

F2020-A

2009 LAWASIA INTERNATIONAL MOOT COMPETITION

IN THE INTERNATIONAL CENTRE OF ARBITRATION

HO CHI MINH, VIETNAM

CASE CONSIDERING MARITIME

PROCEEDINGS IN ROLGA

2009

BENEVOLENT HERITAGE INC.

(Claimant)

v.

THE GOVERNMENT OF ROLGA

(Respondent)

MEMORIAL OF THE APPLICANT

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STATEMENT OF JURISDICTION

Pursuant to the Partnering Agreement Memorandum concluded on 27th September 1995, including the Corrections and Clarifications agreed to therein, between Benevolent Heritage Inc. and the Government of Rolga, and in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration, the parties hereby submit to this Arbitration Tribunal its dispute concerning the proceedings in Rolga.

In accordance with Point 18 of the Moot Problem, the Arbitration Tribunal is hereby requested to adjudge the dispute by adoption of the UNCITRAL Model Rules on International Commercial Arbitration in accordance with Rolgan law, and any other applicable rules and principles of international law.

QUESTIONS PRESENTED

- (i) Has the Respondent interfered with the Claimant's salvage rights and performance under the 1995 Agreement by entering into Agreement with Astoria in 2003?

- (ii) Has the Respondent interfered with the Claimant's salvage rights and performances under the 1995 Agreement by ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage?

- (iii) Has the Respondent interfered with the Claimant's salvage rights and performance under the 1995 Agreement by allowing other tour operators to organize and profit from visiting activities to the site?

- (iv) Does the Claimant have exclusive rights of photographing and documenting of the Coeur de l' Ocean?

- (v) Should the calculation of profits and/or distribution of artefacts between the Parties be made solely on the basis of salvage legal principles?

STATEMENT OF FACTS

The wreck of the Coeur de l' Ocean lies 12 nautical miles from the Rolga baseline and contains a large amount of cargo including many riches from the Palace of Zamzala. In 1990, Mr Bernadd Bodd, national of Astoria, well known salvor and major shareholder in Benevolent Heritage Inc. with expertise in historic wrecks recovery researched and submitted a proposal to the Rolga Cultural Heritage Committee for survey and recovery of significant historical wrecks in the Astorian expansion era. After extensive research solely on the part of Heritage Inc., the work paid off and the wreck was found. All subsequent recovery, besides the initial batch was then governed by the Partnering Agreement Memorandum, signed by Heritage Inc. and the Rolgan government on 27th September 1995.

The wreck has been estimated at being worth more than USD \$1 billion, and described by The National Geographic as the most “bedazzling underwater treasures ever found today”. The initial recoveries covered a wide range and included cannons, elephant tusks and gold coins which, when exhibited, doubled “the number of tourist visits to the National Museums”.

In the actual Partnering Agreement made in 1995, Heritage Inc. was required to place a deposit with the Government of a sum up to USD \$1,250,000. In the event that the exploration did not provide sufficient revenue to pay the Governments expenses, such deposit could be forfeited to foot the expenses. Also, Heritage Inc. would be responsible for the payment of all expenses, including financing expenses in addition to the amount stated above. In addition, there was a further deposit of an adjustable sum of \$100,000 to assure the Government that funds were available “for the conservation and documentation of any artefacts retrieved from the site.” Heritage Inc. was to provide a project plan that was signed

within 100 days of its submission, to signal approval from the Government. The entire process of salvage was to be carried out in accordance with the project plan and under the possible monitoring as carried out by up to two Government representatives.

The Partnering Agreement further provided for a Sharing Arrangement. The Sharing Arrangement provided that in the event of the appraised value of the artefacts being above \$500 million, for the government to get a 60% share, whilst Heritage Inc. the other 40%. Heritage Inc. would also be entitled to own and possess its relative share of the remaining artefacts, excluding the first \$45 million worth of it that would be sold. Finally, the parties were to formulate a joint marketing plan for the placement and sales of the remaining artefacts. In the light of all its obligations, the Government was still at all times to be considered the owner of the shipwreck.

With regard to merchandise, the Government has granted the use of the name “Coeur de l’ Ocean” in association with sales and marketing of merchandise (exclusive of artefacts) related to the acts. In consideration of this, Heritage Inc. would pay the Government a fee equal to three percent of its gross sales of merchandise that utilizes the name “Coeur de l’ Ocean.

