

IN THE INTERNATIONAL CENTRE OF ARBITRATION

HO CHI MINH CITY, VIETNAM

THE 2009 LAW ASIA INTERNATIONAL MOOT COURT

CASE CONCERNING THE SALVAGE OPERATIONS OF COEUR DE L' OCEAN

BENEVOLENT HERITAGE INC.

(CLAIMANT)

V.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

2009

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STATEMENT OF JURISDICTION

Benevolent Heritage Inc and The Government of Rolga have submitted this dispute to the International Centre of Arbitration pursuant to their Agreement dated September 27, 1995. Clause 10 of the agreement clearly stipulates that the parties will in case of any difference or dispute; submit the same to the International Centre of Arbitration. The decision of the Arbitration tribunal shall be binding on both the parties. Moreover, the tribunal is to follow the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration model law on International Commercial Arbitration. The parties have agreed to the contents of the Compromis. The Parties shall accept any Judgment of the tribunal as final and binding upon them and shall execute it in its entirety and in good faith.

QUESTIONS PRESENTED

I

Whether International Centre of Arbitration is the appropriate forum to decide the instant dispute.

II

Whether the Partnering Agreement Memorandum entered between the claimant and respondent for salvaging the shipwreck is null and void under the Malaysian Contracts Act, 1950.

III

Whether Benevolent Heritage Inc. has exclusive rights of photography and documenting of the “Coeur De l’ Ocean” and if the same can be envisaged as a part of salvage rights.

STATEMENT OF FACTS

1. That Astoria was a colonial empire of the West and one of the notable adventures was that of the journey made by the Coeur de l' Ocean to the city of Zamzala, now part of the state of Rolga.
2. That whilst enroute to another destination, the vessel sank, and it was carrying large of cargoes and other war booty.
3. That Rolga gained independence from Astoria on 7th November 1959 and since then has prospered on agriculture and tourism.
4. Government of Rolga is a monist state and follows the incorporation approach.
5. Rolgan laws are in pari material with Malaysian law. Thus, all agreements fall under the Contract Act,1950.
6. That in 1980's , reports were made of rampant lootings of historic wrecks in territorial waters of Rolga.
7. That in 1990,Mr. Bernard Bodd, a major shareholder in Benevolent Heritage Inc. submitted a proposal to the Rolga Cultural heritage Committee for recovery of historic wrecks which involved the discovery of Coeur de l' Ocean.
8. That the Government approved the project and the partnering Agreement memorandum was signed on 27th September 1995.
9. That the Government of Rolga strengthened its cultural heritage appreciation, adopted the United Nations Convention on the Protection of Underwater cultural heritage. A new law was passed in 2000 to protect wrecks of historical and cultural significance to Rolga.
10. That the government entered into an agreement on the 'protection of Astorian Wrecks' with the Government of Astoria in 2001.

Memorial for the Claimant

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Statement of Facts

11. That in the light of these developments, the Government was questioned on its alleged involvement with the commercial exploitation of the artefacts recovered from the Coeur de l' Ocean
12. That the artefacts were found to be fragmentary.
13. That Aquatic view, a tour operator was given permit to organise exclusive underwater trips to the wreck. It started taking photographs and video clips of the wrecks.
14. That these developments plus the strengthening of the protection of the cultural heritage has put doubts in the mind of the Benevolent Heritage Inc. to reconsider their position as they felt that further efforts into other wrecks would be harmful to them.
15. That the parties took steps at finalizing the distribution of artefacts. At the same time heritage Inc. has accused the Government of unfair distribution contrary to the 1995 agreement.
16. That the dispute is now before the International Arbitration Centre.

SUMMARY OF PLEADINGSCONTENTION 1

THAT THE INTERNATIONAL CENTRE OF ARBITRATION IS THE APPROPRIATE FORUM TO DECIDE AND SETTLE THE INSTANT DISPUTE.

- Most Salvage contract disputes e.g. Lloyd's Open Form Salvage Agreement refer their disputes to an international arbitral tribunal.
- Pursuant to Article 187 and 188 of UNCLOS, Contract related disputes are fit for an International Arbitrator.

CONTENTION 2

THAT THE PARTNERING AGREEMENT MEMORANDUM ENTERED BETWEEN THE CLAIMANT AND RESPONDENT FOR SALVAGING THE SHIPWRECK IS NULL AND VOID

- Legal Object of the contract i.e. shipwreck is vitiated.
- The consent of Benevolent Heritage was not free when it entered into the contract.
- The Govt. of Rolga is not the owner of the sovereign Coeur de l' Ocean.
- The distribution of artefacts rested on a 'Joint marketing plan' making it a contingent contract.

Summary of Pleadings

- This main contract is void as the ‘joint marketing plan’ was never formulated.
- The Performance rights and salvage rights of the claimant have not been infringed in any way.
- The distribution of profits and artefacts should take place solely on the basis of salvage legal principles.
- The Salvor is entitled to 75% of the monetary value of the artefacts.
- The salvor is entitled to a share from the artefacts recovered.

