean.

Astoria was the rightful owner of the Coeur de l'Ocean as the vessel was an Astorian warship.⁶ However, Astoria transferred all its rights, title, and interest in its wrecked ancient

¹ United Nations Convention on the Law of the Sea, Preamble (Montego Bay, 10 December 1982) (hereinafter "1982 UNCLOS").

² Moot Problem, ¶¶ 16, 17.

³ 1982 UNCLOS, Article 303.

⁴ *Id.* at Article 3.

⁵ Corrections, ¶ 1.

⁶ Moot Problem, ¶ 1; *see also* Clarifications, ¶ 5.

vessels lying on or off the coast of Rolga to Rolga under the 2001 Agreement.⁷ In the agreement, Astoria agreed that:

Astoria as a successor to the property and assets of the Astorian ancient wrecks, transfers all its right, title and interest in and to wrecked ancient vessels of the Astoria lying on or off the coast of Rolga and in and to any articles thereof to Rolga which shall accept such right, title, and interest.

As such, upon entering into the 2001 Agreement with Astoria, Rolga obtained full ownership of the Wreck.

c. The Coeur de l’Ocean was not Lost or Abandoned Therefore the law of Finds does not Apply.

Several courts have held that the owners of a wrecked ship have abandoned it if the location of a wreck is unknown and no attempts are made to find it.⁸ An abandoned ship is subject to the law of finds, not the law of salvage.⁹ In *International Aircraft Recovery (IAR) v. Unidentified Aircraft*, the United States, as intervenor, had abandoned the unidentified aircraft, because the aircraft rested undisturbed on the ocean floor for more than 50 years, and the intervenor had no hope or expectation of ever recovering it. Additionally, the intervenor had no knowledge of the aircraft’s location and repeatedly marked its records as "stricken," indicating that it abandoned the aircraft. Consequently, IAR’s salvage services constituted a valid maritime lien against defendant, and plaintiff’s salvage rights and remedies were in full force and effect.

Here, however, even though the Wreck has rested on the ocean floor for over 100 years, the record does not indicate that Rolga lacked hope or expectation of ever finding it. Quite the

⁷ Moot Problem, ¶ 9.

⁸ See, e.g., *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 462 (4th Cir. 1992). (“*Central America Case*”); *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th cir. 1978).

⁹ *Id.*

contrary, in 1990, when Mr. Bernard Bodd, Heritage's major shareholder, submitted the proposal to Rolga for the recovery of wrecks, he received particular attention because the proposal involved the discovery of the Wreck.¹⁰ There was also no indication of abandonment by the lack of knowledge regarding the Wreck's location or its owner marking its records as "stricken" like in *International Aircraft Recovery*. In fact, old archival records in Astoria regarding maritime adventures and disasters at sea in the waters surrounding Rolga still exist.¹¹ Further, efforts were made to locate the Wreck by conducting extensive research and study of these records by Heritage as permitted by Rolga.¹² Lastly, the remains of the vessel had not been designated as 'cemetery.'¹³

Consequently, Heritage's services did not constitute a valid maritime lien, and Heritage does not have any rights concerning the Wreck, only contractual rights to conduct salvage operations granted to it by Rolga under the Partnering Agreement.

II. ROLGA DID NOT COMMIT ANY ACT OR OMISSION THAT INTERFERED WITH HERITAGE'S CONTRACTUAL RIGHTS TO CONSTITUTE SERIOUS BREACH OF THE PARTNERING AGREEMENT.

Heritage's contractual right to conduct salvage operations to recover artifacts from the Wreck is provided by the Partnering Agreement. Said Agreement is a salvage contract between Rolga and Heritage (hereinafter "Parties") whereby the Parties agreed to "the provision of a financial reward for the rescue of property from a maritime peril."¹⁴

¹⁰ Moot Problem, ¶ 4.

¹¹ Moot Problem, ¶ 3.

¹² Moot Problem, ¶ 5.

¹³ Clarifications, ¶ 6.

¹⁴ Maraist, Frank L. and Galligan, Thomas C., Jr., *Admiralty in a Nutshell*, 5th Ed., 134 (West 2005).

The Partnering Agreement provides a provision governing the “Term and Termination” of the contract, it states: “The agreement may be terminated in the event... any serious breach of obligation by Benevolent Heritage or by the Government under the Agreement.”¹⁵ The issue is then whether, under applicable laws, Rolga interfered with Heritage’s contractual rights seriously breaching its obligations under the Partnering Agreement.

a. Rolga is a Monist State, therefore, international treaties entered into force against it become automatically binding and fully integrated into domestic law.

“Monist states see international law as part of the law of the land together with the national law.”¹⁶ A Monist state would permit international laws to be incorporated into domestic laws without the need for further legislative action.¹⁷ However, even for a Monist state, signatory status is not enough for international agreements to take full effect, the state has to ratify the convention in question.¹⁸ Principles of international law further provide that a treaty does not have any effect on a signatory until the treaty has been ratified *and rendered in force*, unless there is a special agreement to the contrary.¹⁹

Here, Rolga is a Monist State,²⁰ thus international law is incorporated into and becomes domestic law. Rolga participated in the negotiation of the UNESCO Convention, and voted in favor of its adoption in Paris on 2 November 2001.²¹ Subsequently, Rolga ratified this Convention on 9 January 2005;²² however, it did not come into force until 2 January 2009.²³

¹⁵ Appendix (1), Partnering Agreement Memorandum, ¶ 8.

¹⁶ Steiner, Josephine, Woods, Lorna, and Twigg-Flesner, Christian, EU Law, 9th Ed. (Oxford University Press, 2006).

¹⁷ 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); *see also* Jordan J. Paust, Self-Executing Treaties, 82 Am. J. Int’l L. 760 (1988).

