

TEAM CODE: F1090-R

INTERNATIONAL CENTRE OF ARBITRATION

2009

4TH LAW ASIA MOOT COMPETITION 2009

BENEVOLENT HERITAGE INC.

(CLAIMANT)

v.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

THE GOVERNMENT OF ROLGA

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STATEMENT OF JURISDICTION

The claimant has approached this Hon'ble Tribunal pursuant to Article 9 of the Partnering Agreement Memorandum, 1995. The Respondent disputes jurisdiction.

QUESTIONS PRESENTED

1. Whether this Hon'ble Tribunal has the jurisdiction to decide on its Jurisdiction to arbitrate upon the dispute?
2. Whether the International Arbitration Centre has jurisdiction to decide the dispute?
3. Whether the subject matter of the dispute is arbitrable?
 - 3.1 Whether International Public Policy is material to determination of arbitrability?
 - 3.2 Whether protection of common heritage forms a part of international public policy?
 - 3.3 Whether sunken vessels constitute 'Underwater Cultural Heritage' ?
4. Whether the claimant has rights of ownership over the artefacts?
5. Whether the Claimant is entitled to salvage remuneration?
6. Whether salvage legal principles were envisaged by the contract?
7. Whether the Respondent enjoys Sovereign Immunity?
8. Assuming salvage law is applicable, whether the contract shall govern the remuneration?
9. Whether the acts of the Salvor amount to misconduct?
10. Whether the acts of the Respondent amount to interference of the contract?
11. Whether salvage rights include exclusive rights to photograph or document the wreck?
 - 11.1 Whether the Claimant has copyright over the photographs or video clips of the Coeur de l' Ocean?

11.2 Whether exclusive rights of documentation conflict with the purpose of salvage law?

11.3 Whether Aquatic View's operations are allowed in public interest?

11. 4Whether permission granted to Aquatic View interferes with the Claimant's rights?

11.5 Whether the Claimant has right over sales and marketing only over merchandise?

STATEMENT OF FACTS

Benevolent Heritage Inc. (hereinafter “the Claimant”), a company incorporated under laws of the state of Rolga is a salvage company, whose major shareholder is Mr. Bernard Bodd, a national of the state of Astoria. Due to their expertise in historic wrecks he submitted a proposal to the Royal Heritage Committee for survey and recovery of historic wrecks belonging to the era of Astorian expansion in Rolga in 1990. This included the discovery of the Couer de l’ Ocean, a vessel belonging to Astoria that had sunk in 1800, laden with valuables and goods stolen from the ancient trading city of Zamzala, now a part of Rolga.

The claimant after extensive research and study of maritime archives discovered the wreck 12 nautical miles from Rolga’s baseline on 1st June 1993. The location however was not made known to the public for security reasons. The claimant also recovered silver coins and gold bars, which established the discovery as a rare finding, as confirmed by the National Geographic. The Government of Rolga (hereinafter “the Respondent”) approved the project and a Partnering Memorandum Agreement was signed on 27th September 1995 (Appendix 1). Many artefacts were recovered from the wreck Coeur de l’ Ocean by the Claimant and some parts of the collection were auctioned off at overseas auction houses to partly finance the costs of the project. The profits generated from the auction were distributed among the parties. Also, a maritime exhibition was set up within the National Museum by the Respondent in 2000. That year, the Government strengthened its cultural heritage appreciation as “symbol of nationhood”, influenced by the negotiations initiated by the UNESCO (United Nations Educational, Social and Cultural Organisation) relating to protection of underwater cultural heritage which led to the adoption of the United Nations Convention in the Protection of the Underwater Cultural Heritage in Paris on 2nd November 2001. The Minister of Rolga Cultural Heritage also stated that it was the duty of every civilized nation to protect its cultural heritage from unlawful and destructive human

interferences. In 2000, the Government also introduced a new economic plan to protect and ensure sustaining use of its cultural resources. A new law was also passed in late 2000, in Rolga, to protect wrecks of historic and cultural significance.

Further, the Respondent entered into an agreement on the “Protection of Astorian Wrecks” with the Government of Astoria in 2001, mainly to provide better protection to historic wrecks where both countries share genuine “historical and cultural” interest following the successful adoption of the UNESCO Convention in 2001. With this agreement Astoria agreed that Rolga, was to be the successor to the property and assets of the Astorian ancient wrecks, thus transferring all its right, title and interest in and to wrecked ancient vessels of Astoria lying on or off the coast of Rolga. Further, as provided in the Agreement, Rolga recognized that Astoria had a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in the Agreement.

Due to these developments, the Respondent was questioned in many forums on its alleged involvement with the “commercial exploitation” of the artefacts recovered from the Coeur de l’ Ocean. At the same time a specialized tour operator, Aquatic View, was given permit by the Government to organize exclusive underwater trips to view the wreck of Coeur de l’ Ocean. This permission according to Heritage Inc., interfered with their salvage rights and performance under the Partnering Agreement Memorandum and also jeopardized their ongoing television documentary deal with an International Broadcasting Company.

The change of mindset within society regarding the need for the protection of underwater cultural heritage and the move towards ratifying the 2001 UNESCO Convention along with the other developments have prompted the Claimant. to reconsider their position under the contract with the Government of Rolga. By 2003, it was felt that any further investment in efforts, time and money into other Astorian wrecks would be harmful to the company. Both parties soon took steps at finalizing the distribution of artefacts recovered from the wreck.

However, no amicable settlement could be reached as the Claimant felt that the distribution so arrived at was unfair and contrary to the 1995 Agreement.

Thus, dispute is now submitted before the International Arbitration Center pursuant to Article 9 of the 1995 Agreement, according to which both the parties have agreed to arbitration as a method of dispute resolution.

SUMMARY OF PLEADINGS

1. THAT THIS TRIBUNAL HAS JURISDICTION TO DECIDE ON ITS JURISDICTION TO ARBITRATE.

“Kompetenz-Kompetenz” rule allows arbitrators to examine their own jurisdiction.

2. THAT THE INTERNATIONAL ARBITRATION CENTRE DOES NOT HAVE JURISDICTION TO DECIDE THE DISPUTE

3. THAT THE SUBJECT MATTER OF THE DISPUTE IS NOT ARBITRABLE.

International public policy is material in determining arbitrability and the subject matter, being contrary to the same, is not arbitrable.

4. THAT THE CLAIMANT DOES NOT HAVE RIGHTS OF OWNERSHIP OVER THE ARTEFACTS

There is a presumption against abandonment for a State vessel and an express act is required. There is no clear evidence for the same, thus the claimant cannot claim ownership under the law of finds.

5. THAT THE CLAIMANT IS NOT ENTITLED TO SALVAGE REMUNERATION

As the salvage was prohibited by the owner, the service amounts to a prohibited service, which does not entitle the salvor to any remuneration.