CONTENTION 3

THAT BENEVOLENT HERITAGE INC. HAS EXCLUSIVE PHOTOGRAPHY
AND DOCUMENTARY RIGHTS OF THE COEUR DE L’ OCEAN

- Aquatic view’s planned photographic expedition will devalue its salvor in possession rights.
- It will disrupt operations because a safety hazard arises when more than one expedition conducts dive operations at the site.
- Salvage law and Intellectual Property laws are related and Copyright would extend in the instant case

PLEADINGS

1. That International Centre for Arbitration is the appropriate forum to decide and settle the instant dispute.

It is humbly submitted before the Hon'ble Arbitrators that International Centre for Arbitration is the right and the appropriate forum to decide on the dispute between the Benevolent Heritage and the Govt. of Rolga.

The claimant and the respondent entered into an agreement in 1995 which was based on performing salvage work by the claimant for which he was ensured profits and artefacts in return. The International Centre for Arbitration is the appropriate and the suitable forum to decide this dispute. This is in pursuance with Article 187 and 188 of the UNCLOS where it is stated that contract related disputes are fit to be referred to an International Arbitrator. Without doubt, this is the right forum to settle the instant decide. Moreover, in salvage agreements which follow the Lloyd's Open Form Salvage Agreement, disputes are generally referred for arbitration¹. Thus, when it comes to maritime disputes especially disputes relating to salvage activities, International arbitral tribunals are preferred. Moreover, the Claimant has full faith in the International Centre for Arbitration and that it will settle the dispute holding the values of Justice and fairness intact.

¹Geoffrey Brice, *Q.C. International maritime law: Salvorial negligence in English and American Law*, 22 Tul. Mar. L. J. 569 (1998).

2. That the Partnering Agreement Memorandum entered between the claimant and respondent for salvaging the shipwreck is null and void under the Malaysian Contracts Act, 1950.

It is humbly submitted before the Hon'ble Arbitral Tribunal that for a valid contract, presence of a lawful object is indispensable as mentioned under S. 10 of the Malaysian Contracts Act, 1950. The object of the contract in question is the shipwreck Coeur de l' Ocean. It is humbly submitted that the Govt. of Rolga has no authority to claim possession over the instant shipwreck and allowing the salvage of the same is without jurisdiction and arbitrary.

Moreover, it is put forth that a ship always carries with it the flag of the nation of origin. Even on high seas, International Law mandates a ship to fly its flag. Moreover, a state owned vessel carries with it the sovereignty of that nation. International Law operates on the sound assumption that all nations are sovereign and that mutual respect will be shown by all to one another. The United Nations Convention on Law of Seas (UNCLOS) describes high seas as an area belonging collectively to all nations and a common heritage of mankind. Moreover, when a nation respects and allows other nations ships to pass through in its waters, it is indirectly respecting the sovereignty of that nation. In the instant case, the Coeur de l' Ocean is a state owned ship which was carrying war-time materials. Since the ship belonged to the state of Astoria, its sovereignty still remains and the fact that it has now sunk cannot escape the fact that it was a ship and will remain as a ship even if it means it is a ship in wrecks. The nation of Astoria had never abandoned the wreck Coeur de l' Ocean. Neither did they have an intention to do so. In the instant case, Coeur de l' Ocean was a sovereign ship and the fact that now it is in wrecks does not dissolve it from its sovereignty. The Govt. of Rolga by claiming sovereignty

over the shipwreck is acting against the very principle of International Law that all nations are sovereign and that no nation will harm or infringe upon the sovereignty of another. This sovereignty is also exhibited by Article 2 of the United Nations Charter, 1945 to which both nations are members. Both the nations are bound by the UN charter and International Law. Moreover, just because the shipwreck lies in the territorial waters does not mean that the Govt. of Rolga is now the owner of the shipwreck. The state of Rolga is claiming sovereignty over the shipwreck in accordance with UNCLOS as the wreck lies in its territorial waters. However, Article 2 (3) of UNCLOS makes an exception that a state will exercise sovereignty over the territorial sea subject to the rules of International Law. Thus, Rolga's claim over the sovereignty over the shipwreck falls flat as it is subject to International Law which clearly bars it from claiming sovereignty over a state vessel/ shipwreck.

Furthermore in the landmark Case of *Colombus*², Courts applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their owners. Under Maritime Law, the original owners still retain their ownership interests in such property. The salvors are entitled to a liberal salvage award which often exceeds the value of the services rendered;³ the ship in the instant case S.S. Central America was never abandoned expressly. The Court went on to hold that Abandonment is a voluntary act, which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership. The proof that need be shown must be strong, such as the owner's express declaration abandoning title. In another case⁴, the Court said that "Abandonment is said to be a voluntary act which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate

² *Colombus-America Discovery Group v. Atlantic Mutual Ins'ce Company*, 974 F.2d 450 (1992).

³ *Ibid.*

⁴ *The Port Hunter*, 6 F. Supp. 1009.

ownership." The proof that needs be shown must be "strong . . . , such as the owner's express declaration abandoning title.⁵In *Hatteras Case*⁶, the Court held that Abandonment can only be shown by an express statement by the owner indicating his intention to abandon. It is thus established that the nation of Astoria had never abandoned the wreck Coeur de l' Ocean. Neither did they had an intention to do so. The fact that the wreck was a sovereign wreck belonging to the state of Astoria is well-established.