¹⁸ Corrado, Michael L., Comparative Constitutional Review: Cases and Materials, p. 187 (Carolina Academic Press, 2004).

¹⁹ Lawrence, Thomas, J., The Principles of International Law, p. 324 (Boston: D.C. Heath, 1910).

²⁰ Clarifications, ¶ 7.

²¹ Clarifications, ¶ 13.

²² Moot Problem, ¶ 16.

As such, the UNESCO Convention did not become domestic law in Rolga until 2 January 2009.

b. Applicable Laws in This Dispute Include Malaysian law and the Common law Tradition.

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 consistently such that the interpretations of one law could be relied upon to interpret the other.²⁴ Rolgan laws are *in pari materia* with Malaysian law on all issues except on being a Monist State.²⁵ Accordingly, Malaysian law is applicable in this dispute.

Further, the record indicates that “Rolga... [is] of common law tradition,”²⁶ and the application of English law is also specified in Malaysian statutes.²⁷ Specifically, the Civil Law Act 1956 calls for the application of English Common Law on issues where no Malaysian Laws have been established.²⁸

As such, Malaysian Law and common law govern this dispute.

c. Pursuant to Applicable Laws, Rolga’s Ratification of the UNESCO Convention did not Interfere with Heritage’s Contractual Rights to Conduct Salvage Operations Under the Partnering Agreement.

Malaysian Law provides that a breach of contract is a “failure or refusal [by the promisor] to perform the contract in its entirety or a failure to do any of the things it had

²³ Clarifications, ¶ 28.

²⁴ “in pari material,” Black’s Law Dictionary, 8th Edition, (West 2004); William Buzbee, “The One-Congress fiction in Statutory Interpretation.” 149 University of Pennsylvania Law Review 171, 222 (2000).

²⁵ Clarifications, ¶ 8.

²⁶ Clarifications, ¶ 7.

²⁷ Civil Law Act 1956, §§ 3 and 5, Malaysia Act 67.3 and 67.5.

²⁸ Civil Law Act 1956, § 3, Malaysia Act 67.3; *see also* Loh Siew Cheang, The Business Guide to Malaysia, p. 17-19 (Butterworth-Heinemann Asia, 1997); 38 HKLJ 769, 778 Hong Kong Law Journal, “Corporate Law Reform and Some ‘Rule of Law’ Issues in Malaysia”.

promised.”²⁹ Additionally, common law tradition and UNIDROIT Principles of International Commercial Contracts (2004) (“UNIDROIT Principles”) define a breach of contract as when a party to the contract takes actions that are against the spirit of the contract and prevents the spirit of the contract from being accomplished.³⁰

Here, Rolga has not failed nor refused to perform its obligations under the Partnering Agreement. In fact, despite Heritage’s termination of its salvage operations in 2003,³¹ which was in itself a serious breach, Rolga took steps in distributing the artifacts when Heritage expressed a change in its position under the contract.³² Rolga’s obligation had yet become due since Heritage did not complete its operation pursuant to the contract. At the time Heritage ceased operation, only approximately \$600 million of the estimated USD \$1 billion worth of the artifacts has been recovered.³³ Thus, the salvage operation was incomplete.

Rolga’s ratification of the UNESCO Convention did not constitute action against the spirit of the Partnering Agreement, nor does it prevent the spirit of the contract from being accomplished. Even though the UNESCO Convention became automatically binding upon Rolga upon ratification, which occur two years *after* Heritage ceased performance in 2003. Further, Rolga did not interfere with Heritage’s salvage operation under the Partnering Agreement.

Thus, Heritage’s claim that Rolga’s ratification of the UNESCO constitutes a serious breach is meritless.

²⁹ *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor*, [2007] 4 MLJ 1, 2 (C.A. Putrajaya).

³⁰ 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.

³¹ Moot Problem, ¶ 12.

³² *Id.*

³³ Moot Problem, ¶¶ 5, 12; Clarifications, ¶ 18.

d. Under the Applicable Laws, Rolga did not Commit a Serious Breach of the Partnering Agreement by Entering Into the 2001 Agreement with Astoria.

Rolga's 2001 Agreement with Astoria did not in any way prevent Heritage from performing and continuing its salvage operations. In fact, the 2001 Agreement strengthens Rolga's ownership and control of the Wreck, thereby strengthening Rolga's rights and authority to enter into the Partnering Agreement with Heritage. Further, the 2001 Agreement inherently encourages such operations as the spirit of the Guiding Principles is to preserve and display rare artifacts.³⁴

1. The 2001 Agreement Strengthens Rolga's Ownership Rights and Jurisdiction over the Coeur de l'Ocean.

As discussed in Part I above, Astoria was the rightful owner of the Wreck prior to the 2001 Agreement with Rolga because the vessel was an Astorian warship. However, under the 2001 Agreement, Astoria transferred all rights, title and interests in the Wreck to Rolga. Therefore, in addition to having jurisdiction over the wreck site, Rolga obtained full possessory and ownership rights to the Wreck.

Under the 2001 Agreement, Rolga "recognizes that Astoria has a continuing interest, particularly for historical and other cultural purposes, in the articles recovered."³⁵ However, the record shows that no artifacts have so far been offered, lent or sold to Astoria.³⁶ In fact, there is no involvement of Astoria concerning the Coeur de l'Ocean today.³⁷

³⁴ *Id.*

³⁵ Moot Problem, ¶ 9.

³⁶ Clarifications, ¶ 36.

³⁷ Clarifications, ¶ 37.

2. Rolga’s compliance with the 2001 Agreement Would not Interfere with Heritage’s Salvage Operations under the Partnering Agreement.

