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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 RESPONDENT

2009

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STATEMENT OF JURISDICTION

The Government of Rolga and Benevolent Heritage Inc. 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 for Arbitration is the appropriate forum to decide and settle the instant dispute.

II

Whether the sovereignty of the Govt. Of Rolga extends over the wreck Couer de l' Ocean and if it is the competent party to perform salvage operations for the same.

III

Whether the government of Rolga has interfered with the claimants rights and performance under the agreement by entering into Agreement with Astoria, by ratifying the 2001 UNESCO convention and by allowing the tour operators to organise wreck divings to the wreck site including the taking photographs.

IV

Whether Benevolent Heritage Inc. enjoys exclusive rights of photographing and documenting of the Coeur de l' Ocean.

V

Whether the salvor Benevolent Heritage is guilty of negligence and mishandling the artefacts while performing salvage work of Coeur de l' Ocean.

VI

Whether the distribution of profits and artefacts can be on the basis of Salvage legal Principles while the 1995 agreement is operational.

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.

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 PLEADINGS

CONTENTION 1

THAT INTERNATIONAL CENTRE OF ARBITRATION IS NOT THE APPROPRIATE FORUM TO DECIDE ABD SETTLE THE INSTANT DISPUTE.

- This dispute involves important questions of Law which requires interpretation of UNCLOS.
- No article of UNCLOS can be interpreted by an Arbitrator pursuant to Article 188(2)(a).
- Interpretation of Article 149 and the scope of Territorial Waters inescapable.

CONTENTION 2

THAT THE SOVEREIGNTY OF THE GOVT. OF ROLGA EXTENDS OVER COUER DE L' OCEAN AND IT IS COMPETENT TO PERFORM SALVAGE ACTIVITY

- Inferential Abandonment can be deduced in the instant case.
- State owned vessels can be abandoned.
- Principles which the Courts take into consideration to infer abandonment.
- Reasons as to why the Govt. of Astoria abandoned the wreck of Coeur in the instant case.

CONTENTION 3

THAT GOVERNMENT OF ROLGA HAS NOT INTERFERED WITH THE PERFORMANCE AND SALVAGE RIGHTS UNDER THE AGREEMENT OF 1995

- No salvage rights have been interfered with when the Government of Rolga entered into an agreement with Astoria
- No performance rights have been hampered when Government of Rolga ratified the 2001 UNESCO Convention
- Heritage Inc. has no exclusive photography rights. Therefore, Government has every right to grant permit to Aquatic View

CONTENTION 4

THAT BENEVOLENT HERITAGE INC. DOES NOT ENJOY EXCLUSIVE PHOTOGRAPHY RIGHTS OVER THE COEUR DE L' OCEAN

- Salvage rights does not include exclusive photography rights and no copyright can be granted to such works.
- Salvor's documentary deal with National Geographic is unlawful and thus the television deal with the broadcasting Company is not jeopardized.

CONTENTION 5

THAT THE SALVOR IS GUILTY OF NEGLIGENCE WHILE PERFORMING SALVAGE OPERATIONS

- Many artefacts including Chinese Porcelains have been broken due to poor-handling.
- Resulted in loss to the value of the shipwreck and the marine environment.

- The expected ‘duty of care’ not taken.
- Application of the ratio of Tojo Maru’s case to decide the penalty.

CONTENTION 6

THAT THE CONTRACT BEING VALID, THE DISTRIBUTION OF ARTEFACTS WILL NOT TAKE PLACE ON SALVAGE LEGAL PRINCIPLES

- The 1995 agreement is valid and clause 5 of the same stipulates the sharing agreement between the parties.
- The salvor did not take the ‘duty of care’ while performing salvage work so deduction of some reward as penalty.

THAT BENEVOLENT HERITAGE IS ENTITLED TO A MONETARY REWARD OF $ **222,519,200.**

- Based on clause 5 of the 1995 agreement between the parties.
- Application of the ratio of Tojo Maru’s Case to penalize the salvor.

PLEADINGS

1. That International Centre for Arbitration is not the appropriate forum to decide and settle the instant dispute.

It is humbly submitted before the Hon'ble Arbitrators that International Centre of Arbitration is not the right forum to decide and settle the instant dispute between Benevolent Heritage and the Government of Rolga. It is worth mentioning here that United Nations Convention on Law of Seas (UNCLOS) is regarded and holds sanctity as the Constitution of the Law of Seas[1]. The agreement in question is regulated by Laws of Rolga and the State of Rolga is a monist state adopting the 'Incorporation approach' so UNCLOS forms lex loci. It is humbly submitted that Article 188 (2) (a) of the Convention limit the powers of an arbitration tribunal formed relating to disputes mentioned in Article 187. This dispute falls under Article 187 and accordingly no arbitration tribunal can interpret any part of this convention. The case involves many questions where interpretation of this convention would be necessary, therefore a forum like this to decide on such precarious issues is not appropriate. Such questions will have to be taken to the Sea-Bed Disputes Chamber and the Hon'ble Arbitrators will have to wait for a decision from the chamber so it could decide and settle the instant dispute. This process will be excessively time consuming. The dispute though is a contract dispute which is fit to be decided by arbitration panel yet the involvement of important issues make the dispute an important one to be decided by a more appropriate forum and settle the questions of law on the same.