It is reverently submitted that it is now a customary law that sunken ships which were government vessels are not dissolved of their state sovereignty irrespective of their location and the time period. It is also imperative to show some policies and statements of different nations regarding sunken vessels all of which are strictly in accordance with principles of International Law. The State of France has declared all its shipwrecks which were owned or operated by the state as sovereign ships not subject to salvage activities or exploitation⁷. Germany in its statement⁸ clearly mentioned that - "Under International Law, warships and other vessels or aircraft owned or operated by a State and used only on government non- commercial service ("State vessels and aircraft") continue to enjoy sovereign immunity after sinking, wherever they are located." The words 'wherever they are located' is safe to conclude that it even includes other nations' territorial waters. The nation of Japan⁹ has made it clear that - "According to international law, sunken State vessels, such as warships and vessels on government service, regardless of location or of the time elapsed remain the property of the State owning them at the

⁵ T. Schoenbaum, *Admiralty and Maritime Law*, 15-7, at 512 (1987); Hener, 525 F. Supp. at 357; Brady v. The Steamship African queen, 179 F. Supp. 321, 324 (E.D. Va. 1960).

⁶ *Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981).

⁷ Sunken warships, military aircraft and other sunken government property; protection policies, Federal Registrar, February 5, 2004 (Nbr. Vol. 69, No. 24). Retrieved from <http://regulations.vlex.com/vid/sunken-warships-military-policies-22710300>.

⁸ Ibid.

⁹ Ibid.

time of their sinking unless it explicitly and formally relinquishes its ownership.” The policy of the United Kingdom¹⁰ is in consonance with the above statements and policies. However, the policy of the United States is worth mentioning.¹¹ The United States of America claims sovereignty over shipwrecks which lie in the territorial waters of another nation. Further, the United States recognizes that title to foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea. It is brought to the notice of the tribunal that all major countries have come out with such policies and statements. This clearly highlights that all states are concerned about their vessels and the fact that now they are in wrecks does not dissolve it from their sovereignty. The presence of the wrecks in territorial waters of another nation also does not give the other nation the right to claim possession over the same.

Thus, Salvage activities should not extend to the shipwreck and the act of the Govt. of Rolga in operationalising salvage activities of the ship of another nation without their permission and consent is bad and illegal. Thus, the very subject matter or the object of the contract is assailed. The Govt. of Rolga does not possess the shipwreck Coeur de l’ Ocean and thus it is not the right competent party to contract. Presence of a lawful object is thus vitiated which makes the contract null and void.

The primacy of the title of ownership is intangible and inalienable. It is noteworthy to mention a watershed case in this regard, in *Sea Hunt v. Unidentified Shipwrecked Vessel* or

¹⁰ Ibid.

¹¹ Statement issued by Dept. of State, Written in Federal Register: February 5, 2004 (Volume 69, Number 24) DOCID:fr05fe04-167; Retrieved from <http://wais.access.gpo.gov>.

*Vessels*¹², the US Court of Appeals said that Commercial salvors have little to do with state vessels/ shipwrecks. The court further held that the lost crews be treated as foreign and sovereign ships and honoured graves, and are not subject to exploration, or exploitation. Hence, hon'ble arbitrators, in this case, the two ships La Galga and Juno both were Spanish shipwrecks and the state of Virginia could not claim sovereignty over the same as both were state vessels. Consequently, in the instant case, Coeur de l' Ocean is an Astorian ship. The Govt. of Rolga claimed sovereignty over the ship in 1995 while entering into an agreement with the claimant only in 2001 where Astoria transferred it's rights, interests and title. Moreover, the Astorian Govt. was not even informed about the ongoing activities on their shipwreck until 2001. Thus, the very subject matter of the agreement is not valid and as contemplated in S.10 of the Act, presence of a lawful object is vitiated in the instant case, thus the contract is null and void.

Thus, the contract entered into between the parties in 1995 is null and void. Moreover, clause 5 of the agreement which deals with the mode of sharing between the parties was contingent in nature and rested on the Joint marketing plan (another contract which was infact never finalised) and which was to decide how the artefacts were to be distributed. This contingency further makes this agreement not enforceable by law as per S.33 of the Malaysian Contract Act, 1950.

Also, for an agreement to be a valid contract, it should be made with free consent as stipulated under S.10 (1) of the Contract Act, 1950. The presence of Free Consent is however affected by certain factors, one of which is Misrepresentation. Misrepresentation has been defined under S. 18 of the act. S.18 defines Misrepresentation as the following –

“Misrepresentation” includes—

¹² 221 F.3d 634, 638-639 (4th Cir., July 21, 2000).

- (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
- (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

In the instant case, the consent of the salvor Benevolent Heritage is not free. The Govt. of Rolga has falsely asserted and warranted itself as the true owner of the shipwreck Coeur de l' Ocean. However, this is not the case. The shipwreck is a sovereign shipwreck belonging to the nation of Astoria and not the Govt. of Rolga (as in 1995). This way the Govt. showed and asserted itself as the owner of the wreck however this was not the case. This way the consent of the salvor was based on misrepresentation of the Govt. of Rolga that they are the owners of the wreck and that they are competent to approve salvage operations for the same. Thus, Misrepresentation applies in the instant case and the contract is voidable at the option of Benevolent Heritage as per S.19(1) of the Malaysian Contract Act, 1950. Benevolent Heritage hereby pleads that the contract be declared void for the same reason.