Rolga entered into an Agreement with Astoria on the “Protection of Astorian Wrecks” in 2001, with the principle objective of providing better protection to historic wrecks, and endeavoring to best preserve any objects recovered for the benefit of mankind.³⁸ The 2001 Agreement does not prohibit Heritage’s performance of its contractual obligation, that of conducting salvage operations to recover artifacts from the Wreck. On the contrary, the Agreement actually *encourages* the recovery of artifacts to display for the benefit of mankind.³⁹ The Guiding Principles of the Agreement provides for the display and preservation of artifacts in museums.⁴⁰ Thus, by implication, salvage operations to recover artifacts for museum display are permitted.

The Guiding Principles also acknowledges that the costs of recovery are outweighed by the values of these goods.⁴¹ By inference, Rolga and Astoria agreed that a salvage company may be paid to help bring up goods of immense “intrinsic” value.⁴² As described by National Geographic, the find is the most “bedazzling underwater treasure ever found today” with an estimated worth of more than USD \$1 billion.⁴³

The spirit of the Partnering Agreement involves the salvage operations by a salvage company to recover artifacts from the Wreck for compensation. While the Guiding Principles admonishes the sale of salvaged underwater cultural heritage, it does not directly prohibit its

³⁸ Moot Problem, ¶ 9.

³⁹ Moot Problem, ¶ 9.

⁴⁰ Appendix (2), Guiding Principles, ¶ A(1).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Moot Problem 2009, ¶ 5.

sale.⁴⁴ Instead, it calls for keeping the goods in collections in order to preserve their historical value.⁴⁵ Thus, salvaged goods without historical value would not be protected by the 2001 Agreement. Amongst the goods salvaged at this time are valuable raw materials, such as gold and silver.⁴⁶ Since these goods do not have historical value, they can be separated and sold. Thus, Heritage could be compensated by profit generated by such sale.

Accordingly, the 2001 Agreement does not prohibit Heritage's salvage operations, nor does it interfere with Heritage's right to compensation pursuant to the Sharing Arrangements provided under the Partnering Agreement.

e. Rolga's Permit Granted to Aquatic View for Exclusive Underwater Tours did not Interfere with Heritage's Contractual Rights.

It is imperative to examine the spirit of a contract because courts in international arbitration proceedings have always looked to it to determine if and when a party breached its contractual obligations.⁴⁷ The Partnering Agreement between Heritage and Rolga is primarily a salvage contract whereby Parties agree that Heritage would recover artifacts from the Wreck in exchange for compensation. On the other hand, the permit granted to Aquatic View by Rolga concerns underwater tours, which is a completely separate and independent contractual subject matter.

1. Rolga has Exclusive Rights to Regulate and Authorize Activities Directed at its Underwater Cultural Heritage Pursuant to the UNESCO Convention.

In addition to Rolga having jurisdiction and control over the Wreck as discussed above, Article 7 of the UNESCO Convention gives "State Parties... the exclusive right to regulate and

⁴⁴ Appendix (2), Guiding Principles, ¶ A(1).

⁴⁵ *Id.*

⁴⁶ Clarifications, ¶ 18.

⁴⁷ *Accord Blount Bros. Corp. v. Ministry of Hous. & Urban Dev.*, 3 IRAN-U.S. C.T.R. 225 (1983 II), *reprinted in* IRAN-U.S. Claims Tribunal Reports 170, 188 (1986 III).

authorize activities directed at underwater cultural heritage in ... [their] territorial sea.”⁴⁸ Here, Rolga is a State Party to the UNESCO Convention⁴⁹, and thus has exclusive rights to authorize the conducts directed at underwater cultural heritage in its territorial sea by third parties like Heritage and Aquatic View.

2. There is no Exclusivity Provision in the Partnering Agreement Between Rolga and Heritage.

The Partnering Agreement does not prohibit Rolga from entering into an agreement with another party other than Heritage concerning the Wreck. Specifically, it does not prohibit Rolga from granting a permit to Aquatic View to bring visitors to view the wreck site. It also does not grant Heritage exclusive right of access to the Wreck. In fact, the substance of the Partnership Agreement with Heritage is one of a *salvage* contract – not of merchandising or media licensing. Further, Aquatic View is not in the business of conducting salvage operations, nor is it in the business of displaying and restoring artifacts.

“[W]here two seemingly conflicting contract provisions can be reconciled, a court is required to do so and give both effect.”⁵⁰ In comparing the two business agreements Rolga has with Heritage and Aquatic View, the court will find that the purpose of the Partnership Agreement is one of salvage operation, whereas the substance of Aquatic View’s permit concerns a tour operation. Clearly, exclusive underwater tours were not envisaged by the Partnering Agreement. Moreover, they do not prevent Heritage from conducting its operations, or marketing and selling products with the name “Coeur de l’Ocean.”

Even in the unlikely event that exclusivity is interpreted to be granted under the Partnering Agreement, Heritage would be in violation of such exclusive provision because it

⁴⁸ UNESCO Convention, Article 7(1).

⁴⁹ Moot Problem, ¶¶ 16, 17.