[1] Retrieved at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

It is reverently submitted some of the artefacts are in urgent need of treatment. Moreover, the salvage machines are lying on the sea bed, the per-day expenditure for which is excessive and immense. Benevolent Heritage will be losing excessively if these machines are allowed to stand on the sea-shore. The Government is also not willing to compensate for the same since this will be a personal expenditure nowhere related to the agreement. The same will also cause marine pollution which is prohibited by various national legislations and International Conventions[2]. The matter has to be decided speedily for the convenience of both the parties. The parties are not in a position to wait for a decree to be pronounced by the Seabed disputes chamber.

1.1 That the word 'Preferential rights of the country of origin' under Article 149 of the United Nations Convention on Law of Seas (UNCLOS) is ambiguous and needs elucidation.

It is reverently submitted that Article 149 of the above mentioned Convention specifically says that particular regard is to be paid to 'Preferential rights of the country of origin'. Hon'ble Arbitrators, the clause 'the country of origin' is vague in this article and produces problems regarding which country should be given preferential rights. In the instant case, the ship Coeur de l' Ocean belonged to Astoria. In the agreement "Protection of Astorian Wrecks", the Government of Rolga has recognized a continuing interest of the State of Astoria. This clause of recognizing a continuing interest has to be read in light of this provision of UNCLOS. Thus, the word 'Preferential rights' needs further elucidation. It is due to this ambiguity that this clause has

[2] Art 1 (4), United Nation Convention on the Law of Seas & Art 1(d) International convention on Salvage, 1989.

never been either used or invoked by any nation since UNCLOS has come into force. The same needs to be clarified for the benefit of all.

1.2 If a State's Sovereignty extends to a sovereign shipwreck lying in its nation's territorial waters and if the nation whose territorial waters contains the shipwreck is the competent party to carry out salvage on the same.

It is put forth before the Hon'ble Arbitral Tribunal that Article 2 of United Nations Convention on the Law of Seas guarantees a state sovereignty over the resources present in its territorial waters. However, there is no explicit mention if this sovereignty extends to shipwrecks and more particularly sovereign shipwrecks which have not been abandoned. Sovereign immunity is guaranteed to ships plying under Article 95 and 96 of the convention. However, there is no such mention about shipwrecks. Various nations like US, UK, France, Spain, etc have asserted that their state owned vessels which are now in wrecks continue to enjoy sovereignty and that the same be not subjected to salvage or exploitation. This claim on the face of it appears to be arbitrary having no base or principle of International Law behind it. The same affects the instant case in a great way. This area needs more elucidation as this is imperative to decide the instant dispute.

2. That the sovereignty of the State of Rolga extends over the shipwreck Coeur de l' Ocean and it is competent to perform salvage operations on the same.

Govt. of Rolga rightly posses the shipwreck Coeur de l' Ocean. Firstly, the shipwreck lies within the territorial waters of the state of Rolga. Now, in pursuance of Article 2 of UNCLOS,

the sovereignty of Rolga extends till 12 nautical miles in sea from its shore. The wreck in question lies within these waters thus, Govt. of Rolga is now the owner of the shipwreck.

Moreover, the wreck has been abandoned by the state of Astoria. Abandonment in Maritime Law is of two types – Express Abandonment (where a state abandons a shipwreck by some express act) and Inferential Abandonment (where circumstances show that the nation has abandoned the wreck). The latter one is attracted in the instant case. The Law on Inferential Abandonment is quite clear and well-settled. It was held in the case of *Frank Chance v. Certain Artifacts*[3] found and salvaged from the Nashville that "Modern Courts, however, have rejected the salvage law theory that title to property can never be lost. They have instead applied the inference of abandonment under the doctrine of "animus revertendi" (the owner has no intention of returning)[4]. The property is considered the equivalent of a plant or a fish.[5] In the same case, it was even held that state owned vessels can be abandoned.

Courts infer of an abandonment only in cases where an owner does not assert a claim to the property at issue.[6] After property is lost at sea, "lapse of time" and "nonuse" are not sufficient, in and of themselves, to constitute abandonment.[7] It is imperative that the nation also had an intention to abandon the shipwreck.[8] However, the dissenting judgement in the case of *Colombus-America Discovery Group v. Atlantic Mutual Ins'ce Company* [9] stated that "In addition, the passage of time brings an inference of abandonment. As the amount of time since

[3] 606 F.Supp. 801, 1985 A.M.C. 609.
[4] Klien v. Unident., Wrecked & Aban. Sailing Vessel, 568 F.Supp. 1562, 1565 (S.D.Fla.1983).
[5] Hener v. United States, 525 F.Supp. 350, 354 (S.D.N.Y.1981).
[6] Columbus-Am Discovery group v. Atl Mut Ins Co. , 974 F.2d 450, 459, 1992 AMC 2705, 2714 (4th Cir. 1992).
[7] Treasur salvors v. Unidentified Wrecked and Abandonment Sailing Vessel , 556 F.Supp. 1319, 1314, 1985 AMC 136, 157 (S.D.Fla.1983).
[8] Fairport International Exploration v. The Shipwrecked Vessel ,1999 FED App. 0171P (6th Cir.).
[9] supra, n.6.

the loss of the ship increases, the strength of the presumption that the property has been abandoned, stated above, increases.

Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.[10] The decisions in the cases of [11] noted the Sixth Circuit's adoption of the 'inferential abandonment test,' which allows a finder or salvor to prove abandonment without proving that the original owner expressly renounced ownership.

Abandonment may be inferred from all of the relevant facts and circumstances and may be determined on the basis of circumstantial evidence[12] . A formal declaration is not necessary i.e. abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property[13]. An intention to abandon may be inferred as a fact from the surrounding circumstances" [14] and indeed often must be, inferred from acts[15]. It is not necessary to prove intention to abandon by express declarations or other direct evidence[16].

In order to decide whether property is either lost or abandoned, Courts consider several factors, including: (1) the condition of the property at the time it was abandoned; (2) the amount of time that has passed since the property was lost or abandoned; (3) any steps taken by the

[10] supra n. 7..
[11] 177 F.3d 491, 499 (6th Cir. 1999).
[12] Hatteras, Inc. v. The U.S.S. Hatteras, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981).
[13] City of New London v. Pequot Point Beach Co., 152 A. 136, 138 (Conn. 1930).
[14] Llewellyn v. Philadelphia & Reading Coal & Iron Co., 162 A. 429, 430 (Pa. 1932).
[15] Pierce v. Bemis (The Lusitania), [1986] 1 Q.B. 384, 389.
[16] Am. Jur. 2d Abandoned, Lost, and Unclaimed Property ,p. 40.

original owner to recover the property; and (4) whether the original owner has relinquished all hope of recovery. [17]

In the instant case, Coeur de l' Ocean has been abandoned inferentially. The following reasons (these reasons are in consonance with the reasons that were applied in *the Fairport International* case[18], *the Moyer* case[19],*Wyman* Case[20], *U.S. v. Smiley*[21], *Martha's Vinyard's* case[22], etc.) illustrate the intention of Astoria regarding abandonment of the shipwreck Coeur de l' Ocean –

1. The ship submerged not very far from the shore of Rolga. Thus, if Astoria was interested in their shipwreck, they would have definitely carried out search or rescue operations.

2. When the ship sank, the Govt. of Astoria did not even bother to set up a committee in order to investigate the reasons for the mishap and possible excavation of important artefacts from the shipwreck.

3. Benevolent Heritage found the exact location of the wreck from archival records of the nation of Astoria. Thus, the location infact the exact location of the shipwreck was always known to the nation of Astoria however it never bothered to take any measures for excavation or (in situ) preservation of the wreck.

[17] Wiggins v. 1100 Tons, More or Less of Italian Marble, 186 F. Supp. 452.
[18] Supra, n 3.
[19] Moyer v. Wrecked and Abandoned Vessel, Known as the Andrea Doria, 836 F. Supp. 1099, 1105 (D.N.J. 1993).
[20] Wyman v. Hurlburt, 12 Ohio 81, 87 (1843).
[21] U.S. v. Smiley, 27 F. Cas. 1132, 1134 (Cir. Ct. N.D. Cal. 1864).
[22] 833 F.2d at 1065.

4. When National Geographic called it as the most “bedazzling underwater treasures ever found” with an estimate worth more than USD $1 billion; Astoria did not bother to take notice and claim any rights over the treasure.

5. Astoria has not made any claims to or rights in the cargo of the Coeur de l’Ocean. It has also not yet submitted any objection to the activities of either Benevolent Heritage or Aquatic View.

6. There is no involvement from Astoria regarding Couer de l’ Ocean currently.

Thus it is quite clear that the wreck had been abandoned inferentially. It was more than 190 years before any kind of effort was made to locate the ship. It is further stated that the effort to locate the ship was made by Heritage Inc. and not by the Govt. of Astoria. This lack of action by the Astorian Govt. clubbed with the factors stated above proves a case of inferential abandonment by the owner beyond doubt. Moreover, its presence in the territorial waters gives Govt. of Rolga absolute sovereignty and possession of the same. Thus, without doubt, the Govt. of Rolga is the owner of shipwreck of Coeur de l’ Ocean and is competent to enter into any agreement with any party regarding the salvage activities to be conducted.

3. That the government of Rolga has not interfered with the claimants rights and performance under the agreement by entering into Agreement with Astoria, by ratifying the 2001 UNESCO convention and by allowing the tour operators to organise wreck divings to the wreck site including the taking photographs