It is also humbly submitted that the Govt. of Rolga has tampered with the performance rights of the 1995 agreement it entered into with the claimant salvor. The Govt. of Rolga entered into an agreement with the Govt. of Astoria called "Protection of Astorian Wrecks" in 2001. This agreement was actually entered in order to recognize Astorian interest in the artefacts recovered. In this agreement, Rolgan government recognizes that Astoria has a continuing interest in articles recovered from Coeur de l' Ocean. However, such an interest was infact never envisaged in the

1995 agreement. The distribution of the artefacts pursuant to the agreement was to take place between Benevolent heritage and the Govt. of Rolga. Law of Contracts does not permit a third party to come in after 6 years of agreement and claim profits and benefit from the agreement. The agreement “Protection of Astorian Wrecks” is bad in law and affects the performance of the 1995 agreement between Rolgan Government and Benevolent heritage.

Moreover, the agreement between the Govt. of Rolga and Govt. of Astoria does not recognize any interest of the salvor in the artefacts recovered. The agreement lays down the principles which would govern the distribution of artefacts between the two nations. It nowhere recognizes any interest of the salvor. This is completely contrary to the 1995 agreement between the claimant and the Govt. of Rolga where the distribution was to take place between the salvor and the Govt. of Rolga. This way the Govt. of Rolga has interfered with the very purpose of the 1995 agreement i.e. distribution of artefacts recovered from the wreck of Coeur de l’ Ocean. The agreement with Astoria defeats the 1995 agreement with the claimant. Thus, the Govt. of Rolga has interfered with the performance rights of the 1995 agreement entered with Benevolent Heritage regarding the distribution of artefacts.

The Govt. of Rolga has also interfered with the performance of the 1995 agreement by ratifying the UNESCO Convention on Protection of Underwater Cultural Heritage, 2001. The agreement clearly stipulated that the salvage activities of the shipwreck are to be carried out for the benefit of mankind since in situ preservation of the shipwreck will not be feasible owing to its location and that artefacts recovered would be suitably sold or else distributed between the parties. This way both the parties agreed that in situ preservation of the shipwreck will not be the best option available and that salvaging the wreck will be better for mankind as a whole. The

same was also in pursuance with Article 149 of UNCLOS. However, the Govt. of Rolga by ratifying the UNESCO convention has acted ultra-vires and unreasonable. The UNESCO convention¹³ firstly prohibits and is against the sharing agreements between the Govt. and Benevolent Heritage. It then goes on to exclude the law of salvage and the law of finds to historic shipwrecks.¹⁴ Various eminent scholars have pointed and commented on this controversial article. Law of Salvage and Law of Finds have been a part of Maritime law since ages. One solitude Convention cannot put shipwrecks beyond its scope. Moreover, the Convention is now lex loci since Rolga is a monist state following the Incorporation approach. In 2001 Mr. Patrick Griggs, in his capacity of president of Committee Maritime International (CMI) wrote a letter to Koichiro Matsuura, Director – General of UNESCO referring to Article 4 of the drafted convention and remarked that¹⁵ –

“The CMI is firmly of the opinion that the law of salvage is not incompatible with the goals of the draft convention. In our view there is no reason why the law of salvage should be deemed a threat to the protection and preservation of underwater cultural heritage. The law of salvage has long had international recognition and is explicitly recognised in Article 303 of UNCLOS. Article 4(a) is ambiguous as to what entity may be deemed "the competent authority" and that article 4 could be applied to restrict legitimate salvage operations which are otherwise in conformity with International Law.”

¹³ Article 2(7) of the UNESCO Convention on Protection of Underwater Cultural Heritage, 2001.

¹⁴ Article 4 of the UNESCO Convention on Protection of Underwater Cultural Heritage, 2001.

¹⁵ ROBERTO GARABELLO, THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER 2001 CONVENTION (Brill Academic publishers, 2003).

This very well illustrates the fact that this convention is a shark in the disguise of an angelfish. Article 3 of the Convention is again ambiguous as it allows salvage activities to be sanctioned by the competent authorities however no such criteria has then been laid down as to who is competent. It is important to keep in mind that this convention now forms a part of the municipal law of Rolga and that the provisions of this contention negate each and every purpose of the 1995 agreement between Benevolent Heritage and the Govt. of Rolga.

It is thus established that the agreement signed in 1995 between the Govt. of Rolga and Benevolent Heritage is null and void. By saving the property, Benevolent Heritgae has acquired a jus in re, a complete possessory right against all persons claiming an interest in it, to retain it until his compensation is paid, or until he can proceed to enforce his right against it by due course of Law. Moreover, as observed by Judge Peters in The Fair American case, if the owner or the salvage authorizer receives the goods then the debt is absolute. The acceptance of the goods is consummation, and not an extinguishment of the claim. Here, the unsold undistributed goods lie with the Govt. thereby making it absolutely and personally liable to reward the salvor.