⁵⁰ [2008] EWHC 1843 (Comm), 2007 FOLIO 1635, (Transcript); *see also* UNIDROIT Principles, Art. 2.1.21.

entered into a documentary deal with International Broadcasting Company concerning the Wreck.⁵¹

3. Rolga Cannot be Made a Party to any Infringement Claim.

Under Paragraph 6 of the Partnering Agreement, Rolga granted Heritage the right to use the name “Coeur de l’Ocean” for the sales and marketing of merchandise related to the Wreck in exchange for three percent of the gross sales of such merchandise.⁵² The name “Coeur de l’Ocean” is a trademark under the Trade Marks Act 1976 because it is a “brand” or a “name”.⁵³ Assuming that Heritage became “a registered user of the trademark” since there is no fact to the contrary, Heritage has exclusive use of the name “Coeur de l’Ocean” pursuant to Section 48 of the Trade Marks Act 1976, which provides that “...the use of that trademark...shall be deemed not to be used by any other person.”⁵⁴ Here, Aquatic View has allegedly entitled one song on its souvenir CD “Coeur de l’Ocean” without Heritage’s consent.⁵⁵

In such a case, the Trade Marks Act 1976 enables Heritage “to restrain by injunction the use in [Rolga] in the course of trade...of the trademark which...is identical with or nearly resembles the proprietor’s mark...where the use is likely to deceive or cause confusion.”⁵⁶ It follows, therefore, that Heritage should file for an injunction against Aquatic View in court as provided by the law. It is also worth noting that Rolga’s permit to Aquatic View does not grant the tour company with any rights other than to conduct underwater tours to view the wreck site.⁵⁷ Thus, any alleged infringement of the trade mark does not concern Rolga.

⁵¹ Moot Problem, ¶ 11.

⁵² Appendix (1), Partnering Agreement Memorandum, ¶ 6.

⁵³ Trade Marks Act 1976 § 3, Malaysia Act 175.3.

⁵⁴ *Id.* at § 48.

⁵⁵ Moot Problem, ¶ 11.

⁵⁶ Trade Marks Act 1976 § 70(B), Malaysia Act 175.70.

⁵⁷ Moot Problem, ¶ 11.

With respect to Heritage's complaint regarding the alleged interference with Heritage's television documentary, Article 14 of the 1996 WIPO Copyright Treaty provides that State Parties to said Treaty shall take measures to ensure action against any act of infringement of rights covered by said Treaty.⁵⁸ The scope of copyright protection extends to expressions of ideas.⁵⁹ Here, Rolga is a State Party to the WIPO Copyright Treaty by either ratification or acceptance,⁶⁰ thus said Treaty is applicable. Rolga has taken measures to implement the requirements under this Treaty in accordance with its legal system via the Copyright Act 1987.

Copyright Act 1987 governs as television broadcasts are eligible for protection.⁶¹ The Act provides that "copyright is infringed by any person who, without the consent or license of the owner of the copyright... exhibit[s] the work in public for the purpose of selling, letting for hire, or by way of trade."⁶² It also provides that in an action for infringement, all such relief by way of damages, injunction, etc. shall be available to the plaintiff.⁶³

Here, in addition to Heritage's possible trademark infringement claim against Aquatic View, it potentially has a copyright infringement against the same party. As with its trademark infringement claim, any alleged copyright infringement does not concern Rolga because it was Aquatic View who allegedly infringed upon Heritage's right. It must be emphasized that the permit granted to Aquatic View by Rolga concerns only the underwater tours and nothing more.

Rolga has exclusive authority to direct activities related to its underwater cultural heritage, and the Partnering Agreement with Heritage does not limit Rolga's authority by any means. The permit granted to Aquatic View by Rolga to conduct exclusive underwater tours to

⁵⁸ WIPO Copyright Treaty (1996).

⁵⁹ *Id.* at Article 2.

⁶⁰ Moot Problem, ¶ 17.

⁶¹ Copyright Act 1987, §§3 and 7, Malaysia Act 332.3 and 332.7.

⁶² *Id.* at § 36(2), Malaysia Act 332.36.

⁶³ *Id.* at § 37(1), Malaysia Act 332.37.

view the Wreck does not interfere with Heritage's contractual rights as the subject matter of each contract is separate and different.

III. ROLGA'S ACTS AND/OR OMISSIONS DO NOT CONSTITUTE ANTICIPATORY BREACH OF THE PARTNERING AGREEMENT; THEREFORE, HERITAGE'S TERMINATION OF ITS SALVAGE OPERATIONS WAS UNJUSTIFIED.

Section 40 of the Contracts Act 1950 provides that "[w]hen 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, unless he has signified, by words or conduct, his acquiescence in its continuance."⁶⁴ Likewise, the UNIDROIT Principles allow termination in cases of fundamental non-performance, where the non-performance deprives the other party of its expected benefit under the bargain.⁶⁵ Additionally, anticipatory breach, or anticipatory repudiation, is also a recognized tenant of English Common Law.⁶⁶ However, the full effect of common law anticipatory repudiation does not have the same effect as it might have in current legal systems.⁶⁷ In order to claim anticipatory repudiation, the party bringing such claim would have to show that the party repudiating has taken active measures to avoid performing their obligations under the contract.⁶⁸

Here, the record shows no indication that Rolga has taken any measure to avoid performing its obligations or that it wishes to terminate the Partnering Agreement.

⁶⁴ Contracts Act 1956 § 40, Malaysia Act 136.40.

⁶⁵ UNIDROIT Principles, Art. 7.3.1.

⁶⁶ See *Kingston v. Preston*, 98 Eng. Rep. 606 (K.B. 1773).

⁶⁷ See generally Samuel Stoljar, Some Problems of Anticipatory Breach, 9 Melb. U. L. Rev. 355, 356-60 (1974) (tracing history of anticipatory repudiation).