Subsequently in 2001, the Government, ratified the UNESCO Convention for the Protection of Underwater Cultural Heritage and entered into an agreement with the government of Astoria for the “Protection of Astorian Wrecks”, without consultation or notification to Heritage Inc. about such. After the government was repeatedly questioned on its alleged involvement in what was termed the “commercial exploitation” of the artefacts recovered from the Coeur de l’ Ocean, and much other concerns raised about the nature of the work being done at the wreck, the government accorded Aquatic View, a specialized tour operator the permit to organize exclusive underwater trips to view the wreck of the Coeur de

l'Ocean. The company has since sold 25 tickets at the price of USD \$20,000 each. In the process of making promotional materials for such trips, they have been taking photographs and making video clips of the wrecks and have posted these on the internet. Aquatic View has also engaged a songwriter to write a song entitled "Couer de l' Ocean", the CDs of which are commercially marketed as souvenirs. A complaint was lodged with the Rolgan Historic Monument Executive Agency, who were for unknown reasons, unable to deal with the complaint at that time. Such activities have jeopardized Heritage Inc.'s ongoing television documentary deal with an International Broadcasting Company.

SUMMARY OF PLEADINGS

The Respondent, by entering into agreement with Astoria, infringed on the claimant's salvage rights and performances in two ways. First and foremost, there was the addition of Astoria as a party to the agreement, splitting the artefacts three ways instead of between Rolga and Heritage Inc. In addition, the provisions for treatment provided for additional requirements and a higher standard concerning the treatment of such artefacts. There is need to recognise that Coeur de l' Ocean is a "salvage operation" under the 1989 International Convention on Salvage and subsequently, to recognise the breach of its salvage rights under the agreement.

In ratifying the 2001 Convention, the Respondent has interfered with the claimant's salvage rights and performances in that there were higher standards that it was being held to, and some fundamental things that it was never required to fulfil under the original agreement contemplated with Rolga. Although the Convention is binding only upon state parties, Rolga retains the right and power to impose sanctions and seize all the artefacts obtained through such means not in line with the Convention, hence jeopardising the Claimant's responsibilities.

The Claimant claims a possessory right over the wreck in its capacity as salvor. This is in line with general salvage principles that have been recognised at common law. As such, all the other tour operators that organize and make profits from visiting activities, including the taking of photographs are infringing upon the Claimant's rights. This is because such acts might potentially disrupt the delicate nature of salvage work, and in addition to that, they

might be infringing on what it considered the Claimant's exclusive rights in the area, a proposition supported by some persuasive liberal American cases. Although the Courts did overturn such ruling in *R.M.S Titanic*, it should be noted that there was silence as to the question of whether or not such an IP right could exist. In addition, although reversing the injunction and adopting a more cautious approach of not expanding the law of salvage so much, the criteria for the test is set out by MDM Salvage and this has not been overruled.

With regard to distribution of artefacts, it is submitted that regardless of the contract, salvage principles will still apply. Salvage principles have been qualified both in statute as well as in case law, with clear principles guiding the reward, most of which the Claimant qualifies under. In having established that, under the function of salvage law, it the reward is considered to be inequitable, the courts can step in to rectify such. It should be noted that on our facts, Heritage Inc. has been putting in all the efforts, from the initial extensive research, to the subsequent salvage with the government in comparison, doing very minimal and optional supervisory work. The spit of profits on the other hand, favours the government as opposed to the salvor. This is clearly inequitable and should be remedied.

PLEADINGS

I. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT'S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ENTERING INTO AGREEMENT WITH ASTORIA IN 2001.

The recovery of artifacts from the wreck of the Coeur de l'Ocean under the 1995 Agreement by the Claimant constitutes salvage under the 1989 International Convention on Salvage¹ because it falls within the definition of a "salvage operation" under Article 1(a). According to Article 3 of the 1982 United Nations Convention on the Law of the Sea², "every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." As the Coeur de l' Ocean lies 12 nautical miles ("nm") from the Respondent's baseline, it is within the Respondent's territorial sea and as such, the Respondent's municipal law applies. In line with the Respondent's position as a Monist State, the act of ratifying the 1989 Salvage Convention, and the UNCLOS immediately incorporates these treaties into Rolgan national law.