6. THAT SALVAGE LEGAL PRINCIPLES WERE NOT ENVISAGED BY THE CONTRACT.

There is absence of marine peril in case of historic shipwrecks and accordingly, salvage law is not applicable as the essential ingredient is absent.

7. THAT THE RESPONDENT ENJOYS SOVEREIGN IMMUNITY

The wreck is entitled to sovereign immunity as it is owned by Astoria and it cannot be subject to a maritime lien or court proceedings. Therefore, the Claimant cannot claim remuneration.

8. ASSUMING SALVAGE LAW IS APPLICABLE, THE CONTRACT SHALL NOT GOVERN THE REMUNERATION.

The contract prescribes an excessive reward for the services and is inequitable. Such contracts are liable to be set aside.

9. THAT THE ACTS OF THE SALVOR AMOUNT TO MISCONDUCT.

A salvor guilty of misconduct forfeits his remuneration. The negligence of salvors causing damage to invaluable artefacts amounts to misconduct, thus, they are not entitled to any remuneration.

10. THAT THERE IS NO INTERFERENCE OF THE CONTRACT

11. THE CLAIMANT DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE WRECK.

Salvage rights do not include exclusive rights to photograph or document the wreck since they maritime lien does not envisage this.

The Claimant does not have any copyright over the photographs or video clips of the wreck so taken, since they do not have title of ownership to the wreck. Since the title is retained by the Respondent, the discretion to permit such rights remain is also retained.

Exclusive rights of documentation conflicts with salvage law since it will increase the propensity of commercial exploitation. Also other commercial interests of the Claimant are no concern of the Respondent, as long as not salvor rights are violated.

The Respondent's permitted Aquatic View to carry out its operations in public interest since it is a historic wreck and so provides an opportunity to be viewed.

Aquatic View's operations do not interfere with the Claimant's performance, since adequate cooperation will be given, given the importance of cultural heritage.

The Claimant has rights only over merchandise related to the wreck and not all souvenirs so marketed.

PLEADINGS

1. THAT THIS HON'BLE TRIBUNAL HAS THE JURISDICTION TO DECIDE ON ITS JURISDICTION TO ARBITRATE UPON THE DISPUTE.

The power of an arbitral tribunal to decide upon its own jurisdiction is an inherent power.¹ It is submitted that the “*Kompetenz-Kompetenz*” rule allows arbitrators to examine their own jurisdiction.² It provides that the arbitrators are competent to determine their own competence.³ “There is a presumption that where an arbitration has been commenced, the issues of *kompetenz-kompetenz* will be first dealt with by the arbitral tribunal.⁴ The rule encompasses essentially two elements - that, an arbitral tribunal can rule upon its own jurisdiction and that for this purpose, the arbitration clause is separate and independent from the terms of the contract containing the transaction between the parties.⁵

In the instant case, the parties have agreed to be bound by the Rules of the Kuala Lumpur Regional Center for Arbitration, hereinafter the KLRCA Rules.⁶ According to Rule 1 of the KLRCA Rules, “Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be settled or resolved by arbitration in accordance with the Rules for Arbitration of the KLRCA, then such disputes shall be settled or resolved by arbitration in accordance with the UNCITRAL Arbitration Rules.”

According to the UNCITRAL Arbitration Rules (Art. 21) and UNCITRAL Model Law on International Commercial Arbitration [Art. 8 (2)], whatever objections may be raised against the jurisdiction or competence of the arbitral tribunal based on invalidity or non-existence of

¹ Redfern & Hunter, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 252 (2004).

² Fouchard, Gaillard & Goldman, *INTERNATIONAL COMMERCIAL ARBITRATION* 416 (1999).

³ Moses, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 21 (2008)

⁴ Tweeddale & Tweeddale, *ARBITRATION OF COMMERCIAL DISPUTES* 175 (2007).

⁵ *Supra* note 1 at 254.

⁶ Cl. 10, Partnering Agreement Memorandum.

the arbitration clause, the non-arbitrability of the subject-matter of the dispute, the scope of the Arbitration clause as to either burden of proof of arbitrability lies on the party alleging that the dispute is not arbitrable parties subject to it or matters or legal relationships falling within its purview, are to be first decided by the Arbitral Tribunal itself and not by a court of law.

Thus, it is submitted that this Hon'ble Tribunal has jurisdiction to decide upon its own jurisdiction.

2. THAT THE INTERNATIONAL ARBITRATION CENTRE DOES NOT HAVE JURISDICTION TO DECIDE THE DISPUTE

The arbitrability of an issue derives fundamentally from the parties' agreement to arbitrate.⁷ Any arbitration can only be based on party autonomy and agreement between parties to arbitrate upon the dispute. The parties consent and agreement provides the underpinning power for the arbitrators to decide on the dispute. The parties' consent also limits an arbitrator's power because an arbitrator can only decide issues within the scope of the parties' agreement.⁸

According to Article 3 (2) of the Statute of the Vietnam International Arbitration Centre, the Vietnam International Arbitration Centre shall exercise jurisdiction over any dispute where, before the dispute arises or after it has arisen, the parties 'agree' to refer the matter to the Vietnam International Arbitration Centre

It is submitted that the parties have not agreed upon the International Arbitration Centre as the centre for arbitration. The seat of arbitration has been agreed upon as Ho Chi Minh City.⁹

⁷ *Katz v. Feinberg*, 167 F. Supp. 2d 556.

⁸ *Supra* note 3 at 2.

⁹ No. 24, Further Clarifications.

The Arbitration Clause in the Partnering Agreement Memorandum¹⁰ clearly sets out that the parties have only agreed upon the procedural rules¹¹ and have not agreed upon any institution for conducting this arbitration.

Thus, in the absence of any agreement between the parties, it is humbly submitted that this International Arbitration Center has no jurisdiction to arbitrate on this dispute.

3. THAT THE SUBJECT MATTER OF THE DISPUTE IS NOT ARBITRABLE.

It is submitted that the preliminary issue of subject-matter arbitrability falls for consideration before this Hon'ble Tribunal. In *ACD Tridon Inc v. Tridon Australia Pty Ltd*, the presumption in favour of arbitrability was rejected by the Court.¹²

“Objective arbitrability” or “arbitrability *ratione materiae*” is where the subject-matter of the dispute submitted to arbitration is not one which can be resolved by arbitration.¹³ Article II (1) of the New York Convention sets forth this principle, according to which, “each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter *capable of being settled by arbitration.*” (emphasis added). Where the issue of arbitrability relates to whether a claim falls within the submission to arbitrate, then the arbitral tribunal will usually have jurisdiction to resolve this issue.