The claimant in the instant case is a salvor and has put in huge investments, time and effort in salvaging the wreck of Coeur de l' Ocean. A lot of sweat and toil has gone into the salvaging of the shipwreck and now the same needs to be rewarded. Benevolent Heritage is a salvor and has performed salvage activities. Thus, salvage legal principles in accordance with the International Admiralty Law needs to be applied. Law of salvage is a recognized form of law in practice since centuries and also forms a part of the municipal Law of Rolga (the same being a 'monist' state). Calculation of Profits and distribution of artefacts should be done solely on the basis of salvage legal principles. In order to determine the manner in which profits are calculated and artefacts are

distributed, hon'ble arbitrators can consider the following factors as laid down in various leading cases¹⁶ -

- (a) The labor expended by the salvors in rendering the salvage service
- (b) The promptitude, skill, and energy displayed in rendering the service and saving the property.
- (c) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.
- (d) The risk incurred by the salvors in securing the property from the impending peril.
- (e) The value of the property saved.
- (f) The degree of danger from which the property was rescued.
- (g) the time used and expenses and losses incurred by the salvors;
- (h) the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salvaged.

In the instant case, Benevolent Heritage spent a lot of labor in salvage service. The skill, energy and promptitude used was also far above excellence, the value of property was huge as the shipwreck was deep below the oceanbed and huge machines were required to do it skillfully; the wreck has been described as one the 'most bedazzling underwater treasures ever found today'

¹⁶ Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869) ; B.V. Bureau Wijsmuller v. United States, 702 F.2d 333; W.E. Rippon & Son v. United States, 348 F.2d 627; Columbus-America Discovery Group, 974 F.2d at 468.

with an estimate worth more than USD \$1 billion. Moreover, constant time and effort has been put in since 1995. The innovative high-tech engineering equipment required for the salvage and offshore operations of the late 20th century is comparable with that developed for the space exploration industry. All the very latest scientific techniques have been employed to preserve delicate treasures that would otherwise decompose when brought to the surface. All this demand on resources, both human and material, represents a considerable investment, a commitment of assets which is difficult to justify when the return is so precarious.¹⁷

However, these factors are not exhaustive. They were laid down long back in history. The times have substantially changed today. Since Law is an agency that regulates the society, it also needs to change with time. The above mentioned legal principles were written long back based on the facts and circumstances of those cases. Hon'ble arbitrators have to do justice in their decision and for the same they should also taken into consideration the investment that has gone in searching the shipwreck. Benevolent Heritage has done a great favour to the nation of Rolga by locating the shipwreck and protecting it from looting and exploitation from the fishermen and other middlemen. This search has been described as one of the 'most bedazzling underwater treasures' ever found. Moreover, the cultural and historical significance of the ship is tremendous. Benevolent Heritage has protected this shipwreck from being exploited. To do the same, a lot of money has been spent in searching the location of the shipwreck. This investment should not go waste. The Govt. of Rolga also needs to reward this investment too. If the arbitral tribunal decides to overlook this investment, then this decision shall greatly affect further salvage

¹⁷ David L. Williams, *Salvage! Rescued From The Deep*, 16 (1st ed. 1991).

operations in time and space.¹⁸ A salvage company performs salvage operations in the hope that apart from serving the society and contributing towards development of Cultural heritage, it will also make profits. However, to search the exact location of a shipwreck is too time and cost intensive. This investment is sometimes overlooked. The salvor is only awarded on the lines of the market value of the shipwreck.¹⁹ Even the social value of the shipwreck is neglected when it comes to rewarding the salvor. The social value of Coeur de l' Ocean is far greater than that of its market value. However, the Govt. is overlooking both the social value of the shipwreck and the investment that has gone into searching the shipwreck. If such a huge investment is gone unrewarded, then salvors will find it difficult to make profits from salvage activities and the same will then come to an end. This will be dangerous for both sides – the salvor and the owner of the wreck.²⁰

Thus, the fact that the claimant salvor deserves a handsome reward in the form of distribution of artefacts and profits is without doubt. Moreover, a salvor is entitled to a liberal award. The profits and artefacts need to be distributed solely on the basis of salvage legal principles. These principles for distribution of artefacts between the parties were dealt with at large in the Cobb Coin company's case.²¹ It will be noteworthy to mention here that all salvage contracts generally stipulate a 75%-25% sharing agreement. In this, 75% goes to the Salvor and 25% goes to the owner.²² Under traditional salvage rules, the salvor receives a lien against the salvaged property²³ and is usually entitled to his expenses plus a salvage award. It is basic that more than a quantum

¹⁸ Murky Waters, *The law and Economics of Salvaging Shipwrecks*, retrieved from <http://www.econ.uconn.edu/>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ *Cobb Coin Company Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186.

²² Ibid.