A. The Recovery of Artefacts from the Coeur de l'Ocean is a 'salvage operation' under the 1989 International Convention on Salvage

The recovery of the artefacts of the wreck falls under a "salvage operation" under the Salvage Convention because of two main reasons.

First, according to Article 1 of the Salvage Convention, a "salvage operation" is any act or activity undertaken to assist a (1) vessel or any other property (2) in danger in

¹ International Convention on Salvage, London, 28 April 1989. ["Salvage Convention"]

² United Nations Convention on the Law of the Sea, Monetgo Bay, 10 December 1982. ["UNCLOS"]

navigable waters or in any other waters whatsoever. The wreck of the Coeur de l’Ocean falls under “vessel or any other property” because “wreck” may refer to sunken vessels, their cargoes and other artifacts of historical and archaeological significance.³ Furthermore, Article 1(c) of the Salvage Convention states that “property” means any property not permanently and intentionally attached to the shoreline and includes freight at risk. “Wreck”, which does not exclude sunken ships or craft of any age, clearly comes within this wide definition.⁴

According to *Halsbury’s Laws of Malaysia*, the Salvage Convention preserves the traditional ‘danger’ requirement in common law.⁵ As early as *HMS Thetis*,⁶ English courts have held services to sunken wrecks and cargo (treasure) as examples of salvage services. In *Colombus-America Discovery Group v. Atlantic Mutual Insurance Company*,⁷ the *Central America*, laden with gold, had sunk 7000 feet of water 160 miles off South Carolina in 1857 and was found lying on the seabed free of accumulating sediment. This lying on the seabed constituted a “danger” for the purpose of a salvage award.⁸ Indeed, in an earlier decision in the same case the Court had held that “historically, courts have applied maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their owners.”⁹ Furthermore, in *The Gas Float Whitton (No 2)*, Lord Esher MR held that the wreck of a ship, her apparel, and cargo was within the ordinary jurisdiction as to salvage of the High Court of Admiralty.¹⁰ Moreover, the fact that the property lays

³ J. Reeder, ed., *Brice on Maritime Law of Salvage*, 4th ed. (London: Sweet and Maxwell, 2003) at [4-01] [“Brice”].

⁴ *Brice* at [4-24].

⁵ *Halsbury’s Laws of Malaysia*, vol. 15 (Malaysia: Malayan Law Journal Sdn Bhd, 2002) at [260.0701], [260.0702].

⁶ *HMS Thetis* 166 E.R. 312 (Ct of Admiralty) at 312.

⁷ *Colombus-America Discovery Group v. Atlantic Mutual Insurance Company* [1995] A.M.C 1985. [“Colombus-America”]

⁸ *Colombus-America Discovery Group v. Atlantic Mutual Insurance Company*, [1995] A.M.C 1985 at 2007-2008.

⁹ *Brice* at [4-88].

¹⁰ *The Gas Float Whitton (No 2)* [1896] P. 42 (C.A.)

immobilized on (say) the sea bed is sufficient “danger”.¹¹ It is thus submitted that this element of ‘danger’ is fulfilled in our case.

Second, it is noted that Article 30(1)(d) of the Salvage Convention allows any State to reserve the right not to apply the provisions of the Salvage Convention “when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”. As Brice opines, the Convention thus assumes that the ordinary law of salvage does apply in principle to the recovery of ‘maritime cultural property’ unless a State chooses to exclude it.¹² In our case, Article 30(d) was not utilised by the Respondents to exclude the Salvage Convention provisions when it ratified the Salvage Convention. As such, by virtue of Article 2, the Salvage Convention applies whenever arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party, as in our case.

According to Brice, the lawful commercial salvage of historic wrecks and their archaeological significance is at least impliedly recognized in Articles 149 and 303 of UNCLOS; and in Article 30(1)(d) of the Salvage Convention.¹³ Article 303 is one of two articles addressing archaeological and historical objects found at sea in the UNCLOS and Article 303(3) acknowledges that the Article does not affect the law of salvage. Art. 149 deals with the preservation and disposition of objects of an archaeological and historical nature found in the Area, where ‘Area’ refers to the seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction. This makes it clear that the State parties did regard the law of salvage as applicable to historic wrecks presumably on the basis that they were regarded as ‘immobilised’

¹¹ *Ibid.*

¹² *Brice* at [4-23].