It is submitted that the preliminary question of arbitrability of subject matter has to be decided by this Hon'ble Tribunal before proceeding with the substantive issues.

¹⁰ Cl. 10, Partnering Agreement Memorandum, No. 4 (ii), Corrections and Clarifications.

¹¹ Rules for the Kuala Lumpur Regional Centre of Arbitration, 2008

¹² *Supra* note 4 at 109.

¹³ *Supra* note 2 at 533.

3.1 THAT INTERNATIONAL PUBLIC POLICY IS MATERIAL TO DETERMINATION OF ARBITRABILITY

“When examining the objective arbitrability of an international dispute, a court must apply its conception of international public policy.”¹⁴ “Lack of arbitrability is a limit on party autonomy and jurisdiction of the tribunal and public policy is a qualification for that limit”.¹⁵ Public policy was defined by the English House of Lords as “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good”.¹⁶ International public policy is understood to be narrower than domestic public policy: not every rule of law which belongs to the *ordre public interne* is necessarily part of the *ordre public externe or international*.¹⁷

In *Agent (Syria) v. Supplier (Italy)*¹⁸, an arbitral tribunal addressed the question of whether there were any international mandatory laws which were applicable to all international commercial arbitrations. The arbitral tribunal concluded that there were. It referred to a decision of the Swiss Federal Supreme Court,¹⁹ where the court stated that in an international commercial arbitration the arbitral tribunal had to apply universal public policy principles. The Swiss Federal Court further stated that the concept of international public policy included ‘fundamental principles of law which are to be applied regardless of the connection of the dispute to a specific country.’

¹⁴ *Supra* note 2 559 (1999).

¹⁵ Bocksteigel, (eds.) et al., *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION* (2005).

¹⁶ *Egerton v. Brownlow* (1853) 4 HLC 1.

¹⁷ Van den Berg, "Distinction Domestic-International Public Policy", (1996) XXI *Yearbook* at p. 502.at p. 502.

¹⁸ *Partial Award in Case No. 8420 of 1996* (2000) XXV *Ybk Comm Arbn* 328..

¹⁹ Decision ATF 120 II 166-8.

3.2 THAT PROTECTION OF COMMON HERITAGE FORMS A PART OF INTERNATIONAL PUBLIC POLICY

The expression 'common heritage of mankind' indicates the fundamental interest of the international community as a whole.²⁰

It is submitted that Article 22 of the Universal Declaration of Human Rights, hereinafter UDHR, recognizes the entitlement of each individual to realize through national effort and international co-operation and in accordance with the organization and resources of each State, the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 15 of the International Covenant on Economic, Social and Cultural Rights, hereinafter ICESCR, recognizes the right of everyone to take part in cultural life. This creates both a negative obligation not to interfere with cultural freedoms, and a positive obligation to protect cultural heritage.²¹ The United Nations Convention on the Law of the Sea, hereinafter UNCLOS, in Articles 149 and 303, recognizes the obligation of states to protect archaeological and historical objects.

“Preservation of cultural heritage must be recognized as a key element of economic, social, and cultural development.”²² What survives of the vessel and its contents represents a unity or, in archaeological terms, a “closed group.”²³ UNCLOS Article 149 states that “all objects of an archaeological and historical nature found in the Area” (‘on the seabed and ocean floor beyond the limits of national jurisdiction’) “shall be preserved and disposed of for the benefit of mankind as a whole, particular regard being

²⁰ Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* 72 (1998), as cited in Valentina Sara Vadi, “Investing in culture, Underwater cultural heritage and international investment law”, 42 *Vand. J. Transnat'l L.* 853.

²¹ Francioni, “Beyond State Sovereignty: The Protection of cultural heritage as a shared interest of humanity”, 2003-04 *Michigan Law Review*, 1213.

²² Valentina Sara Vadi, “Investing in culture, Underwater cultural heritage and international investment law”, 42 *Vand. J. Transnat'l L.* 853.

²³ *Supra* note 22.

paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” Similarly, under UNCLOS Article 303, states have a dual duty to protect objects of an archaeological and historical nature found at sea and to cooperate for this purpose. A state may establish an archaeological zone within its contiguous zone and thus consider another actor’s removal of any archaeological or historical object from the contiguous zone an infringement of the UNCLOS.

Customary rules of treaty interpretation as restated in the Vienna Convention on the law of treaties, hereinafter the Vienna Convention, require treaty terms to be interpreted not only according to their strict textual meaning but also in good faith in context and in light of their object and purpose.²⁴ Further, Treaty terms must be interpreted while taking into account any relevant rules of international law applicable to the relationship between the particular parties.²⁵

Thus, in light of the specific provisions of various treaties referred to above, there is an international obligation to protect cultural heritage.

3.3 THAT SUNKEN VESSELS CONSTITUTE ‘UNDERWATER CULTURAL HERITAGE’

Sunken vessels constitute the essence of underwater cultural heritage, which can be defined as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously for at least 100 years.”²⁶ The cosmopolitan character of UCH as a “common heritage of mankind” makes it

²⁴ Article 31-32, Vienna Convention on the Law of Treaties, 1969.

²⁵ Article 31 (3) (c), Vienna Convention on the Law of Treaties, 1969.

²⁶ Article 1, paragraph 1 of the UNESCO Convention on the Protection of Underwater Cultural Heritage, 2 November 2001, ILM 2002, ILM, 2002, Vol. 41.

an object worthy of protection by international law.²⁷ At the international level, “there is wide agreement . . . that archaeological remains and their treatment are a matter of ‘public’ concern.”²⁸

The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, hereinafter CPUCH, provides a complement to the UNCLOS by ensuring and strengthening the international protection of UCH.²⁹ “The new universal instrument stands as a *lex specialis* for UCH and its protection, whereas the UNCLOS remains an authoritative *lex generalis* for the whole law of the sea.”³⁰ “The latter, as codified by the LOS Convention, establishes a duty (*sui generis*) to protect UCH without spelling out its precise content, the minimum threshold of protection, or even a definition of UCH.”³¹

Certain disputes which affect the fundamental rights guaranteed by international covenants may not be arbitrable unless the arbitration agreement permits affected parties to have effective and appropriate remedies.³² Arbitration agreements have also been held to be null and void where the subject matter of the dispute may affect the rights of third parties.³³

It is further submitted that arbitrators generally consider only the legal arguments expressly made by the parties ‘*secundum alligata et probata*’, unlike national judges who apply the applicable international law, disregarding the different rules invoked by the parties ‘*iura novit*

²⁷ *Supra* note 22.

²⁸ *Supra* note 22.

²⁹ *Supra* note 22.

³⁰ Carducci, “New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage”, 96 Am. J. Int'l L. 419 at 420.

³¹ *Id.*

³² *Supra* note 2 at 111.