Article 6(3) of the Convention on the Protection of the Underwater Cultural Heritage states that this Convention shall not alter the rights and obligations of States Parties regarding the protection

of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention. Now the Government of Rolga had approved the project and signed the 'Partnering Agreement Memorandum' with Benevolent Heritage Inc. on 27th September 1995. Government of Rolga also took steps to ratify the UNESCO Convention of 2001. Now when these two agreements were signed , both are mutually exclusive. Which means the by ratifying the Convention, the Government has not hampered the performance rights of Heritage Inc. under the 1995 agreement. Article 6(3) of the Convention clearly state that the Convention shall not alter the rights of state parties arising from bilateral agreement (in this case Government of Rolga and Heritage Inc.) concluded before its adoption. The agreement was signed in 1995, so the convention cannot have ex post facto application and cannot anywhere affect the performance rights of Heritage Inc. Also, when the Agreement was signed in 1995, at that time the agreement was beneficial to both the parties. Now when due to change in certain conditions or change of time, when the same very agreement is not giving one of the parties the desired profit, one cannot say that the agreement is impossible to perform and apply the impossibility test. When an agreement is signed it is assumed that both the parties have agreed to take the profit/loss which will come with the agreement in the future. By 2003, Heritage Inc. felt that further investment in efforts, time and money into other Astorian wrecks would only be harmful to the company. This contention by them cannot be taken as certain circumstances have changed over many years. This does not mean that the very contract is impossible to perform. Therefore, it is humbly submitted that developments plus 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 by the Government, Government of Rolga has not interfered with the claimants rights and performance under the agreement.

In the instant case before the Hon'ble Arbitral Tribunal, the claimants argue that the government has interfered with the performance rights by allowing tour operators to organise wreck divings to the wreck site including taking the photographs of the wreck. Aquatic View, a specialised tour operator was given permit by the government to organise exclusive underwater trips to view the wreck. It also engaged a song writer and CD's were commercially marketed as souvenirs. The Agreement of 1995 discusses the sharing strategy to be adopted by the Government and Heritage Inc. It nowhere declares that only Heritage Inc. has the exclusive rights to photography.

Now when the Government allowed tour operators to organise wreck divings to the wreck site, it was done for the welfare of the general public. Article 2(10) of the Convention on the protection of the Underwater Cultural Heritage states that responsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management. The very fact that tickets are being sold and souvenirs are being marketed, it can be safely inferred that it was done to encourage public awareness, appreciation and the protection of the wreck and was a responsible non- intrusive access. As far as the agreement of 1995 between the Government of Rolga and Benevolent Hertitage Inc. is concerned, the agreement is a performance based agreement and it is humbly submitted before the honourable arbitral tribunal that it includes the Memorandum, the project plan, the structure regarding fees and deposits, information regarding government representatives, the sharing

agreement, term and termination of the agreement, the governing law and confidentiality clause. As far as the Merchandising income, the government has granted the right to use the name "Coeur de l' ocean" in association with sales and marketing of merchandise (exclusive of artefacts). This does not mean that the very fact that government has signed the agreement memorandum with Heritage Inc., the government cannot enter agreement with any other member state or a corporation, or cannot ratify any convention which might be helpful to the Government of Rolga. The Government has granted the right to use the name in association of merchandise to Heritage Inc. Nowhere in the 1995 agreement it has been declared that Government has no right to allow any other corporation or for that matter 'Aquatic View' in the instant case. In *R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel*[23], for several years , the salvor conducted several salvage operations, primarily to use the wreck and its artefacts for historical purposes. The financing came in part from museum ticket sales, photographs and a television documentary. The Court issued a preliminary injunction, finding that otherwise the salvor would suffer irreparable harm because it would be precluded from conducting its salvage operations for safety reasons and could lose a salvage reason.

In the instant case, even if the photographic expedition of Aquatic View is allowed, it will nowhere affect the salvage rights. Heritage Inc. and the Government have agreed upon the sharing arrangements with respect to the aggregate amount of the appraised values, net of agreed selling expenses. Aquatic View will not hamper the performance of the 1995 agreement. The distribution of artefacts will still take place and Heritage Inc. will get its profit/share once the net value is agreed upon. The 1995 agreement is about distribution of artefacts between the

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[23] 9 F. Supp. 2d 624.

Government of Rolga and Benevolent heritage Inc. and the procedure followed to achieve the same. It does not anywhere restrict the Government to allow a permit or do anything else apart from sharing the artefacts with Heritage Inc.

In *R.M.S Titanic Inc. v. The Wrecked and Abandoned Vessel*[24] the Court held that in this "historical salvage" case, that it is desirable to keep these artefacts together for the public display and, therefore, traditional salvage rights must be expanded for those who properly take on the responsibility of historic preservation. The Court was of the same view in *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*,[25] . This ruling was consistent with the importance the Fourth Circuit has given to the archaeological and historical preservation efforts of a salvage operation such as that of the TITANIC. The Court found that 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 artefacts themselves.

But in the instant case, benevolent Heritage Inc. had an agreement with the government of Rolga on selling the artefacts and had a clause on sharing the profits earned from the collection of artefacts from the wreck.

The wreck of 'Coeur de l' Ocean' has a historical significance but at the same time Heritage Inc. has an intention to sell the artefacts. Therefore, unlike the Titanic case , Heritage Inc. cant be given exclusive rights to other means of obtaining income. In a case such as this, allowing another "salvor" or another corporation to take photographs of the wreck and wreck site is not akin to allowing another salvor to physically invade the wreck and take artefacts

[24] ibid.
[25] 631 F. Supp. 308.

themselves. Aquatic View has every right to take photographs of the wreck and has nowhere interfered with the claimants salvage and performance rights under the 1995 agreement.