⁶⁸ See *Kingston v. Preston*, 98 Eng. Rep. 606 (K.B. 1773); see also UNIDROIT Principles, Art. 7.3.3.

a. **Rolga's Performance Under the Partnering Agreement had not Become due at the Time Heritage Ceased its Salvage Operations.**

In *ABB Distribution v. GKM Development & Anor*, GKM placed an order with ABB for the purchase, installation, and service of a switchboard. ABB proceeded to order the switchboard for GKM from its supplier, but GKM was unable to raise the funds needed to purchase the switchboard and attempted to repudiate the contract. The court found that a valid contract had been formed, and GKM had anticipatorily breached the contract by failing to complete its obligations once they became due.⁶⁹

In this case, Rolga concedes that a legally enforceable salvage contract was formed. However, this dispute is distinguishable from *ABB Distribution v. GKM Development & Anor*. ABB has already performed its obligation under the contract by proceeding to order the switchboard for GKM from its supplier. It was then GKM's turn to perform its obligation by raising the funds for the purchase. Here, under the Partnering Agreement, Heritage's obligation is to perform the salvage operations to recover the artifacts of the Wreck. In return, Rolga's obligation is to compensate Heritage pursuant to the Sharing Arrangements which includes the distribution of artifacts recovered from the wreck.

Unlike ABB, Heritage has not completed its obligation under the Partnering Agreement. The value of artifacts from the Wreck was estimated to be worth USD \$1 billion.⁷⁰ However, only approximately USD \$600 million's worth of artifacts have been recovered by the time Heritage ceased performance.⁷¹ Furthermore, the Partnering Agreement does not specify a time

⁶⁹ *ABB Distribution v. GKM Development & Anor*, 7 MLJ 292, 301 (H.C. Kuala Lumpur 1997).

⁷⁰ Moot Problem, ¶ 5.

⁷¹ Clarifications, ¶ 18.

upon which each party must perform its obligations.⁷² It could be inferred from the Sharing Arrangements that the distribution can only occur when the recovery of artifacts has been completed. Such provision provides different tiers of compensation depending on the *aggregate* values of the artifacts, and not per item recovered. Therefore, Heritage's compensation and share of the artifacts cannot yet be determined and Rolga would not be able to distribute said artifacts pursuant to the Partnering Agreement.

b. Despite the Increasing Political Pressure Concerning the Protection of Underwater Cultural Heritage, Rolga has not done Anything to give Heritage the Apprehension that it Would not Abide by its Contractual Obligations.

Rolga has not acted in any manner to give Heritage apprehension that Rolga would not abide by its contractual obligations. In fact, Heritage's operations continued uninterrupted for two years after Rolga signed the 2001 Agreement with Astoria. Further, the UNESCO Convention did not enter into force until 2009, six years after Heritage unilaterally ceased its performance.

The record reveals that Heritage felt that the political climate was not conducive to business and that further investment in efforts, time, and money would be harmful to the company.⁷³ However, as discussed in Part II above, Rolga did not in any way interfere with Heritage's performance. In fact, even though the Minister of Rolga was given the authority to designate an area around a wreck site as a restricted area pursuant to the 2000 Rolgan law and has been urged by the Rolgan Cultural Society to do so for fear that salvage activities would negatively impact the site, no such move has been made.⁷⁴ Moreover, the record shows that

⁷² Appendix (1), Partnering Agreement Memorandum.

⁷³ Moot Problem, ¶ 12.

⁷⁴ Moot Problem, ¶ 10.

many artifacts were destroyed due to poor handling by Heritage personnel.⁷⁵ Even in light of Heritage's recklessness, Rolga has not taken any action to admonish or prevent Heritage from continuing its operations.

Furthermore, if the signing of agreements which are designed to promote cultural heritage and preservation of historical artifacts is grounds for anticipatory breach, this tribunal would set a dangerous precedent in admonishing those who seek to enter into agreements that would effectively serve the interests of mankind. There is no indication that Rolga would be unable to uphold both its goals to preserve cultural heritage as well as its prior contractual obligations.

Accordingly, Rolga did not anticipatorily breach the Partnering Agreement since its performance was not yet due at the time Heritage unilaterally terminated its salvage operation. Heritage's suspension of its performance under the Partnering Agreement was unjustified.

IV. HERITAGE'S PERFORMANCE OF ITS OBLIGATIONS UNDER THE PARTNERING AGREEMENT WITH ROLGA IS *NOT* EXCUSED UNDER THE DOCTRINE OF FRUSTRATION.

Contracts Act 1950 requires that "parties to a contract must either perform... their respective promises, unless the performance is dispensed with or excused..."⁷⁶ In this dispute, some performance has been "dispensed with," as Heritage has recovered many of the artifacts from the Wreck as a result of its salvage operation. However, complete performance has not been tendered as Heritage began reconsidering its position under the Partnering Agreement with

⁷⁵ Moot Problem, ¶ 10; Clarifications, ¶ 34.

⁷⁶ Contracts Act 1950 § 38, Malaysia Act 136.38; *see also* UNIDROIT Principles, Art. 7.2.2.

Rolga in 2003 and shortly thereafter stopped its salvage operation. As discussed below, Heritage's performance has not been excused.

The doctrine of frustration operates to excuse further performance of a contract. The test in determining whether a contract has been discharged by frustration is incorporated in the phrase *Non haec in foedera veni*, which means "It was not this that I promised to do."⁷⁷ 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.⁷⁸ Frustration is codified in Section 57(2) of the Contracts Act 1950 as "[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."⁷⁹ Under the Contracts Act 1950, the Partnering Agreement has not been frustrated.

Even though the Contracts Act does not explicitly define the word "impossible," the courts have interpreted the section to include 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.⁸⁰ No event or circumstance has rendered Heritage's performance either physically impossible or illegal.

a. The Doctrine of Frustration Requires that the Nature of the Contract be Fundamentally Altered Before it Could be Considered Frustrated and Incapable of Performance.

⁷⁷ *Eastacres Development v. Fatimah Mutallip & Anor*, 7 M.L.J. 371, 388 (2000).