³³ *Supra* note 2 at 112; *A Best Floor Standing Pty Ltd. v. Skyer Australia Pty. Ltd.*, [1999] VSC 170.

curia'.³⁴ The application of any 'building block of norms,'³⁵ therefore, would ultimately rely upon the parties' will.³⁶

It is submitted that the UCH is the common heritage of humankind. It is further submitted that the Respondent has ratified the CPUCH, thus creating an obligation on its part to protect underwater cultural heritage. Thus, the dispute on hand involves rights of the humanity in general guaranteed by the international covenants. A greater public interest is involved in the dispute which also involves the rights of humankind as a whole. Thus, it is submitted that the dispute is not arbitrable and that the arbitration agreement is null and void.

4. THAT THE CLAIMANT DOES NOT HAVE RIGHTS OF OWNERSHIP OVER THE ARTEFACTS

Under the law of finds, abandonment requires both physical abandonment and a present intention to relinquish title to property³⁷. In the event that this is proven with clear and convincing evidence³⁸, the finder of such a property obtains title to the same.³⁹

Vessels that belong to the State are considered to still be owned by the State under customary international law, till there is an express act of abandonment or a declaration to that effect.⁴⁰

States are not divested of their title easily despite passage of time, inaction, delay, laches, mistake etc.⁴¹ Courts in common law jurisdictions have also been reluctant to apply the law

³⁴ *Supra* note 22..

³⁵ See generally, Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. Pa. L. Rev. 1643, 1664 (1996) as cited in *Supra* note 22.

³⁶ *Supra* note 22.

³⁷ *Eads v. Brazelton*, 22 Ark. 499, 509 (1861); T. Schoenbaum, (2009) 2 Admiralty & Mar. Law § 16-7 .

³⁸ *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company* , 974 F.2d at 464-65.

³⁹ *Marex Intern., Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825; L.H. Dietz, Salvage, 68 Am. Jur. 2d Salvage § 3 .

⁴⁰ Jason R. Harris, "Protecting Sunken Warships as Objects Entitled to Sovereign Immunity", 33 *Univ. Miami Inter-Am. L. Rev.* 101..Statement of UK on UCH cited from R. Garaballo & T. Scovazzi, *PROTECTION OF UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 251 (2003).

⁴¹ *U.S. v. Steinmetz*, 1991 A.M.C. 2099; P.A.Berns, "A Sovereign's Perspective on Treasure Salvage", 30 *J. Mar. L. & Com.* 269; *Hatteras, Inc. v. USS Hatteras*, 1984 AMC 1094.

of finds as opposed to the law of salvage to such circumstances.⁴² Furthermore, the flag state's law determines whether there is abandonment.⁴³ There is no clear and convincing evidence of the abandonment. A mere absence of an objection cannot be considered as "clear and convincing evidence" of the abandonment.

In *US v. Steinmetz* the court had held that even a non territorial sunken vessel's title still vests with the government and that it is consistent with International Law. This is more so, when warships sink, unless surrendered or captured – they are presumed not to be abandoned.⁴⁴ In fact, in the *US v. Seahunt*'s case the court refused to interpret a treaty that transferred all title and property to the US to include wrecks.⁴⁵ The express abandonment has to also indicate a clear intention of abdicating title to the specific property. The finding of abandonment is often done only when the owner does not reappear at all.⁴⁶ The act of abandonment ought to also be voluntary and it has been held that yielding to force or circumstances would not amount to voluntary abandonment.⁴⁷

In this case, the Astorian State had not abandoned the shipwreck owing to the fact that there is no clear and express evidence of abandonment. Warships such as this Wreck of the Couer De l'Ocean are not presumed to be abandoned. Subsequently, the Astorian State transferred all title with few reservations to this ship to the Rolgan State which makes Rolga, the owner of the ship.⁴⁸ The fact that Astoria reappeared and asserted its rights makes it implausible to state that the rights had been abandoned.⁴⁹

⁴² *Columbus America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 1990 A.M.C. 2409; E.L. McDougall-Tural, "USA: Application of Salvage Law or Law of Finds to the Recovery of Wreck – Case Comment", Int. I.L.R. 1994, 2(4), G61-63

⁴³ Statement by the US President on US Policy on Sunken Vessels cited from <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi>, last visited Sept 3, 2009.

⁴⁴ *US v. Steinmetz*, 1991 A.M.C. 2099.

⁴⁵ 2000 A.M.C. 2113.

⁴⁶ *Id.*

⁴⁷ *Simon v. Taylor*, [1975] 2 Lloyd's Rep. 338.

⁴⁸ ¶ 9, p. 3, Fact Sheet.

⁴⁹ ¶ 9, p. 3, Fact Sheet.

The Coastal State also has jurisdiction over the vessel to regulate activities in the vessel as it is present in the territorial waters.⁵⁰ The Rolgan State had not ratified the UNCLOS when this act of signifying consent to salvage exploration and ownership was done.⁵¹ Therefore, the law applicable would be the customary international law which indicates the States do have the right to interfere with or takeover wrecks, the rights being derived from inherent powers under international law.⁵² Even under the UNCLOS, the Rolgan State has a duty and right to protect and preserve archaeological heritage and has powers to regulate activities that continue in its territories.⁵³

Even if there was abandonment by Astoria, there is an overarching duty placed on the Rolgan State by customary international law and the UNCLOS to protect all sites and objects of archaeological importance.⁵⁴ Therefore the State acts as a custodian of the vessel and the artefacts by virtue of its territorial sovereignty.⁵⁵

The claimant has no rights of ownership. The ownership vested with the State of Astoria during the time of the contract and now the title, to the extent of a proprietary interest vests with the State of Rolga.

5. THAT THE CLAIMANT IS NOT ENTITLED TO SALVAGE REMUNERATION

An owner of the property is entitled to deny salvage services to the vessel.⁵⁶ Salvage cannot be thrust on the unwilling.⁵⁷ The prudent mariner test is essentially that the court should consider if a prudent and reasonable mariner would have declined the salvage services. If any

⁵⁰ S. Dromgoole & N. Gaskell, "Interests in Wreck" in Palmer & McKendrick, *INTEREST IN GOODS* 375 (1997).

⁵¹ Declaration on Ratification of United Nations Convention on the Law of the Sea, 1982 www.un.org/Depts/los/convention_agreements/convention_declarations.htm ; Partnering Agreement Memorandum, dated 27th September 1995.

⁵² *Supra* note 50 ; Malaysia's Declaration on ratification of UNCLOS cited from from R. Garaballo & T, Scovazzi, *PROTECTION OF UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* (2003).

⁵³ Article 303 (2), United Nations Convention on the Law of the Sea, 1982

⁵⁴ *Supra* note 50.

⁵⁵ , See generally, Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2004), Chapter 6.