Article 6(1) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage states that Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention. In the instant case the Government of Rolga entered into an agreement on the "protection of Astorian Wrecks" with the Government of Astoria in 2001 with the main object of providing better protection to historic wrecks where both countries share genuine "historical and cultural" following the adoption of 2001 convention. Now when we go through the agreement between Rolga and Astoria, it includes the general principles which talks about the cost of recovery, the considerations governing the partition of archaeological collections, treatment of material recovered which talks about the articles about the fragmentary and in need of immediate chemical conservation.

Upon analysis of the agreement between Rolga and Astoria, it is an agreement for the protection of the Astorian wrecks in accordance to the UNESCO convention of 2001. It's a simple bilateral agreement between states for the protection of the underwater cultural heritage in conformity with the provisions of the Convention. In the facts of the case, profit was generated from auction and was distributed among the Parties.

This is not contested. No Artefacts have so far been offered, lent or sold to Astoria. Whatever amount of artefacts will be recovered from the wreck, will be distributed between the Government of Rolga and Heritage Inc. according to the partnering agreement. The agreement with Astoria will nowhere hamper the profit earned by heritage Inc. In *Colombus- America Discovery Group v. Atlantic Mutual Insurance Company*[26], the Court discussed the six main ingredients admiralty Courts use when fixing an award for salvage are:

(1) The labor expended by the salvors in rendering the salvage service.

(2) The promptitude, skill, and energy displayed in rendering the service and saving the property.

(3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.

(4.) The risk incurred by the salvors in securing the property from the impending peril.

(5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

Now in the instant case there is an agreement between the salvor and the government on how the artefacts will be distributed once the net value is decided and the Court will take into account the ingredients discussed above and reward the salvor. The agreement between government of Rolga and Heritage Inc. and the agreement between the governments of Rolga and Astoria are mutually exclusive. On the basis of one agreement Heritage Inc. will get the profit/share from the recovery of the wreck and the discovery of the artefacts and on the basis of the other agreement the

[26] Supra, n.6.

government of Astoria will have a continuing interest in the Astorian works for the welfare of the underwater cultural heritage and will be getting certain representative collections for archaeological studies and protection of fragmentary material and for public access for which certain artefacts will be kept in the museum. Heritage Inc. will suffer from no monetary loss and their salvage and the performance rights will not get affected.

Hence it is humbly submitted before the honourable tribunal that by entering into Agreement with Astoria, by ratifying the 2001 UNESCO convention and by allowing the tour operators to organise wreck divings to the wreck site including the taking photographs, the government of Rolga has not interfered with the claimants rights and performance under the agreement of 1995 with Benevolent Heritage Inc.

4. That Benevolent Heritage Inc. does not enjoys exclusive rights of photographing and documenting of the Coeur de l' Ocean

It is humbly submitted before the honourable Arbitral tribunal that it has been found out that the Aqua View has been given a permit and have been taking photographs and making video clips of the wrecks. Due to advancement of technology, expeditions and photographic works of the wrecks and underwater cultural heritage can easily be undertaken. In *Hener v. United States*,[27] it was held that a salvor will frequently seek the right to salvage without interference. These rights were first laid down in the case of *Cossman v. West,*[28] wherein the Privy Council stated that, "In the case of a derelict, the salvors who first take possession have not only a maritime lien

[27] supra, n.5.
[28] [1887] 13 App Cas 160.

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."

In *Amstar Corp. v. S/S Alexandros T.*,[29] the Court observed that this lien attaches to the property to the exclusion of all others including the property's true owner. And to facilitate enforcement of the lien, the salvor enjoys a possessory interest in the property until the salvor is compensated. Because the salvor's lien is exclusive and prior to all others, so too, the salvor's possessory interest is enjoyed to the exclusion of all others, including the res' true owner. Therefore it is humbly submitted before the honourable arbitrators that when a salvage operation takes place, certain kind of possessory rights come with it. These rights include the right to exclude any other salvor or a third party to interfere with the wreck. Nowhere the rights include the right to exclude third parties from taking photographs or documenting things.

In *R.M.S Titanic Inc. v. Wrecked and Abandoned Vessel*[30] , the Court held that video sales, film documentaries, are inventive marketing ideas that RMST must resort to since it is not selling the artefacts and it is clear that the presence of another in the marketplace would diminish the rights the Court has granted RMST." The Court found that "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 artefacts themselves. But there is a difference between the Titanic Case and this case. In the instant case, Heritage Inc. has an intention to sell the artefacts and earn profit . So it has a way of earning income and just because Aquatic View has started expeditions to the wreck and started taking photographs, this wont harm Heritage Inc. operations. They are just salvors and have no right to restrict others from taking photographs.

[29] 1981 AMC 2697.
[30] Supra, n.23.

There is no case in the United States or in the body of jus gentium, however, that has expanded salvage rights to include this type of a right. More importantly, it is submitted that how 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. It is not to take photographs and make documents and start harming the very wreck for which the salvage operations were undertaken. 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.