⁷⁸ *Id.*; see also UNIDROIT Principles, Art. 6.2.2, 7.1.7

⁷⁹ Contracts Act 1950 § 57, Malaysia Act 136.57.

⁸⁰ *Eastacres Development*, 7 M.L.J. 371 at 387; see also *Yee Seng Plantations v. Kerajaan Negeri Terengganu & Ors*, 3 M.L.J. 699, 709 (2000), UNIDROIT Principles, Art. 3.3.

The doctrine of frustration has been applied very narrowly and requires that the nature of the contract must be *fundamentally altered* before it could be considered frustrated and incapable of performance.⁸¹ Courts have expressed the view that this doctrine must be narrowly confined because “commercial bargains should not be lightly brushed aside upon a mere change of circumstances.”⁸²

The record does not reflect any event or circumstance which would render Heritage’s performance of its obligation under the salvage contract physically impossible. Although, it is anticipated that Heritage would contend that the equipment necessary for Aquatic View’s diving to the wreck site to provide underwater tours, which were permitted by Rolga, physically interfere with Heritage’s salvage operation. Such a claim, however, would be highly speculative as no such facts exist in the record showing that Aquatic View’s dives interfere with Heritage’s operations.

Consequently, there was no fundamental change in circumstances supporting the doctrine of frustration in this dispute.

b. Rolga’s Implementation of new Laws did not Render Heritage’s Performance Under the Partnering Agreement Legally Impossible.

Even if the implementation of new laws in Rolga constitute a change in circumstances, such changes are not *fundamental* to the root of the Partnering Agreement to render it incapable of performance.

⁸¹ *Eastacres Development*, 7 M.L.J. 371 at 389.

⁸² *Id.*; see also UNIDROIT Principles, Art. 3.3., 6.2.1.

1. The 2000 Rolgan Law Under the new Economic Plan did not Affect Heritage's Performance.

As discussed in Part III above, the 2000 Law was passed to protect wrecks of historical and cultural significance to Rolga. The law gives the Minister the authority to designate an area around a wreck site as a restricted area at her discretion.⁸³ However, the record reveals that despite political pressures to designate the wreck site as restricted, no such move has been made.⁸⁴

Therefore, the 2000 Rolgan law did not render Heritage's performance illegal.

2. The requirements of the UNESCO Convention are not contrary to the Partnering Agreement.

Rolga's ratification of the UNESCO Convention did not render Heritage's performance legally impossible. The Convention is applicable to the Partnering Agreement between Rolga and Heritage because salvage operations to recover underwater cultural heritage are considered "activities directed at underwater cultural heritage."⁸⁵ "Underwater cultural heritage," as defined by the 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."⁸⁶ While all contents of the Wreck have been underwater continuously since 1800⁸⁷ and provide traces to human existence, only some of the contents are subject to the UNESCO Convention because they have the required cultural, historical or archaeological character as defined by the Convention.

⁸³ Moot Problem, ¶ 8.

⁸⁴ Moot Problem, ¶ 10.

⁸⁵ UNESCO Convention, Article 1(6).

⁸⁶ *Id.* at Article 1(1)(a).

⁸⁷ Moot Problem, ¶ 1.

To the extent that the UNESCO Convention prohibits commercial exploitation of the underwater cultural heritage,⁸⁸ those artifacts that are not considered such heritage due to their lack of the cultural, historical and archaeological values could be traded or sold. Notably, the Partnering Agreement does not specify the nature and value of the recovered artifacts, instead it appears to be mainly concerned with the monetary values in the distribution. Consequently, Heritage's share of the recovered artifacts pursuant to the Sharing Agreement would come out of those that could be traded or sold and this would not be unlawful.

Further, the UNESCO Convention promotes and encourages, but does not require, the *in situ* preservation of the underwater cultural heritage.⁸⁹ Article 2 states that "the preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage."⁹⁰ Therefore, the UNESCO Convention does not outright prohibit Heritage's act of recovery of the underwater cultural heritage. In fact, Heritage's recovery is permitted as the Convention contains provisions dealing with the handling, conservation, documentation, and maintenance of the recovered underwater cultural heritage.

The terms of the Partnering Agreement do not necessary contradict the requirements under the UNESCO Convention. Rather, it appears that the Convention provides detailed procedures concerning issues such as the preliminary reporting/surveying of the wreck site, conservation, and documentation of the recovery artifacts,⁹¹ which are encompassed in the Partnering Agreement. For instance, paragraph 2 of the Partnering Agreement, entitled Project Plan, states that the parties "have made arrangements for the approval process of the project plan

⁸⁸ *Id.* at Article 2(7), Annex Rule 2.

⁸⁹ *Id.* at Article 2(5), Annex Rule 7.

⁹⁰ *Id.* at Article 2(5).

⁹¹ *Id.* at Annex Rule 9-16, 24, and 26-27.

that will set forth, amongst other things, the equipment, personnel and methodologies to be employed in the exploration... the conservation and documentation of any artifacts that may be retrieved from the shipwreck.” Further, Heritage would be allowed to conduct a survey in advance of the approved project plan. Even though the Project Plan does not contain terms in to the specificity laid out in under the Convention, it parallels the requirements under the law.

To the extent that the UNESCO Convention requires funding in advance of any activity,⁹² the record shows that parties have fully complied with the Fees and Deposits provision under the Partnering Agreement, which requires deposit of funds be made “prior to beginning the exploration... for the conservation and documentation of any artifacts retrieved from the site.”⁹³ The Partnering Agreement also calls for government representatives to monitor and record the exploration to ensure activities are carried out in compliance with the project plan.⁹⁴ This provision is consistent with Article 22 of the UNESCO Convention, which requires that competent authorities be established by Rolga to ensure proper implementation of the requirements under the law concerning the protection, conservation, presentation, management, research, and education of the underwater cultural heritage.⁹⁵

Consequently, Rolga would be able to comply with both the UNESCO Convention and its obligations under the Partnering Agreement.