¹³ *Brice* at [4-03], [4-16] – [4-25].

The 1995 Partnering Agreement Memorandum between the Claimants and the Respondents (‘1995 Agreement’) was entered into by both the Claimant and the Respondant on the basis that the Salvage Convention and/or salvage principles will and should govern the contract. It is noted that in Article 303(3) of the UNCLOS the law of salvage is expressly retained and unaffected: this makes it clear that the State parties *did* regard the law of salvage as applicable to historic wrecks, presumably on the basis that they were to be regarded as “immobilized” if no other immediate or reasonably foreseeable physical danger arises.

The law of salvage not only must, but should apply to govern the 1995 Agreement because of two reasons. First, it is often the techniques, expertise and financial resources of a responsible salvor that enable underwater cultural heritage to be revealed, recorded and artefacts preserved for museums whereas public financial funding may be woefully lacking¹⁴. Rolga is one such example – lacking the funds to police its territorial waters, run the Rolgan Historic Monument Executive Agency, or even shoulder a substantial part of the costs of recovery of the artefacts. Indeed, given the amount of effort, research and money spent by the Claimants, it is submitted that they are the polar opposite of a ‘tomb robber’. Second, in the rejection of the *H.M. v. Mar Dive*¹⁵ decision, *E.L. Soba v. Fitzgerald* overruled governmental objections to award salvage to the divers, pointing to the inherent unfairness if such claims were denied.¹⁶ It is thus submitted that in our case, the law of salvage should be applied despite governmental objections.

¹⁴ *Brice* at [4-10].

¹⁵ *H.M. v. Mar Dive* [1997] A.M.C 1000 (Ontario Court, Canada, General Division).

¹⁶ *E.L. Soba v. Fitzgerald* [1997] A.M.C 2254.

B. Breach of the 1995 Partnering Agreement Memorandum

Under the 1995 Agreement, the Claimant has been given the right to salvage the Coeur de l’Ocean in accordance with the proposal submitted and through a process that the government may appoint representatives “to monitor and record the exploration to determine whether the activities are being carried out in compliance with the project plan.”¹⁷ On the other hand, the Astoria Agreement stipulates an alternate form of performance - Clause 3 “Treatment of material recovered” dictates that “the articles are... ..in need of immediate chemical conservation and stabilization in the laboratory as soon as they are recovered” and that “this treatment cannot await distribution.”¹⁸ These processes were clearly not contemplated or in the scope of the Claimant’s performance of the contract. Owing to the clear incompatibility between the two agreements, it is submitted that the Astoria Agreement has interfered with the Claimant’s performance under the 1995 Agreement.

By entering into the Agreement with Astoria in 2001 (‘Astoria Agreement’) without informing the Claimants, the Respondents had breached the 1995 Agreement because that agreement will now be governed by an additional set of rules and obligations which neither party had contemplated when entering into it – namely those dealing with the distribution of artefacts after their recovery from the Coeur de l’Ocean. This is clearly an interference with the Claimant’s rights and performance under the 1995 Agreement. First, (1) asking for “meaningful assemblage”¹⁹ of parts of the collection, (2) requiring that a “representative collection of the contents of each statistical sample should be made available to a museum of the Astoria and a museum of Rolga”,²⁰ and (3) making provisions for the acquisition of

¹⁷ Moot Problem Appendix (1) at cl. 4.

¹⁸ Moot Problem Appendix (2) at cl. 3.

¹⁹ *Ibid* at cl. 2 para 2.

²⁰ *Ibid* at cl. 6.

“representative collections of the less common and even unique objects”²¹, effectively contemplates Astoria as one of the beneficiaries of the wreck. On the contrary, the Sharing Arrangements²² envisaged in the 1995 Agreement have only two parties in contemplation – the Claimant and the Respondent. As such, the Astoria Agreement entirely goes against the 1995 Agreement, as well as salvage principles relating to reward.

It is submitted that the Claimant should be entitled to damages at the very least. According to Brice, if the owners of the property to be salvaged, in breach of contract, wrongfully act in such a way as to prevent salvors engaged under the salvage agreement from performing their services thereunder which they are both willing and able to perform, then the party in breach will be liable to damages.²³

II. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT’S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY RATIFYING THE 2001 CONVENTION.

The ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage [“2001 Convention”] by the Respondent was an interference on the Claimant’s salvage rights and performances. This also relates to the matter of allowing other tour operators to organize and make profits from visiting activities to the site, including the taking of photographs of the wreck. It is noted that Rolga is a Monist state. As such, international conventions that it has ratified not only becomes a part of its national law and

²¹ *Ibid at cl. 7.*

²² Moot Problem Appendix (1) at cl. 5.

²³ *Brice at [2-S260]*

governs its relationships with other states, but also agreements that the Respondent enters into with private organizations, in our case, the 1995 Agreement made with the Claimants.

The ratification of the 2001 Convention has clearly resulted in an interference with the Claimant's salvage rights and performances under the 1995 Agreement. The laws of salvage which were assumed to be applied to the 1995 Agreement are no longer applicable due to Article 4 of the 2001 Convention, which excludes the application of the law of salvage so long as all activities relating to underwater heritage to which the Convention applies (including activities done by other parties) are not in full conformity with the Convention.

The Articles of the 2001 Convention not in conformity include Article 5, which states that each "State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage." Rule 3 of the Annex²⁴ also states that "activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project." This is re-asserted in Rule 4, which explicitly states that there must be the use of "non-destructive techniques".

From the facts, it was confirmed by "a government underwater archaeologist stationed on site that many of the artefacts (e.g. Chinese porcelains) were destroyed due to poor handling of objects" and that there have been allegations of "commercial exploitation" of the artefacts.²⁵ This proves that there was damage being done to the wreck and that the Respondent was in breach of its duties under the 2001 Convention. Indeed, the use of "non-destructive techniques" was evidently lacking. With the ratification of the 2001 Convention,

²⁴ UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris, 2 November 2001 at Annex Rule 3 and 4. ["2001 Convention"]

²⁵ Moot Problem at para 10.

the artefacts fall prey to “seizure and disposition” under Article 18²⁶ that states “each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention” an effect not contemplated during the signing of the 1995 Agreement. It should be clarified that the Claimant is only subject to such “seizure and disposition of underwater cultural heritage” due to the subsequent ratification by the Respondents, without regard for the Claimant’s rights and performance under the 1995 Agreement.²⁷

In addition, Article 2(3) states that the preservation of underwater cultural heritage should be “for the benefit of humanity in conformity with the provisions of this Convention”. In line with this objective of preservation for ‘the benefit of humanity’, majority of the artefacts, besides that required to be sold to cover costs, should be placed in museums as exhibits, or within access of researchers and historians who would help maximize humanity’s understanding of such world history. This runs contrary to the Sharing Arrangements,²⁸ which have (1) already provided for the sales of artefacts up to forty-five million dollars, (2) contemplates the formulation of “a joint marketing plan for the placement and sales of the remaining artefacts” and (3) has provision for the Claimant “to own and possess its relative share of the remaining artefacts”. Rule 32 in the Annex of the 2001 Convention states that “arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.” Read in light of the 1995 Agreement, this has clearly failed to happen.

It appears that in ratification of the 2001 Convention, the Respondent does in many ways require a less profit-oriented method of dealing with the wreck as opposed to that set

²⁶ 2001 Convention at Article 18(1).

²⁷ Moot Problem Appendix (1) at cl. 5.

²⁸ *Ibid.*

out in the 1995 Agreement. By Article 20 of the 2001 Convention, each State Party “shall take *all practicable measures* to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.” This ostensibly would entail the allowance of third parties like Aquatic View to organize tours and make CDs to increase awareness of the importance of conserving such heritage. There is a clear incompatibility of aims, from the profit-oriented private company as opposed to the noble country working for the benefit of humanity. In accordance with the fact that the private agreement with the Claimant was established first, and in accordance with the sovereignty of Rolga, the Claimant should clearly be compensated for such interference with its rights.

III. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT’S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ALLOWING OTHER TOUR OPERATORS TO ORGANIZE AND MAKE PROFITS FROM VISITING ACTIVITIES TO THE SITE, INCLUDING THE TAKING OF PHOTOGRAPHS.