If exclusive rights are given to photograph the shipwreck, then salvors will put the salvage service at the back of their mind and start concentrating on commercial exploitation which finally will be harmful to the wreck as well as public welfare. For instance, even under American, South African and U.K copyright laws, where an artist has a copyright in the design of a painting, that right does not extend to prevent the viewing and photographing of the painting, if it is located at a public site or is visible from a public place.[31] Similarly, Heritage Inc. is a salvor and has possession over the wreck. This possession does not extend to prevent the viewing and photographing of the wreck. In *R.M.S Titanic v. Haver*,[32] ,the Court held that the district Court erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site of the Titanic at its location in international waters. It was of the view that if exclusive rights are given, then it would lead to altering the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently-applied body of law. But it should also be

[31] 17 U.S.C. 120(a).
[32] (1999) A.M.C. 1330.

observed that intellectual Property laws are also well defined and a uniform body of law. If such rights are applied then there would have been no confusion as intellectual laws are universally acknowledged. In the instant case, if exclusive photography rights are given, then future salvors will slowly show their disinterest in salvaging wrecks and other heritage and everyone will focus on how to earn profit by commercial exploitation in the name of salvage services.

Therefore it is humbly submitted that Benevolent Heritage Inc. does not enjoy exclusive rights of photographing and documenting of the Coeur de l' Ocean under the law of salvage and the Intellectual Property laws.

5. That the salvor is guilty of negligence while performing salvage operations

It is humbly submitted that the economy of Rolga thrives on agriculture and tourism. For the nation, ancient artefacts and archaeological collections form a very important part of Cultural Heritage. The Govt. of Rolga has always been committed towards preserving and protecting heritage in the nation. A member of our cabinet Riska Benti in one of her landmark speeches even emphasized the importance of cultural heritage in one's life. Her speech inspired many people to protect and preserve the heritage of the nation. Moreover, the govt. has been specially concerned about the wreck Coeur de l' Ocean. The Govt. also passed a law through which an area where a shipwreck lies can be declared as a protected and restricted area. The Govt. approved the salvage operations of Coeur de l' Ocean soon after its discovery. The same was very necessary.

With such a view, the Govt. of Rolga approved the project plan of the claimant for the salvage of Coeur de l' Ocean. This was done on the promise that utmost care and precaution

would be taken while performing the salvage activity. Such a duty was also imposed on Benevolent Heritage by International Law including UNLCOS. Article 8 of the International Convention on Salvage, 1989 mandated the claimant salvor to take due care while performing salvage. It also mandated the salvor to exercise due care so as to not to harm the environment. However, the claimant salvor has failed to take any duty of care or take any precaution while excavating the artefacts. The archaeologist present underwater on site reported that many of the artefacts were destroyed due to poor handling of objects. This is gross negligence on the part of the salvor. Chinese porcelains have been destroyed due to negligence on the part of the salvor. Many other artefacts have been destroyed by the salvor due to mismanagement and carelessness. Such negligent and amateurish behavior of the salvor cannot go pardoned.

In accordance with Article 18 of the International Convention on Salvage, 1989[33], a salvor can be deprived of his artefacts on part of his fault or negligence while performing the salvage activity. The standard of 'duty of care' in the eyes of Justice Atkin in *Anglo-Saxon Petroleum Co. v. The Admiralty*[34] was –

> "I do not think any different law applies to people undertaking salvage operations from the law which applies to those rendering any other sort of services. They have to exhibit the skill and care which can reasonably be expected from persons in their position."

[33] article 8 of the 1910 Convention.
[34] 79 Lloyd's List L. Rep. 611 (K.B. 1946) (The Delphinula).

However, the position was clarified in *Tojo Maru v. N.V. Bureau Wijsmuller*[35], where the Court laid down the remedy of indemnifying the owner for the negligence of the salvor. It was decided that the proper measure of damages was the difference between what would have been the value of the ship upon completion of the salvage services (if there had been no negligence) and her actual value at the place of termination (in the state in which she was as a result of the negligence).[36] However, the salvage remuneration was to be assessed on the assumption that there had been no negligence (i.e. on a salved fund without a deduction for the cost of repairing the damage).One figure is then set against the other.

There is yet another test derived by American Courts to determine negligence during salvage. American Courts have developed the doctrine of a liability restricted to "distinguishable and independent damage." This was defined in *Noah's Ark v. Bentley & Felton Corp*[37]. as –

> “The key to the correct legal principle is the character of the injury inflicted - i.e. distinguishable or, as sometimes called, independent. The requirement for wilful or gross negligence as an element of salvor liability relates to injuries of a non-distinguishable, non-independent kind. In a very broad sense the latter covers errors that made the salvage ineffectual. A distinguishable injury, on the other hand, is some type of damage sustained by the salved vessel other than that which she would have suffered had not [the] salvage efforts been undertaken to extricate her

[35] [1972] 1 App. Cas. 242.
[36] [1972] 1 App. Cas. at 243.
[37] 292 F.2d 437 (5th Cir. 1961); see also Oil Screw Noah's Ark v. Bentley & Felton Corp., 322 F.2d 3 (5th Cir. 1963).