3. The 2001 Agreement with Astoria Actually Empowers Heritage’s Salvage Operations.

The Guiding Principles, to be read together with the 2001 Agreement with Astoria, provides principles emphasizing the main object of both countries’ genuine shared interest in

⁹² *Id.* at Annex Rule 17-19.

⁹³ Partnering Agreement, ¶ 3.

⁹⁴ Partnering Agreement, ¶ 4.

⁹⁵ UNESCO Convention at Article 22.

providing better protection to historic wrecks, and endeavoring to best preserve any objects recovered for the benefit of mankind.⁹⁶ As evidenced by the use of the term “should” throughout the document,⁹⁷ these principles provide a mere guidance concerning the disposition of the recovered objects. Moreover, these principles also do not prohibit commercial exploitation of recovered goods. Therefore, the Guiding Principles would not make Heritage’s performance of its obligation under the Partnering Agreement illegal to warrant an excuse of performance.

Even if implemented, the Guiding Principles does not conflict with Heritage’s rights to its rewards. As mentioned above, the main object of the 2001 Agreement and the accompanying Guiding Principles is the shared interests of Rolga and Astoria in protecting and preserving historical and cultural artifacts for the benefit of mankind. Generally, the principles suggest the desire to keep recovered artifacts together to the extent that a “representative collection” could be deposited in the National Museums/Museums of Astoria and Rolga so that projects of scholarly research will not be impeded.⁹⁸ Further, in the event that the contents of an archaeological site are to be split, arrangements should be made for the reassembly of the contents for the purposes of further statistical and scholarly analysis, and perfect replicas of rare and unique objects should be made to complete the assemblage.⁹⁹ It also appears that the idea of salvage operations is favored because the Guiding Principles contains guidelines on the treatment, maintenance, and distribution of recovered artifacts.¹⁰⁰

While the Sharing Agreement entitles Heritage “to own and possess its relative share of the remaining artifacts” should the aggregate amount of the appraised values and the net proceeds of any sales of artifacts exceed forty-five million dollar, the Partnering Agreement does

⁹⁶ Moot Problem, ¶ 9.

⁹⁷ See Appendix (2), Guiding Principles, ¶¶ 2, 6, and 7.

⁹⁸ Appendix (2), Guiding Principles, ¶ 1.

⁹⁹ *Id.* at ¶ 2.

¹⁰⁰ *Id.* at ¶ 3.

not specify whether Heritage's share is determined by the monetary value of the recovered artifacts or the actual items of the contents recovered.¹⁰¹ The Partnering Agreement also does not contain provisions on the classification of artifacts as "unique and rare" with historical, cultural and archaeological values. Further, Heritage has not expressed an interest in retaining physical possession of any recovered artifacts. Thus, Heritage's compensation under the Sharing Agreement could still be satisfied monetarily even with the implementation of the Guiding Principles.

Lastly, the record reveals that at present, there is "no involvement of Astoria concerning Coeur de l'Ocean"¹⁰², and that "no artifacts have so far been offered, lent, or sold to Astoria."¹⁰³ In fact, Astoria "has not made any claims to or rights in the cargo... and has also not yet submitted any objection to the activities of either Heritage or Aquatic View based on the 'Protection of Wrecks' Agreement."¹⁰⁴ Consequently, Heritage cannot claim that Rolga's entering into the 2001 Agreement with Astoria has made it physically or legally impossible for it to fulfill its performance under the Partnering Agreement.

In sum, Heritage's obligation to perform pursuant to the Partnering Agreement must not be excused under the doctrine of frustration. As discussed, no event or circumstance exists that would make Heritage's performance physically impossible. The 2000 Rolgan law, Rolga's ratification of the UNESCO Convention as well as the 2001 Agreements with Astoria do not constitute a supervening illegality as Heritage may continue to perform its salvage operation and receive compensation under the Partnering Agreement.

¹⁰¹ Appendix (1), Partnering Agreement Memorandum, ¶ 5.

¹⁰² Clarification No. 37.

¹⁰³ Clarification No. 36.

¹⁰⁴ Clarification No. 4.

V. HERITAGE DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING OR DOCUMENTING OF THE COEUR DE L'OCEAN.

As discussed in Part II, there is no exclusivity provision in the Partnering Agreement between Rolga and Heritage. It follows, therefore, that Heritage does not have exclusive rights to photographing or documenting the Wreck.

a. The salvor's traditional salvage rights recognized under the 1989 Salvage Convention do not include intellectual property rights.

The 1989 Salvage Convention, which governs contracts concerning salvage operations, does not grant any intellectual property rights.¹⁰⁵ However, since the “Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication,”¹⁰⁶ intellectual property rights may be granted by way of a contract between the parties.

Courts in common law 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.¹⁰⁷ For instance, in the *R.M.S. Titanic v. Wrecked and Abandoned Vessel* case, when the trial court granted exclusive photographing rights to the salvor-in-possession,¹⁰⁸ it specifically referred “to 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.¹⁰⁹ It further found that “...allowing another ‘salvor’ to take

¹⁰⁵ International Convention on Salvage (London, 28 April 1989).

¹⁰⁶ *Id.* at Article 6(1).

¹⁰⁷ 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>.

¹⁰⁸ *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, (1996) A.M.C. 2497; see also *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, (1998) A.M.C. 2421.