⁵⁶ Vinzenzini, *INTERNATIONAL SALVAGE LAW* 54 (1992), p. 54; Article 19, IMO, London Salvage Convention, 1989.

⁵⁷ Brice, *MARITIME LAW OF SALVAGE* 44 (2003).

prudent man would have accepted such services, it is considered that the salvor would be entitled to remuneration.⁵⁸

In the presence of an express prohibition that salvage activities shall not be carried on without the consent of the Flag State, it amounts to a prohibited service under Article 19 of the London Salvage Convention, 1989. Astoria has expressly stated that no rights in the ship are abandoned and that any activity on a sovereign vessel shall not be carried out with the express consent of the State of Astoria.⁵⁹ This clearly amounts to a prohibition under Article 19 of the London Salvage Convention.

This prohibition is express and reasonable, as Astoria has an interest in the vessel and all activities carried on by it should be under its supervision in order to protect its cultural heritage. In this case, there was no express consent being provided by the owner of the vessel i.e., Astoria. The actions of the salvage on the vessel remain prohibited due to the law and the policy of the owner. Therefore, as seen in the *Seahunt's* where the ship was a sunken warship, the salvor will not be entitled to any remuneration especially where the State had not abandoned the property and had expressly disallowed such operations without permission⁶⁰ Similarly, in the *International Aircraft Recovery's*⁶¹ case where the owner, the Navy had expressly stated that salvage services will not be recognized when they are without their consent. It was held that there will be no remedies for such a salvor.

Therefore, the fact that these activities were unauthorized results in the Claimant having no rights of remuneration. Though the State had permitted the salvage operations, it was the salvor's duty to ensure that all other requisite permits were sought for the purpose of salvaging the property.

⁵⁸ *Merritt & Chapman Derrick v. US; The Vandyck*, 5 Aspinall's Maritime Law Cases 17 (C.A. 1882); David J. Bederan & Brian D. Spielman, "Refusing Salvage", 6 *LYMLJ* 31.

⁵⁹ Communication from the UK Foreign and Commonwealth Office, July 4, 2003 cited from <http://0-edocket.access.gpo.gov.library.colby.edu/2004/04-2488.htm>

⁶⁰ *Supra* note 45.

⁶¹ *Aircraft Recovery v. The Unidentified, Wrecked Vessel*, 2004 A.M.C. 1724.

6. THAT SALVAGE LEGAL PRINCIPLES WERE NOT ENVISAGED BY THE CONTRACT.

A salvage can be defined as the follows: Salvage is the concept of the saving of life and property from the perils of the sea.⁶² The general principle is that a party who successfully saves a person or maritime property which is in danger, from the sea earns the right to an award from the owner of the property so saved.⁶³ The onus of proving that such a danger/marine peril exists rests on those claiming a salvage award.⁶⁴ Marine peril requires a "reasonable apprehension of danger" that might expose the vessel to destruction if timely assistance is not rendered.⁶⁵

Here, as the ship has been immersed in water for years the peril has ceased to exist. There is no imminent danger where the vessel would be destroyed without timely assistance as envisaged in the Salvage Convention. There are cases that have expressed concern over an expansive definition of marine peril. In *Subaqueous Exploration & Archaeology Ltd v. Unidentified, Wrecked & Abandoned Vessel*⁶⁶ the court held that the marine antiquities are not proper subjects of salvage because they are not in marine peril.

However, Historic shipwrecks do automatically fall under the purview of the Salvage Convention by virtue of being property not permanently attached to the shoreline.⁶⁷ They also require a reservation to be excluded from the operation of the Convention.⁶⁸ This does not, however, imply that a salvage reward lies irrespective of whether there is a danger/peril faced by these wrecks. The wrecks may be property, but salvage requires property in peril. It is

⁶² David J. Bederman, "Historic Salvage and the Law of the Sea", 30 *U. Miami Inter-Am. L. Rev.* 99.

⁶³ R. Regan, "When Lost Liners Become Found: An Examination Of The Effectiveness Of Present Maritime Legal and Statutory Regimes For Protecting Historic Wrecks In International Waters With Some Proposals For Change", 29 *Tul. Mar. L.J.* 313.

⁶⁴ *Id.*

⁶⁵ *Conolly v. S.S. Karina II*, 302 F. Supp. 675, 679.

⁶⁶ 1984 AMC 923.

⁶⁷ Article 1(c), IMO, International Convention on Salvage, 1989; Questionnaire on Salvage Convention, 1989: State Responses: UK 's Response to whether wrecks fall under the purview of Salvage Convention http://www.comitemaritime.org/worip/pdf/Salvage_conv_1989_fullWP.pdf, Last visited Sept. 3, 2009.

⁶⁸ Article 30, IMO, International Convention on Salvage, 1989.

therefore not plausible to apply the law of salvage and award the claimant with a remuneration in accordance with salvage law.

7. THAT THE RESPONDENT ENJOYS SOVEREIGN IMMUNITY

Under the Salvage Convention, Article 4, State owned vessels or warships are entitled to sovereign immunity at the time of salvage operations unless the State decides otherwise.⁶⁹

This excludes the application of the convention and therefore salvage legal principles as envisaged under the convention.⁷⁰ Though Astoria has included application of salvage law for these vessels, it retains the sovereign immunity from being attached, proceeded against and does not permit a lien on such things.⁷¹

The courts of any country will not implead a foreign sovereign against his will to a legal proceedings to recover from him specific property or damages.⁷² This immunity applies to cargo and ships owned or possessed by the Foreign State or Sovereign.⁷³ Furthermore, it has been held that subsequent private ownership will not deny the right of the vessel to have sovereign immunity as allowing a lien subsequently would reduce the price of the vessel, which in effect affects the property of the Government.⁷⁴

Therefore, in this case, the Wreck of Couer De l' Ocean is entitled to sovereign immunity. It therefore cannot be subject to a maritime lien or subject to court proceedings for any activities performed on it. The Claimant will not be entitled to any remuneration or a maritime lien on the vessel.

⁶⁹ Article 4, IMO, International Convention on Salvage, 1989.

⁷⁰ Article 4(1), IMO, International Convention on Salvage, 1989.

⁷¹ Questionnaire on Salvage Convention, 1989: State Responses: UK 's Response to applicability of the Salvage Convention to Warships: http://www.comitemaritime.org/worip/pdf/Salvage_conv_1989_fullWP.pdf, Last visited Sept. 3, 2009.

⁷² *The Cristina*, [1938] A.C. 485; *Supra* note 57 at 153.

⁷³ *The Arantzau Mendi* (1939) A.C. 256 at 257, *Supra* note 57 at 155.

⁷⁴ *The Tervaete* [1922] P. 259, CA.; *Supra* note 57 at 155.