A. The Claimant has a right as a salvor-in-possession over the wreck of Coeur de l’ Ocean.

It has been recognised, “both at common law and in Admiralty, that in certain circumstances salvors in principle have possessory rights”.²⁹ This means that salvors, in undertaking a salvage service, may acquire rights as the owners of the property which is being

²⁹ Francis D. Rose, *Kennedy and Rose The Law of Salvage*, 6th ed. (London: Sweet & Maxwell, 2002) at [1228].

salved.³⁰ They would hence be protected against third parties wrongfully interfering or seeking to interfere with the salved property or in the salvage operation. For instance, in the case of *R.M.S. Titanic v. Wrecked and Abandoned Vessel*,³¹ the District Court held that it could protect the rights of the salvor in possession of a historical wreck by enjoining others from taking photographs.

Particularly noteworthy, is that in the case of RMS Titanic, the District Court went as far as to conclude that the salvor-in-possession was entitled not to be disturbed in its salvage work. Due to the absolute darkness as caused by the depth of the wreck, photographers had to use powerful lights and travel extremely closely to the wreck, which was considered to be a disruption to the salvor-in-possession and hence disallowed. There, the court noted that the right of a salvor-in-possession was so strong that “no other person can lawfully intrude upon that possession, including the salved vessel’s master or owner.”³²

In our case, the Claimants, in the act of carrying out salvage of the Couer de l’ Ocean, would similarly have such rights. As such, allowing other tour operators to organize and make profits from visiting activities to the site could effectively be infringing on such possessory rights. More importantly, it could have a negative effect on the delicate nature of the salvage works that the highly professional Heritage Inc. is involved in. As such, it would be interfering with their rights as possessory owners to have a undisturbed environment to carry out their salvage responsibilities under the 1995 Agreement. Considering the strict project plan that Heritage Inc. has to follow, as well as the highly specialized nature of historical wreck recoveries, having extra unaccounted for manpower freely moving in and out of the wreck site and attempting to take photographs and more is clearly an interference with their basic salvage right and performance under the 1995 Agreement.

³⁰ *Brice* at [2-260].

³¹ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* 9 F.Supp.2d 624 (1998) [“RMS Titanic”]

³² Vol. 3A, M. Norris, *Benedict on Admiralty: The Law of Salvage* 151 (7th ed. 1983).

It is noted that the decision in *RMS Titanic* was overturned, in part, on appeal.³³ However, the appeal court was careful to state that “this does not mean, however, that a court may not enforce salvage rights by prohibiting a party over whom it has personal jurisdiction from conducting salvage operations or interfering with the first salvor’s exclusive possession of the wreck for purposes of salving it.”³⁴ The Appeal court further clarified that it affirmed the district court's injunctions insofar as they enjoin parties and persons in privity with them from conducting salvage operations of the *Titanic* wreck and interfering with the salvage operations of salvor.³⁵

IV. THE CLAIMANT HAS EXCLUSIVE RIGHTS TO ORGANIZE AND PROFIT FROM VISITING ACTIVITIES TO THE WRECK SITE, INCLUDING THE TAKING OF PHOTOGRAPHS.

A. There exists an express term in the 1995 Agreement entitling the Claimant to exclusive rights to photograph and document the Coeur de l’ Ocean.

Under the 1995 Agreement, there is provision for Merchandising Income³⁶ whereby 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) related to the wreck of Coeur de l’ Ocean.” In addition, the Government receives “a fee equal to three percent of its gross sales of merchandise” utilizing that name. It is obvious that the purpose of the clause is to encompass all merchandise related to the wreck itself, as seen from the fact that the 1995

³³ *R.M.S. Titanic v. Haver* (1999) A. M. C. 1330.

³⁴ *Ibid*, at 1359

³⁵ *Ibid*, at 1360

³⁶ Moot Problem Appendix (1) at cl. 6.

Agreement was only between two parties, the Respondent and Heritage Inc. and that the Respondent is taking a cut from the merchandise. Furthermore, given that ‘merchandise’ is extremely broad in definition, it could, first of all, be taken to include photographs and secondly, souvenirs or merchandise with photographic images printed on them. As the clause for merchandising income is clearly broad enough to include photographs, it is submitted that there exists an express term entitling the Claimant to exclusive rights to photograph and document the Coeur de l’ Ocean.

B. In the alternative, there exists an implied term entitling the Claimant to exclusive rights to photograph and document the wreck of Couer de l’ Ocean.