²³ Gilmore and Black, *The law of Admiralty*, 628 (2d ed. 1975).

meruit is involved. The remuneration to the salvor and benefit to the owner are always larger where the property that receives assistance is large than where it is small; and vice versa.²⁴ Here, since the social and the monetary value of the shipwreck Coeur de l' Ocean is huge the salvor should be entitled to a larger share as per decisions of various Courts. In addition, the salvor should also be entitled to a share of the artefacts recovered from the wreck. This is based on the sound premise that it is due to the salvor's effort that artefacts which have been in sea for more than 190 years are now in the hands of the Govt. for the benefit of mankind or else it would have been unknown to the terrestrial world. Moreover, since the social value of the wreck far outweighs its monetary value, a share of the artefacts is justifiable and in accordance with principle of Equity²⁵. In this case, the portion representing the State's interest would be in the form of historical artefacts (mainly). It may well be that, where an item of highly unusual historical, cultural, or archaeological significance is salvaged, such a piece might be awarded to the State due to its indivisibility and uniqueness, regardless of the proportion of the total find which it might represent, were an estimate of the monetary value attempted. However, other artefacts could be distributed between the state and the salvor in a manner the arbitral tribunal thinks fit. In the landmark case of Cobb Coin²⁶, the Court went ahead and gave the salvors certain artefacts it had recovered from the ocean. The case was won by Cobb Coin on merits. It is submitted that the ratio and decision of the Cobb Coin case should be followed in the instant dispute and the salvor should be entitled to an award of 75% monetary value of the artefacts recovered along with some artefacts²⁷.

²⁴W. Marvin, *A treatise on the law of wreck and salvage*, 122-23 (1st ed. 1858).

²⁵ *The Aquila*, 1 C. Rob. 36, 165 Eng.Rep. 87 (1798).

²⁶ *Supra* n. 11.

²⁷ *Supra* n. 11.

In the case of *Sabine*²⁸, the Court went ahead and dealt with the ‘Theory of Remuneration’ for salvors. The Court said that Compensation as “salvage,” is not to be viewed as merely pay on the principle of ‘quantum meruit’ or as ‘remuneration pro opere et labore’, but as a reward given for perilous services rendered, and as an inducement to mariners to embark in such dangerous enterprises to save life and property.

It is for all these reasons and Law that Benevolent Heritage seeks distribution of Profits and Artefacts recovered solely on the basis of Salvage Legal Principles. It is humbly wished that the arbitral tribunal awards a 75% share to the salvor of the monetary value of the wreck and entitled to it possession of some of the artefacts recovered. The Benevolent Heritage in accordance with these principles sets out that the following distribution which may be ordered by the Hon’ble Arbitral Tribunal if it deems fit –

Total No. of Artefacts present in the repository of the Govt. of Rolga - 21

No. of Artefacts whose Appraised Values are estimated –13

Aggregate Value of the Artefacts whose Appraised Values are estimated - **\$ 616,298,000**

This is now to be distributed in two sets. Benevolent Heritage gets 75 % of the aggregate value.

Share of Benevolent Heritage – $0.75 * 616,298,000 = \$ 462,223,500$

Share of the Govt. of Rolga – $0.25 * 616,298,000 = \$ 154,074,500$

²⁸ 101 U.S. 384.

Thus, Benavent Heritage is entitled to a share of \$ 462,223,500. However, there are still 8 artefacts whose appraised values are not yet determined. These artefacts are Indigo (200 Chests), Tobacco (10 Tons), Bronze Cannon with Astorian Marks (2), Comb (2), Olives and Pickles (3 Jars), Unknown Liquid (1 Bottle), Cannon Balls (12), Spices (70 Bottales). Now consideration has to be paid as to how these artefacts are to be distributed. There are 200 chests of Indigo. This can be distributed equally. Since the historical and archeological value of the same is not as high as of others, a share of it can be given to the salvor as his reward. Thus, it will be suitable if 100 chests are awarded to the salvor. Now, there are 10 tons of Tobacco. The same attends for tobacco. This can also be distributed equally between the parties. So Benevolent Heritage can be given a share of 10 tons of tobacco. There are 2 Bronze Cannon with Astorian Marks. Now this is one artefacts whose historical and social vale is much more than other artefacts. This is because of the historical aspect related to it. The Benevolent Heritage does not wish to ask for any Bronze Cannon simply because its true colours will be glow only in a museum and not with an individual. This is a rare species of artefacts found and is unique for its history. This needs preservation. So, Benevolent Heritage does not wish to ask for Cannons. However, in turn the salvor wishes that these Cannons should not be sold. They should be preserved in a museum or any other place which is open for Public-viewing. This will entail greater respect and value for the artefact. Then there are 2 combs and 3 Bottles of Olives and Pickles. These again can be equally distributed between the parties. The Govt. of Rolga can keep 50 % of these artefacts and give the remaining to the salvor. Then there is 1 bottle of Unknown Liquid. This liquid could prove to be dangerous. However, since the contents of the liquid are unknown, nothing can be said about the same. The liquid could be anything ranging from Poison to Medicine or Hair Shampoo. It is imperative that the Govt. uses its R&D to find out what this liquid is at the

earliest. It is for this reason that Benevolent Heritage does not want the Bottle of Liquid. However, Benevolent Heritage wishes a reward for excavating the bottle of liquid in good condition. Thus, the arbitrator may award any compensation to the salvor which it deems fit for excavating the bottle containing unknown liquid. Then there are 12 Cannon Balls. This also needs to be distributed between the parties. However, since these cannon balls have more of historical and social value than monetary value, the Govt. can be entitled to a share greater than Benevolent Heritage. In such a case, Benevolent Heritage can be given 42% (approximately) cannon balls i.e. 5 cannon balls out of 12. This shall be fair for both the parties. Now 70 bottles of spices remain. This can again be distributed equally between the parties. Benevolent Heritage can get 35 bottles and the Govt. can get the remaining 35 bottles.