8. ASSUMING SALVAGE LAW IS APPLICABLE, THE CONTRACT SHALL NOT GOVERN THE REMUNERATION.

The Salvage Convention allows parties to apply and fix their own remuneration by contract. This excludes the application of the convention with regard to determination of remuneration.⁷⁵ Salvage agreements are however subject to Article 7. Article 7 states that contracts may be annulled or modified if the terms are inequitable or if the payment under the contract is in an excessive degree for the services rendered. The courts set aside an agreement to pay an exorbitant amount and do so even where there is no compulsion or dishonesty. In *The Theodore*⁷⁶ the court set aside an agreement to pay a certain amount, purely on the ground that it was too high. It is therefore immaterial whether there was undue influence or that the circumstances led to this unfair consideration, a mere finding that the consideration/remuneration per se is excessive would suffice to set aside or modify the contract⁷⁷ and therefore award fair remuneration accordingly.

The contract requires a remuneration of almost 90% of the value of the artefacts being salvaged. This is not the value of the services being rendered but the property. Though the court should consider valuing the property as one of the criteria⁷⁸ there are other criteria such as the time used, the risk of liability, the measure of success etc. In this case, the salvor has taken more than ten years to salvage those artefacts in addition to having carried out the salvage in the most negligent manner. The nature of the services rendered have been poor as it is said that the artefacts have not been handled with care and caution.⁷⁹

There is no danger or peril, the salvors are therefore not entitled to such a large amount of consideration. The contract shall not therefore govern the amount of remuneration.

⁷⁵ Article 7, IMO, International Convention on Salvage, 1989.

⁷⁶ (1858) Swa. 351 cited from *Supra* note 57.

⁷⁷ R. Clift & R. Gay, "The Shifting Nature of Salvage Law- A view from a distance" 79 *Tul. L. Rev.* 1355.

⁷⁸ Article 13, IMO, International Convention on Salvage, 1989.

⁷⁹ ¶ 10, p. 4, Fact Sheet.

9. THAT THE ACTS OF THE SALVOR AMOUNT TO MISCONDUCT.

A salvor ought to exhibit the skill and care which can be reasonably expected from persons in their position.⁸⁰ Under the Salvage Convention and even in Common Law, even if a salvor is performing a valuable service, if he is guilty of misconduct the just award remains forfeited.

⁸¹ This could be forfeited by willful misconduct, bad faith, an intention to not do the whole duty or an intention to protract during that duty for the purposes of piracy.⁸² The misconduct ought to be willful, proven beyond a reasonable doubt by the person asserting it.⁸³

In this case, the salvor had not taken the reasonable skill and care to avoid the damage to the artefacts and perform the duties with due care. There have been many instances of damage to the artefacts.⁸⁴ These are invaluable and form a part of the cultural heritage. The contract, furthermore, had expressly stated that these had to be transferred to a conservation facility and requiring the reasonable care to be taken in conservation and documentation of the artefacts.⁸⁵ The negligent acts of the salvors i.e., the poor handling of the archaeological objects has resulted in damage and many artefacts have been lost. Therefore, it is submitted that these acts amount to misconduct and that the salvor is not entitled to any remuneration.

9.1 WHETHER THE ACTS OF THE RESPONDENT AMOUNT TO INTERFERENCE OF THE CONTRACT?

The respondent submits that the signing of the underwater cultural heritage convention and the agreement with Astoria does not amount to an interference with the performance and the rights of the salvor. The contract, furthermore, can still be performed as the National Heritage

⁸⁰ *Anglo Saxxon Petroleum Co. Ltd v. Admiralty (The Delphinula)* (1946) 79 Ll. L. Rep

⁸¹ Article 18, IMO, International Convention on Salvage, 1989 ; *The Lady Worsley*, (1855) 2 Spinks 253 at 256; 164 E.R. 417.

⁸² *The Magdalen* (1861) 31 L.J. Ad. 22

⁸³ *The Atlas* (1862) 1 Lush. 518 cited from *Supra* note 57 at 474.

⁸⁴ ¶ 10, p. 4, Fact Sheet.

⁸⁵ Cl. 2, 3, Partnering Agreement Memorandum.

Act, 2005 permits the claimant to still undertake excavation operations, with the requirement of a license that is obtainable from the government. The National Heritage Act is the law that is applicable in the current scenario

10. THAT THE SALVOR IS NOT ENTITLED TO ANY REMUNERATION AND APPORTIONMENT

As salvage law is not applicable: considering the nature of the wreck and the nature of the vessel and considering the fact that the Astorian State had not authorized the activities on the vessel initially – the claimants are actually not entitled to any remuneration.

Even if Salvage law is made applicable to this case scenario; the contract, even if applicable, marks a compensation that is too excessive. The clear absence of any form of danger or risk per se, and the fact that the salvage has taken more than 10 years should be a consideration in bringing down the remuneration. Also, the salvage operations were initially prohibited, this being a reasonable prohibition, as there is no danger and that the State has a legitimate interest in protecting the property. Thus, such services do not give rise to a payment.⁸⁶

Also, there is manifest incompetence on the part of the salvor which disentitles him to any compensation as there have been various instances of manhandling of the vessel properties and artefacts which are invaluable. The salvor can therefore be deprived of the whole or part of the payment due.⁸⁷ Therefore, the salvor is not entitled to any remuneration.

⁸⁶ Article 19, IMO International Convention on Salvage, 1989.

⁸⁷ Article 18, IMO International Convention on Salvage, 1989.

11. THE CLAIMANT DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L' OCEAN.

11. 1 THAT SALVAGE RIGHTS DO NOT INCLUDE EXCLUSIVE RIGHTS TO PHOTOGRAPH OR DOCUMENT THE WRECK

A vessel which is being salvaged is still the inherent property of the owner and the salvor does not become the owner, but obtains a maritime lien and can only expect to receive, in exchange for his services, a salvage award.⁸⁸ The purpose and rules of the law of salvage is to give the salvor a right to compensation. Hence the salvor acquires only a right of possession and not a title to the vessel, until an award is so granted.⁸⁹

Therefore, the salvor's lien has to encompass the right to restrict others from taking visual images of the wreck or of the work in progress. The 1989 Salvage Convention does not cover the rights of the salvors where visual images are concerned but the watershed case which decided on this was *R.M.S. Titanic Inc., Successor in Interest to Titanic Ventures, Limited Partnership v. Christopher S. Haver; Deep Ocean Expeditions*⁹⁰, having reversed the decision of the District Court⁹¹ as to the extent of such rights. The lower court had previously held that the salvors, RMST, had the exclusive right to photograph the vessel based on its position as the salvor in possession, deciding that these particular intellectual property rights were a part and parcel of the salvor's rights and also granted an injunction against other salvors, tour operators and persons applying to photograph the wreck for their personal collection. The Court held that salvage rights did not encompass the right to prevent others from visiting, observing and photographing the wreck and the district court in enjoining

⁸⁸ Benedict, *BENEDICT ON ADMIRALTY VOLUME 3A* 11 (1990).