There exists an implied term within the 1995 Agreement between Heritage Inc. and the Respondents that Heritage Inc. would own the exclusive rights of photographing the Coeur de l’ Ocean, and to organize and profit from visiting activities to the site. In noting that the Respondents are of common law tradition,³⁷ the current approach under common law for determining the existence of an implied term is found in the case of *B P Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of the Shire of Hastings*.³⁸ It was stated as a two-part test comprising of the ‘business efficacy’ test as stated by Bowen LJ in *The Moorcock*³⁹ and the ‘officious bystander’ test as formulated by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd*.⁴⁰

The ‘business efficacy’ test states that a “term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can

³⁷ Moot Problem Further Clarifications, at cl. 7.

³⁸ *B P Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 C.L.R. 266 at 282-283 (P.C.).

³⁹ *The Moorcock* (1889) 14 P.D. 64 at 68.

⁴⁰ *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206 at 227.

confidently be said that if at the time the contract was being negotiated some one had said to the parties, ‘What shall happen in such a case,’ they would both have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear.’ Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed. The officious bystander states “if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: ‘Oh, of course.’”

Although different common law countries have applied the two-part test differently, the result is the same regardless of which is applied in our case. Singapore has applied the tests conjunctively, as seen in the Court of Appeal case of *Chua Choon Cheng v. Allgreen Properties Ltd*⁴¹; while the UK has applied them disjunctively, in the recent Privy Council case of *Attorney General of Belize v. Belize Telecom Ltd.*⁴². The leading Malaysian case - the Court of Appeal decision of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd*,⁴³ is unclear as to whether the tests are to be used disjunctively or conjunctively, as it was held that the implied term disputed would have failed both tests.

In our case, however, it is clear that both tests are fulfilled. The ‘business efficacy’ test is fulfilled because the very nature of the 1995 Agreement is a commercial one, and it must be commercially viable, i.e. one that has to work out to be profitable for the Claimant and one that is workable. There is no way that the Merchandising Income clause⁴⁴ can be construed to exclude photographs. Under Fees and Deposits,⁴⁵ it imposes on the Claimant the onerous duty of depositing upfront the large sum of up to USD \$1,250,000 to be used should

⁴¹ *Chua Choon Cheng v. Allgreen Properties Ltd* [2009] SGCA 21 at para [63].

⁴² *Attorney General of Belize v. Belize Telecom Ltd* [2009] UKPC 10 at [26]-[27].

⁴³ *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 M.L.J. 587. [“Sababumi”]

⁴⁴ Moot Problem Appendix (1) cl. 6.

⁴⁵ *Ibid.*

there be insufficient revenue to pay the Respondent's expenses related to the 1995 Agreement. This arrangement allows the Respondent to bear a minimal amount of the costs and risks whilst transferring much of the burden to the Claimant. Of course, merely proving that the balance is tilted in favour of one party is insufficient as an implied term has to arise from "necessity and not mere reasonableness" as per Lord Wilberforce in *Liverpool City Council v. Irwin*.⁴⁶

With regard to clause 6 (Merchandising Income) of the 1995 Agreement, it is submitted that the right to use the name "Coeur de l' Ocean" in association with sales and marketing of merchandise related to the wreck is exclusive to Heritage Inc. This clause would mean nothing if in the first place, there can be troves of other merchandise, for instance photographs, clearly from the same site, but just not carrying the specific words. The clause cannot be so narrow as to just be concerning usage of the name with nothing as to the actual content or exclusivity of its merchandise. The definition of merchandise generally would be taken to mean all those things which merchants sell either wholesale or retail, as dry goods, hardware, groceries, drugs, etc. usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used or which are used only by a slow consumption and clearly incorporates an idea of good being sold, which would include photographs.

Simply put, considering the risks that the Claimant was willing to accept and the possibility of losing huge amounts of money in the event of failure, there was no possibility that the 1995 Agreement would have entirely ignored the other profitable aspects of the Coeur de l' Ocean. The 'officious bystander' test would have been fulfilled because if an

⁴⁶ *Liverpool City Council v. Irwin* [1977] A.C. 239 at 254.

official bystander were to point out that the clause was greatly in favour of the Respondent and asked if there was an intention for the Claimant to have exclusive rights to make profits from visiting activities and the rights of photographing and documenting the wreck, it would be clear that both sides would have testily suppressed him with a common “oh, of course”. It was the Claimant, on its own, that expended time and resources to research and find the location of the wreck. The Claimant was also the only party that to have been in contact with the wreck. This was in line with the Respondent’s intention of protecting the wreck to the best of its ability and to be able to monitor whether activities were done in accordance with the project plan. Having third parties would potentially alter the work being done and could not have been contemplated by the parties when concluding the 1995 Agreement. The only reason why the contract has been silent about this would be solely because it would have been too obvious a point to be included.