> from the perils to which she was exposed. In other words it is a harm distinct from that from which the vessel is being saved."[38]

The test of "distinguishable and independent damage" applies to the instant fact situation. The breaking of artefacts (e.g. Chinese porcelains) is a distinguishable injury. This damage would not have been caused had the ship not been salvaged. Chinese porcelains have broken due to the negligence of the salvor. The damage is also causing the salvage ineffectual. A lot of artefacts have been destroyed. Thus, the injury is independent. Further, salvage law when performed under contract imposes heightened duties on professional salvors that may make them liable for negligence.[39] This is so even in the absence of gross negligence, willful misconduct, or distinguishable injury.[40]A professional salvor may be liable on a simple negligence theory for the failure of a salvage operation, or for taking on a job beyond the salvor's capacity because of inadequate equipment or expertise. Moreover, it is now mandatory for all salvors to protect the archaeological value of the wreck. In *Klein v. The Unidentified Wrecked and Abandoned Vessel*, the Court denied a salvage award to a private salvor who had made no effort to protect the archeological value of the wreck.[41]

Thus, the claimant Benevolent Heritage is guilty of negligence while performing salvage operations both under the Common law jurisprudence and the various tests laid down by the American Courts. The same needs to be penalized. Since Benevolent Heritage has defaulted in its part it will now have to compensate the Govt.[42]The Govt. of Rolga is not bound to share

[38] 292 F.2d at 441.
[39] 930 F. Supp. 227, 1997 AMC 231 (E.D. Va. 1996).
[40] Ibid.
[41] 758 F.2d 1511 (11th Cir. 1985).
[42] This is in accordance with the assumption that the Govt. of Rolga is the protector of the ship in accordance with the Public Trust Doctrine; a doctrine well established in Common Law.

profits with the claimant strictly in accordance with Article 5 of the Partnering Agreement Memorandum signed in 1995. This table of sharing agreements was to be followed on the premise that all precautions would be taken and a duty of care would be taken while performing salvage activities and only then shall the salvor be entitled to his share as his reward. However, this has not happened Now, Benevolent Heritage should get a share which is lesser than what they get if Article 5 of the 1995 agreement is applied and this should be in accordance with the principle of sharing laid down in the case of *Tojo Maru v. N.V. Bureau Wijsmuller*.[43]

6. That the reward of the salvor is to be fixed by the agreement and not on salvage legal principles

It is now well established that the Govt. of Rolga is the true owner of the wreck of Coeur de l' Ocean and that it is the competent authority to perform salvage activities on the same. It is also true that the Govt. has neither interfered with the performance rights of the 1995 agreement it entered into with the claimant nor his salvage rights.

The primary purpose to enter into the agreement was infact to decide the way in which profits would be distributed between the parties. The claimant in contending that distribution should take place as per Salvage principles is acting against its rights created by the contract. The claimant is trying to supersede the terms of a contract it itself willingly entered into. The same is not allowed by Law. Section 38(1) of the Malaysian Contract Act, 1950 also obligates Benevolent Heritage to act according to contract since the same is not dispensed with any excuse under the act or any other Law. The Legal doctrine of 'Estoppel' also does not allow Benevolent Heritage to rescind from a part of the contract. Under Estoppel, a party cannot alter the rights and

[43] Supra, n.35.

obligations of a contract so as to benefit him. This doctrine thus needs to be applied and Benevolent Heritage cannot back out from the contract on its own whims and fancies.

The contention of the Salvor that apart from the profits, it is also entitled to artefacts is baseless and goes against the International maritime Law. In *Platoro Ltd. Inc. v. Unidentified Remains, Etc*[44], the Court held that only under the law of Finds is a person awarded in terms of res than dollars. Under the Law of Salvage, if a Court grants a salvor a right in res apart from dollars, then the same is against salvage legal principles. The Court in this case declined to accept the in specie award as a valid award in a salvage action.[45] This is also on the premise that under the Law of Salvage, the title to the personality remains in its owner. Thus, it is not right on the part of to claimants to argue that the artefacts and the profits should be distributed solely on salvage legal principles. There is no provision in Law that allows for the same. The calculation of profits solely on the basis of salvage legal principles neither can take place nor was envisaged.

The claimant is entitled to profits and artefacts in accordance with clause 5 of the 1995 agreement. This is also however not to be strictly followed. Since the salvor is guilty of negligence, he will be entitled to a share lesser than what was agreed for. This shall be in accordance with the principles lad down in the Tojo Maru's case.[46]

6.1.1 Distribution of artefacts

It is humbly submitted before the Arbitrators that the distribution shall be carried in accordance to the provisions of Clause 5 of the Benevolent Heritage and the Government have agreed upon

[44] 695 F.2d 893, 904 (5th Cir.1983).
[45] Ibid.
[46] supra, n. 35.

the following sharing arrangements with respect to the aggregate amount of the appraised values Agreement between the Government of Rolga and Benevolent Heritage Inc. signed in the year 1995. The specific clause reads as follows;

5. Sharing Arrangements

Benevolent Heritage and the Government have agreed upon the following sharing arrangements with respect to the aggregate amount of the appraised values and/or selling prices of the artefacts, net of agreed selling expenses.

Range	**Government of Rolga**	**Benevolent Heritage Inc.**
$0 - $45 million	20%	80%
$45 million to $500 million	50%	50%
Above $500 million	60%	40%

Now, the following are the details of the artefacts recovered and the aggregate of appraised values of the artefacts.