⁸⁹ *Hener v. United States*, 525 F. Supp. 350.; *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560.

⁹⁰ (1999) 171 F.3d 943 (U.S.C.A. 4th Circuit).

⁹¹ *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic* 1998 WL 557591; *RMS Titanic Inc. v. The Wrecked and Abandoned Vessel ("Titanic I")* 924 F. Supp. 714 at 716; *RMS Titanic Inc. v. The Wrecked and Abandoned Vessel ("Titanic II")* 9 F. Supp. 2d 624 at 627.

others from interfering with the ongoing salvage operations could not exclude others from an area within a 10-mile radius.⁹² Therefore, even though salvage law treats historic salvages differently due to their archaeological significance there is no justification for such expansion.

However, even if the District Court's reasoning were to be applicable to the present case the justification for such expansion would not be valid. Firstly, it is important to note that one of the foremost reasons for awarding such exclusive rights was the fact that unlike most historic wrecks, the Titanic's insured cargo consisted of nearly worthless perishables and items of personal property which were not of much value except as souvenirs thus providing no opportunity for recoupment of the costs of salvage. With little prospect of selling the salvaged items, RMST had to rely on profits from public exhibition of the items, sales of licenses to third parties for replicas of Titanic artefacts and Titanic souvenirs, as well as revenue from ancillary activities, such as prospective tourist travel to the site of the wreck.⁹³

In the present case however prior auction of the artefacts have taken place and also the artefacts so recovered are of great monetary value⁹⁴ and are "rare items"⁹⁵, a large portion being non perishable. Also, a sharing arrangement has been outlined as per the Partnering Agreement Memorandum⁹⁶. This establishes the fact that the claimants have sources of recovering costs so incurred in the salvage operations and do not need to be aided by exclusive rights as a source of compensation.

Another argument in support of granting such exclusive photography rights, unless such non-intrusive means of financing are allowed, historians will lose the opportunity to study shipwrecks as a whole, and the value of rare artefacts will depreciate once removed from the

⁹² *R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel ("Titanic II")* 9 F. Supp. 2d. 624 at 627

⁹³ James A.R. Nafziger, "*The Titanic Revisited*", 30 *J. Mar. L. & Com.* 311.

⁹⁴ No. 18, Corrections and Clarifications.

⁹⁵ ¶ 5, p. 2, Fact Sheet.

⁹⁶ Cl. 5, the Partnering Agreement Memorandum.

wreck and separated from their sister pieces.⁹⁷ However, this does not hold here, since the salvage agreement does envisage the selling of the artefacts⁹⁸

In the case of *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*,⁹⁹ where video and photographic images were held to be equivalent of artefacts recovered from a shipwreck, the court decided that allowing *another salvor* to take photographs is akin to permitting the physical invasion of the wreck. However, here the Respondent has merely authorized another party, a tour operator, Aquatic View to take such photographs and video clips, not engaged in salvage operations, and therefore is not subject to such reasoning.

It is therefore submitted that the claimant due to their position as the salvors do not enjoy any exclusive rights to photograph or document the wreck.

11.2. THAT THE CLAIMANT DOES NOT HAVE COPYRIGHT OVER THE PHOTOGRAPHS OR VIDEO CLIPS OF THE COEUR DE L' OCEAN

The Berne Convention¹⁰⁰ read with the Copyright Act, 1987¹⁰¹ would consider creations such as photographs or video clips of the wreck of the Coeur de l' Ocean to be entitled to protection since as they are secondary, or derivative, images of the original wreck.¹⁰²

Here, as per the Partnering Agreement Memorandum¹⁰³ and the agreement on the "Protection of Astorian Wrecks"¹⁰⁴ the Government of Rolga is the owner of the wreck with all right, title and interest and as shown above, the claimant holds no ownership whatsoever.

According to Section 2(3) of the Act, a creation may be granted protection if sufficient effort has been expended to make the work original in character and has been reduced to material

⁹⁷ Rachel Lin, "Salvage Rights & Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. Titanic?" 23 *Tul. Mar. L.J.* 483.

⁹⁸ Cl. 5 of the Partnering Agreement Memorandum.

⁹⁹ *Supra* note 91.

¹⁰⁰ Berne Convention, 1886.

¹⁰¹ Copyright Act, 1987 (Malaysia).

¹⁰² *Supra* note 97.

¹⁰³ Cl. 5, Partnering Agreement Memorandum.

¹⁰⁴ ¶ 9 p. 3, Fact Sheet.

form.¹⁰⁵ For a work to qualify for copyright protection it must be original, that is, is independently created, and not copied from other works. Further, a derivative work is one based upon a pre-existing original works, like a sculpture, painting, or any other form, which may be converted¹⁰⁶ into a *translation, adaptation, arrangement and other transformations of works eligible for copyright*.¹⁰⁷

The shipwreck itself, however, cannot be copyrighted because the author did not create the wreck. In *Leigh v. Warner Brothers*¹⁰⁸, the court found that the plaintiff's copyright in a photograph of a sculpture did not extend to copyright in the sculpture itself. The photograph of the sculpture was a valid derivative work because it recast the pre-existing work. Derivative works receive thin copyright protection that only prohibits exact copying of the existing work. The court found that, while other authors could not copy the photograph, the author could not restrict others from creating new derivative works by taking their own photographs of the sculpture.

By analogous application of this principle, a salvor's rights in copyright would be limited to protection against the copying and distribution of the images the salvor took of the wreck, but the salvor would have no proprietary interest in the physical wreck itself.¹⁰⁹

In a claim of infringement of the claimant's copyrighted images, then, they will have to prove that Aquatic View copied or distributed the image the salvor made of the wreck, because the salvor does not have a copyright in the wreck. Hence, the claimant has no claim in copyright against a party who visited the wreck site and made their own original image of the wreck.

Also, since the Government of Rolga has permitted Aquatic View in the capacity as the owner to conduct tours, as long as no interference with the salvage operations is shown, the

¹⁰⁵ Section 2(3) (a), (b) Copyright Act, 1987 (Malaysia).

¹⁰⁶ *Supra* note 97.; *Bridgeman Art Library, Ltd. v. Corel Corp*, 36 F. Supp. 2d 191.

¹⁰⁷ Section 8 (1) (a) Copyright Act, 1987, (Malaysia).

¹⁰⁸ 212 F.3d 1210 .

¹⁰⁹ Colin T. Cameron, "In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works" 15 *Tex. Intell. Prop. L.J.* 31.

same may be done and photographs and video clips may be taken and distributed, provided they are not the ones taken by the salvor.