¹⁰⁹ *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, (1996) A.M.C. 2497, 2499.

photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.”¹¹⁰

However, in 1999, the Court of Appeals in said case *overruled* the lower court’s grant of exclusive photographing rights to the salvor-in-possession.¹¹¹ There, the Court of Appeals stated that it was not aware of any “cases in the United States or in the body of *jus gentium*... that has expanded salvage rights to include [exclusive photographing rights].”¹¹² It held that “to award, in the name of salvage service, the exclusive right to photograph a shipwreck, would... tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors.”¹¹³ Further, the salvors’ incentive would counter the purpose of salvage if they were given exclusive rights because they would potentially be better compensated by leaving the wreck intact underwater, and selling photographs or charging the public admission to view it underwater.¹¹⁴

The Court of Appeals in *Titanic* pointed out that exclusive viewing and photographing of property is usually achieved by exercising exclusive possession and control. Here, the record reflects that Rolga remains the owner of the shipwreck under the Sharing Agreement.¹¹⁵ Article 7 of the UNESCO Convention further reiterates that Rolga has exclusive right to regulate and authorize activities directed at underwater cultural heritage in its territorial sea.¹¹⁶

Consequently, Heritage does not enjoy exclusive rights of photographing and documenting of the Wreck.

¹¹⁰ *Id.*

¹¹¹ *R.M.S. Titanic v. Haver*, 171 F.3d 943, 969 (1999).

¹¹² *Id.*

¹¹³ *Id.* at 970.

¹¹⁴ *Id.*

¹¹⁵ Partnering Agreement, ¶ 5.

¹¹⁶ UNESCO Convention, Article 7(1).

b. The Partnering Agreement does not Explicitly Grant Heritage any Photographing Rights or Exclusive Documenting Rights.

The Partnering Agreement does not provide Heritage the exclusive rights of photographing and documenting of the Wreck. In fact, the Project Plan provision is extremely vague on the method of documentation as it states, "...the project plan...will set forth, amongst other things, the...methodologies to be employed...in the conservation and *documentation of any artifacts that may be retrieved from the shipwreck.*"¹¹⁷ Moreover, the Partnering Agreement mentions no photographing rights.

Thus, even when construed liberally in favor of Heritage, this provision appears to provide Heritage with the right of documentation of only the recovered artifacts and not of the ship wreck itself while it is still underwater.

VI. HERITAGE'S COMPENSATION AND SHARE OF THE ARTIFACTS MUST BE DISTRIBUTED PURSUANT TO THE SHARING ARRANGEMENTS PURSUANT TO THE PARTNERING AGREEMENT AND NOT ON THE BASIS OF SALVAGE LEGAL PRINCIPLES.

The 1989 Salvage Convention provides the basis for salvage legal principles, which entitles salvors to compensation or "rewards".¹¹⁸ Said 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.*"¹¹⁹ Here, as discussed above, the Partnering Agreement is a salvage contract between Rolga and Heritage. Thus, Heritage's compensation must be made solely based on said Agreement, and not based on the Salvage Convention.

¹¹⁷ Partnering Agreement, ¶ 2.

¹¹⁸ International Convention on Salvage (London, 28 April 1989).

¹¹⁹ *Id.* at Article 6(1).

Rolga anticipates Heritage will argue that Rolga breached the Partnering Agreement by its acts or omissions that interfere with Heritage's rights and performance, therefore Heritage's compensation must be made based on the salvage legal principles. On the contrary, as discussed above, there is no actual or anticipatory breach by Rolga, and the doctrine of frustration does not apply to excuse Heritage's performance of its obligations. As a result, if any breach occurred, it was Heritage who breached the Partnering Agreement by voluntarily stopping its salvage operation in 2003. Due to Heritage's nonperformance, it should be entitled to no relief.

However, since Partnering Agreement is enforceable in full, thus Heritage should be compensated according to the Sharing Arrangements. The record shows that the estimated value of the recovered artifacts is approximately \$616,298,000 USD. The contract provides, if the value of the artifacts exceeds \$500,000,000 USD, Heritage would be entitled to 40% of the monetary value. Using the fee schedule, Heritage would be entitled to compensation in the amount of: \$379,798,000. The Respondent is willing to give monetary compensation for the full amount. Alternatively, the Respondent proposes that Heritage be compensated by distributing the goods. Respondent proposes that the gold and silver bullion and ingots be transferred in full to Heritage. The balance of the compensation due to Heritage can be derived from the cache of Silver Coins found from the Wreck. The transfer or sale of a portion of the Silver Coins with Astorian Marks would not violate the terms of the UNESCO Convention or the 2001 Agreement because, as explained in the Memorial, the fact that there are 50,000 coins available diminishes the coins' uniqueness and rarity. The mutually agreed upon joint marketing plan for the placement and sale of the remaining artifacts is not required once the values exceed \$45,000,000 since the Agreement only provides that the parties will *endeavor* to formulate such a plan.

Further, Heritage is entitled to own and possess its relative share of the remaining artifacts once the values exceed \$45,000,000 under the Agreement. Since the UNESCO Convention is only applicable to underwater cultural heritage, which is defined as items having “a cultural, historical, or archaeological character,” items that do not fall into this category of protection could be distributed to Heritage, including 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.

CONCLUSIONS AND PRAYER FOR RELIEF

For these reasons, the Government of Rolga respectfully requests the International Arbitral Tribunal to declare that:

1. The Partnering Agreement is enforceable in full.
2. Heritage is entitled to possession of its relative share of the salvaged goods as detailed in the Sharing Arrangements, and not under traditional salvage legal principles.
3. Heritage is not entitled to payment for any goods that have not yet been salvaged.
4. Heritage shall not have distributed to it any underwater cultural heritage that is protected under the UNESCO Convention.
5. Any award to Heritage shall have deducted from it the value of the goods damaged during salvage.