This distribution is totally fair and just. In this regard as crux of the matter, Benevolent Heritage gets the following as Compensation/ Reward for its services –

- a. Money worth \$ 462,223,500 from the Govt. of Rolga.
- b. 100 Chests of Indigo from the recovered artefacts.
- c. 5 tons of tobacco from the recovered artefacts.
- d. 1 Comb and 1 bottle of Olives and Pickles.
- e. 5 Cannon Balls from the recovered artefacts.
- f. 35 bottles of Spices from the recovered artefacts.
- g. Special Monetary Reward (whatever the Arbitral tribunal deems fit) for excavating the bottle of Unknown Liquid.

3. That Benevolent Heritage Inc. has exclusive rights of photography and documenting of the “Coeur De l’ Ocean”.

It is humbly submitted before the Hon’ble Arbitral tribunal that Aquatic View, a specialized tour operator was given permit by the Government of Rolga to organize exclusive underwater trips to view the wreck of Coeur de l ‘Ocean. So far the company has sold 25 tickets at the price of USD \$20,000 each. It was also found out that the Aqua View staff have been taking photographs and making video clips of the wrecks. Now the claimant contends that it has the exclusive rights of photographing and documenting the wreck.

The question that has to be resolved is whether salvor in possession rights include the right to exclude others from visiting the wreck site to photograph the wreck? The methods used initially were simple and rudimentary nets, hooks and unencumbered but courageous divers – until developments in technology, spurred on by the rewards of plundering the deep, led to the invention. Today, the use of robotics, Global Positioning Systems and improved diving submersibles have increased the stakes in recovering wrecks and their cargoes from what was once thought to be depths unreachable by man.²⁹

The Law of salvage has today become so vast that it gives primary importance to salvors. The Possessory rights of first Salvors which says that the rights of salvors are wide and extensive, especially if they are in the position of being the first salvors³⁰. In *Hener v. United*

²⁹ Tan Twan Eng, *Can Intellectual Property Rights Form a Part of The Salvors Traditional Rights*, Retrieved from <http://web.uct.ac.za/depts/shiplaw/theses/twan-eng.pdf>.

³⁰ Ibid.

States,³¹ it was held that a salvor will frequently seek the right to salvage without interference, and the law will grant such an exclusive right if the first salvor's effort is ongoing and has a fair prospect of success.

These rights were first laid down in the case of *Cossman v. West*,³² wherein the Privy Council stated that, “In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence.”

In *R.M.S. Titanic v. Wrecked and Abandoned Vessel*,³³ the court held that the salvor in possession has a right to salvage the wreck free from the interference of others. In a case of historical and archeological salvage, interference may take two forms

1. Interference with the salvor's active operations and
2. Interference with the wreck itself.

In the instant case before the tribunal, Aquatic view started taking photographs of the wreck, thus causing interference with the wreck itself. In a case such as this, allowing another 'salvor' to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.

³¹ 525 F. Supp. 350.

³² [1887] 13 App Cas 160.

³³ 9 F.Supp.2d 624 (1998).

In *Moyer v. The Wrecked*³⁴ and Abandoned Vessel, known as the *Andrea Doria* it was held that archaeological preservation is most important in cases involving treasure ships where the preservation may constitute a ‘window in time...to an earlier era.

The court’s criteria in granting the injunction should include³⁵:

- i) The protection of archaeological interests, in particular the efforts taken to preserve the “archaeological integrity of the shipwreck;
- ii) The extensive effort invested in the project by the plaintiff, the meticulous documentation of the exercise, via video and photography

It is also submitted that one would have to get very close to the wreck and on the site with powerful lights in order to take photographs. Because photographers must work so close to the wreck, there is a significant risk of interference with or injury to the wreck itself. This has the potential of spoiling the historical and archaeological value of the wreck itself, which the salvor in possession has a duty to protect. Now if the salvor cannot protect the very wreck for which salvage operations are taking place, then there is no point in undertaking future salvage operations. In accord with salvage law, it is in the public interest for a single salvor to salvage the wreck and have exclusive photography rights. Heritage Inc. has been doing an acceptable job of salvaging the wreck in its deep ocean environment, maximizing the wreck's historical value, and returning the wreck's artefacts to society for the general use and education of all mankind which

³⁴ 836 F. Supp. 1099, 1994, AMC 1021 (D.N.J. 1993).

³⁵ Ibid.

can be seen from the quantity of artefacts recovered and articles auctioned at various museums. This should be read in conformity with the *R.M.S. Titanic case*.³⁶

Thus, it is in the public interest for Benevolent Heritage Inc. to continue its operations unhindered. Aquatic view's planned photographic expedition will only serve to disrupt Heritage Inc. operations and devalue its salvor in possession rights. It will disrupt operations because a safety hazard arises when more than one expedition conducts dive operations at the site. Furthermore, if Aquatic view is granted leave for its photographic excursion, the disruption will not end there. All others who wish to conduct the same activity will assert the same right. This could result in multiple photographic excursions to the wreck site each year with no practical way for Heritage Inc. to police the activities of the participants. Likewise, people who purchase photographs of the "Coeur de l' Ocean" should be purchasing photographs from Heritage Inc. and not from someone else who visits the wreck one time.