11.3. THAT EXCLUSIVE RIGHTS OF DOCUMENTATION CONFLICTS WITH THE PURPOSE OF SALVAGE LAW

The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress. The law does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value.¹¹⁰ Traditionally, the inducement for salvage service is limited to the court's award of compensation and reward. However, to award, in the name of salvage service, the exclusive right to photograph and document a shipwreck, will convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors.¹¹¹

Even in the *Haver Appeal*¹¹², the court of appeals asserted was that incentives created with sole photography rights would run counter to the purpose of salvage law. Since this would lead to the salvors being less inclined to recover property because they might profit more by leaving the property in situ and selling the photographed images.¹¹³

Here, the claimant is the salvor who has signed an agreement with the Respondent as to the distribution of the artefacts and property recovered. There is no mention as to right to document the operations in the agreement and neither does salvage law recognise such rights, as established earlier. However, even if the claimant has signed a documentary deal with an International Broadcasting Company¹¹⁴, they have no right to curtail the Respondent's rights

¹¹⁰ Robert D. Pelt, "Salvaging Historic Shipwrecks", 25 *Tul. Mar. L.J.* 47.

¹¹¹ Craig J.S. Forrest, "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?", 34 *J. Mar. L. & Com.* 309.

¹¹² (1999) 171 F.3d 943.

¹¹³ *Supra* note 93.

¹¹⁴ ¶ 11, p. 4, Fact Sheet.

as the owner to permit other video clips from being distributed or even other tours from being carried out, as long as their operations as *salvors* are not affected.

It is submitted that salvage law is not aimed to serve the commercial interests of the salvors and at the most may compensate the recovery and operations costs, this deal so engaged in by the Claimants is not related to the agreement and the Respondent is not bound by it.

11.4. THAT AQUATIC VIEW'S OPERATIONS ARE ALLOWED IN PUBLIC INTEREST

In *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*,¹¹⁵ the court held that archaeological preservation, on-site photography and the marking of sites are particularly important to public interest with respect to a ship wreck as it constitutes a “window in time” providing an unique opportunity to create a historical record of an earlier era. Also, courts have always distinguished between a case involving the salvage of a historic wreck and one concerning a modern wreck, holding that “in the case of ‘historic salvage’, it is desirable to keep these artefacts together for public display, and therefore, *traditional salvage rights must be expanded* for those who properly take on responsibilities of historic preservation...”.¹¹⁶ It also must be noted that in *Cobb Coin Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*¹¹⁷, the court suggested that Admiralty principles, as applied to the law of salvage of historic shipwrecks, could be used to safeguard the artefacts and invaluable archaeological information and the public’s interests in the shipwreck could be accommodated through a proper award of a portion of the artefacts to the state.¹¹⁸

Here, with the efforts so expended by Aquatic View, the Coeur de l’ Ocean as a significant historic would be accessible through the promotional materials as well as the tours so arranged; thereby benefiting the public since an apportionment clause has already been

¹¹⁵ 631 F. Supp. 308, 312-13.

¹¹⁶ *RMS Titanic Inc. v. The Wrecked and Abandoned Vessel (“Titanic II”)* 9 F. Supp. 2d 624.

¹¹⁷ 549 F.Supp. 540.

¹¹⁸ Cl. 5, Partnering Agreement Memorandum.

decided upon¹¹⁹, with such an opportunity the members of the public or even members of the academic community may gain access to it. Though the Claimant has also arranged for a broadcast of the operations, the Respondent is under no obligation to address the commercial concerns external to the agreement so signed.

11.5. THAT PERMISSION GRANTED TO AQUATIC VIEW DOES NOT INTERFERE WITH THE CLAIMANT’S RIGHTS

The UNCLOS III agreement and the Buenos Aires Draft Convention seek to provide basic legal protection for shipwrecks and precious artefacts that are subject to increasing levels of damage and destruction. Along with delineating state responsibility to protect underwater heritage.¹²⁰ According to Article 149 of UNCLOS III, parties to the agreement accept a basic responsibility to “*take all reasonable measures to preserve underwater cultural heritage for the benefit of humankind.*”¹²¹ The Preambles of the Buenos Aires and UNESCO Draft Conventions emphasize the need for cooperation among states, salvors, divers and their organizations, marine archaeologists, and museums and other scientific institutions. Both instruments are the product of widespread consultations with disparate interests in the underwater heritage.¹²²

The permission so granted to the tour operator, Aquatic View, thus will help allow public access and provided the archaeological value and recovery of the artefacts are not disturbed, such an exercise in consonance with the State’s international obligations.

¹¹⁹ Cl. 5, Partnering Agreement Memorandum.

¹²⁰ Marian Leigh Miller, “Underwater Cultural Heritage: Is the Titanic in peril as courts battle over the future of the historical vessel?”, 20 *Emory Int’l L. Rev.* 345.

¹²¹ Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, in ILA, Report of the Sixty-Sixth Conference 432 (1994).

¹²² *Supra* note 93; See generally, Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, in ILA, Report of the Sixty-Sixth Conference 432 (1994).

11.6 THAT THE CLAIMANT HAS RIGHT OVER SALES AND MARKETING ONLY OVER MERCHANDISE

According to Clause 6 of the Agreement, the Claimant has the right to use the name “Couer de l’ Ocean” in association with sales and marketing of merchandise related to the wreck. However, Aquatic View as a tour operator has commercially marketed CDs with songs entitled with the name of the wreck as souvenirs.¹²³ This concerns the promotion of the tour rather than commercially exploit the name by selling merchandise, that is, goods for sale. The souvenirs serves as mementos rather than commercial goods and therefore no right of the Claimant are infringed.

Also, the contract only gives a right over goods “related” to the wreck there is no express contractual prohibition over permitted use of the name of the wreck.

¹²³ ¶ 11, p. 4, Fact Sheet.

RELIEF REQUESTED

In light of the arguments presented, the respondent herein requests this Arbitral Tribunal to find and hold as follows:

1. That this Hon'ble Tribunal does not have jurisdiction to decide on this dispute.
2. That the State of Astoria has not abandoned title to the wreck.
3. That the Claimant has not acquired title to the property under the law of finds
4. That salvage legal principles are not applicable.
5. That the claimant is not entitled to salvage remuneration and If salvage law is applicable, The contract shall not govern the remuneration.
6. That the claimant's acts amounted to misconduct and therefore the claimant is not entitled to any remuneration.
7. That the Respondent does not have exclusive rights to photograph and document the wreck.
8. That the Claimant has no copyright over the photographs and video clips of the wreck.
9. That the permission granted to Aquatic View does not interfere with the Claimant's rights and performance as per the Contract.