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

No. of Artefacts whose Appraised Values are estimated –13

There are still 8 types of artefacts recovered whose values are not known. However, if clause 5 is to be technically interpreted, it refers to the distribution of the artefacts whose values are known. "Benevolent Heritage and the Government have agreed upon the following sharing arrangements

with respect to the aggregate amount of the appraised values”. It clearly states that the distribution bar given in Clause 5 refers to the distribution of artefacts whose appraised values are known. Since, the appraised values of the remaining artefacts are not known, Clause 5 of the Agreement is not attracted and by default these artefacts shall remain with the Government of Rolga.

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

Since the amount of appraised value of artefacts clearly exceeds $500 million, the distribution shall be carried out in accordance with the third sub-clause of clause 5 i.e. the Govt. Of Rolga gets 60% of the appraised value of the artefacts recovered and Benevolent Heritage Inc. gets 40%. However, it is to be noted that some artefacts were destroyed due to poor handling of the personal and staff of Benevolent Herotage Inc. Therefore, some monetary value will have to be paid by Benevolent Heritage Inc. to the Govt. In order to compensate for the above said loss. Since the value of Chinese porcelains are known to us and details of the remaining destroyed artefacts are not given, we shall calculate the compensation to be paid by benevolent Heritage Inc. taking into consideration the loss suffered due to breakage of Chinese Porcelains only. This compensation shall be carried in accordance to the guidelines provided in the case of *Tojo Maru v. N.V. Bureau Wijsmuller*[47]. The guidelines or the principles governing the same can be seen at Page No 38 of the Memorial Para 1 . Thus, the following is the calculation of compensation and the total amount given to Benevolent Heritage Inc. after deduction of the compensation. Since the Government gets to keep all the artefacts, the following is the amount to be paid by the

[47] Supra,n.35.

government as a reward to Benevolent Heritage for its salvage services performed in the wreck of Coeur de l' Ocean.

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

Total appraised value of the Chinese porcelains had they not been destroyed: 20000*5000= $ 100,000,000

Total appraised value of the Chinese porcelains due to Negligence of Benevolent Heritage Inc. : $ (10000*5000 + 10000*1000) = $ 60,000,000

Net Loss : $ 100,000,000 - $ 60,000,000 = $ 40,000,000

Now, applying the principle given in the Tojo Maru v. N.V. Bureau Wijsmuller[48] case, the calculation goes as follows;

The Net Loss will be added to the total appraised value of the artefacts; $ 616,298,000 + $ 40,000,000 = $ 656,298,000

Now, Benevolent Heritage Inc. gets 40% of this value minus the value lost due to its negligence.

Share of Benevolent Heritage – $ (0.40 * 656,298,000) = $ 262,519,200

Ideally, Benevolent Heritage Inc. should get this value but for the negligence by its employees. So it is inclined to pay the loss due to breakage of Chinese Porcelains to the Govt. of Rolga. So the total value that Benevolent Heritage will get is $ 262,519,200 - $ 40,000,000 = **$ 222,519,200.**

[48] ibid.

This amount is in accordance with the provisions of the Partnering Agreement of 1995 between Govt. of Rolga and Benevolent Heritage Inc. and also taking into account the compensation that Benevolent Heritage pays to the Govt. due to the negligence of its staff. It is humbly submitted that this value is in accordance with International Law and with principles of equity and justice. Thus we propose that Benevolent Heritage be paid an amount of **$ 222,519,200** by the Govt. of Rolga due to the salvage services rendered by it and in turn the Govt. of Rolga gets to keep all the artefacts recovered. The Govt. of Rolga and Benevolent Heritage entered into an agreement in 1995 for salvage activities. Thus, the agreement is a salvage contract. Under the Law of Salvage, the salvor always gets reward/ compensation for his services. A Salvor is never entitled to the artefacts that he recovers. It is only under Law of Finds that a finder gets to keep the goods. Under the Law of salvage, the salvor has a maritime lien on the artefacts recovered only till the time he is awarded for his services. Now, that the Govt. is awarding money to the salvor, he is not entitled to any artefacts under the Law of salvage. Moreover, the 2001 “Agreement for Astorian Wrecks” also clearly says that the artefacts shall be preserved and not sold off. It is moreover desirable that the artefacts will be preserved in museums of the two nations.

REQUEST FOR RELIEF

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

1. That the Partnering Agreement of 1995 between the Govt. and Benevolent Heritage being valid, the distribution cannot be made solely on the basis of salvage legal principles.
2. That Benevolent heritage should be given a salvage award of $ 222,519,200.
3. That Govt. of Rolga retains the possession of all the artefacts recovered from the wreck of Coeur de l' Ocean.
4. That the Govt. of Rolga has not interfered with the salvage rights of Benevolent Heritage by entering into an agreement with Astoria
5. That Govt. of Rolga has the right to give permission to Aqua View and any other corporation to conduct tour operations at the site.
6. That photographing and documenting of the wreck is not a part of traditional salvage rights guaranteed to Benevolent Heritage.

Respectfully Submitted

Counsel for the Respondent, Government of Rolga