While the spheres of salvage law and intellectual property law appear to have nothing in common, the advancements made in the technology used for salvaging and the growing awareness of the potential for media exploitation would find these two fields of law spinning into one another's orbit more and more often³⁷. Article 1 Clause 8 of the Constitution of the United States of America, namely, to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."³⁸

³⁶ supra n.33.

³⁷ supra n. 22.

³⁸ The Constitution of the United States of America.

Article 2 of WIPO Copyright Treaty 1996 states that Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such³⁹. Cinema works and photographic works of Heritage Inc. would come under article 2(1) of Berne Convention for the Protection of Artistic and Literary Works 1886. A photograph of the wreck would fall under “pictorial, graphic and sculptural works,”⁴⁰ which have been defined by the Act as being “two-dimensional and three-dimensional works of fine, graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.” The documentaries and television broadcasts of the salvage operations would be protected under “motion pictures and other audiovisual works.”⁴¹ Heritage Inc. various live and recorded broadcasts would also be covered in South African copyright law under “Sound and Television Broadcasts⁴²”. Therefore the photographs and film recordings made of the “Coeur de l’ Ocean” would prima facie be protected by the intellectual property laws and the Copyright laws. Attention must be drawn to the fact that, for example, should a tourist who has seen a particularly unusual and striking shot of the wreck taken by Heritage Inc., then decide to take the same photograph himself, using the same lighting techniques, angles, exposures, composition, “he will have copyright in his photograph although the idea of taking the photograph was derived from his having seen the first photograph.”⁴³

It is therefore contended, in deciding to grant the exclusive rights of photography to the salvor, would be pragmatically correct in its approach, protecting the interests of the salvor in prohibiting anyone else from approaching the wreck site.

³⁹ WIPO Copyright Treaty, 1996.

⁴⁰ 17 USC s 102(a)(5).

⁴¹ 17 USC §102(a)(6).

⁴² South African Copyright Act, 1978.

⁴³ Copinger and Skone James, *Copyright*, 21 (1st ed. 1991).

In *R.M.S Titanic v. Haver*,⁴⁴ the court stated that ‘we are not satisfied that the law of salvage would be properly extended to give salvors exclusive image recording rights in yet to be saved property. The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress. To award, in the name of salvage service, the exclusive right to photograph a shipwreck, would, we believe, also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. The incentives would run counter to the purpose of salvage. Salvors would be less inclined to save property. Exclusive viewing and photographing of property is usually achieved by exercising exclusive possession and removing the property to a private or controllable location where it cannot be viewed or photographed except under conditions controlled by the owner. The court also held that for giving exclusive photography rights, the entire salvage law will have to be changed which will cause problems.

But the court seemed to have ignored the fact that these IP rights are also a ‘well-understood and consistently applied body of law’ enjoying “uniformity and international comity” as well. If such IP rights had been applied, the result would not have provoked a tsunami of confusion or outrage, since such IP rights, as we have seen, are universally acknowledged and internationally reciprocated.

When the Hon’ble court itself agreed that the underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress and if photography rights are given, salvors would be less inclined to save property and will start exploiting for its own benefit. In the instant case, Heritage Inc. has made meticulous efforts at preserving the heritage

⁴⁴ (1999) A. M. C. 1330.

and that is why the very reason that it doesn't want any third party to interfere with the wreck either directly with the wreck or indirectly by taking photographs. If exclusive photography rights are not given, then it won't be an operation serving the salvors. The incentives would not run counter to the purpose of salvage. Although nowhere it is explicitly mentioned that law of salvage includes the right to exclude third parties from taking photographs, but if the very purpose of salvage is to preserve cultural heritage and give archaeological importance to the artefacts, then allowing tour operators approach the wreck for various purposes and in the process damaging the historical wreck, the very purpose of law of salvage will be defeated. Hence the court erred in Haver's case when they allowed third parties to have expeditions to the Titanic wreck and take photographs thereby defeating and hampering the very aim and purpose of law of salvage. Therefore, in the instant case exclusive rights should be given to Heritage Inc. in conformity with Law of Salvage and Intellectual Property laws.

Therefore, it is humbly submitted that looking at the claimants efforts in the instant case, the meticulous documentation and efforts to preserve the wreck, keeping in mind the very purpose of Law of Salvage, Heritage inc. has the exclusive rights of photography and documentation.

REQUEST FOR RELIEF

Wherefore In light of the issues raised, arguments advanced and authorities cited, it is humbly requested that the Tribunal may adjudge and declare that -

1. The 1995 agreement between the Benevolent Heritage and Govt. of Rolga is null and void.
2. That Aqua View be stopped from carrying out its tour-operations.
3. That Aqua View shall indemnify Benevolent Heritage for the loss caused by the photographs (taken by Aqua View) of the shipwreck.
4. That the distribution of profits and artefacts be on the basis of Salvage Legal Principles.

Respectfully Submitted

Counsel for the Claimant, Benevolent Heritage Inc.