Furthermore, following UNCLOS, which Rolga ratified before it entered into the 1995 Agreement, it is stated in Annex III Article 3(4)(c) that the operator has “the exclusive right to explore for and exploit the specified categories of resources in the area covered by the plan of work”. As an operator engaged by the Respondent under the 1995 Agreement, there is clearly an implied term for the exclusivity of the Claimant’s rights within the 1995 Agreement.

Under American law, in considering whether to grant a particular salvor exclusive rights over an historical wreck, the court takes into account the effort, skill and ability of the salvor in the field of preservation of archaeological material and information, e.g. by

photographs, carrying out historical research (*MDM Salvage v Unidentified etc. Wreck*⁴⁷). In protecting such rights, the court will usually give an injunction or an award of damages in favour of the possessory rights of the salvor.⁴⁸

C. The exclusive right to photograph has been recognised under American law and is applicable in this case.

Under American law, there has been recognition of the exclusive right to photograph a wreck site as established by *RMS Titanic*.⁴⁹ In addition, in *MDM Salvage*,⁵⁰ the courts examined the case where two independent salvors had requested a declaration as to which of them, if any, had exclusive rights over the wreck site. In considering the issue of exclusive rights, the court took into account the effort, skill and ability of the salvor in the field of preservation of archaeological material and information, eg. by photographs, carrying out historical research etc. In the case, both parties had not sought to preserve the archaeological integrity of the area, had not invested sufficient capital in their respective projects and had not presented convincing evidence of the near-term ability to salvage the wreck.

This is in sharp contrast to *Heritage Inc.*, which has expended extensive time, effort and research and clearly demonstrated the ability to salvage the artefacts of the *Coeur de l' Ocean*

⁴⁷ *MDM Salvage v Unidentified etc. Wreck* [1987] A.M.C. 537 at 539-540 ["MDM Salvage"]; also see *J.F. Moyer v The Wrecked Andrea Doria*, [1994] A.M.C. 1021 at 1031

⁴⁸ *Brice* at [4-70].

⁴⁹ *R.M.S. Titanic v. Haver* (1999) A. M. C. 1330.

⁵⁰ *Supra* note 47.

V. THE CALCULATION OF PROFITS AND/OR DISTRIBUTION OF ARTEFACTS BETWEEN THE PARTIES SHOULD BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES.

A. In light of the inequitable terms concerning distribution, the Sharing Arrangements should be disregarded and salvage principles, applied.

In accordance with Article 7(b) of the International Convention on Salvage, 1989 (“Salvage Convention”), a contract or any terms thereof may be annulled or modified if “the payment under the contract is in an excessive degree too large or too small for the services actually rendered.” Although there are Sharing Arrangements⁵¹ provided for by the 1995 Agreement, the split of appraised profits 60% to the Respondents and 40% to Heritage Inc. is clearly too small an amount. Indeed, this has to be considering in light of the fact that Heritage Inc. has done all the salvage work, from the initial “years of endless survey” to the project plan that was approved by the Government, then finally to the actual act of salvaging the wreck. The Respondents had merely had an understaffed agency with the option of monitoring and recording the exploration to ensure that it was done in compliance with the project plan. As such, the 1995 Agreement with respect to Sharing Arrangements should either be nullified or amended. In the absence of a clear provision in the contract, as stated in Article 6⁵² that the Salvage Convention “shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication”, it can be taken that the Salvage Convention would apply.

Under Article 12(1), “salvage operations which have had a useful result give right to a reward.”⁵³ The criteria for fixing the reward, subsequently set out in Article 13, include:⁵⁴

⁵¹ Moot Problem Appendix (1) Point 5.

⁵² Salvage Convention at Article 6.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

- (a) the salvaged value of the vessel and other property;
- (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
- (c) the measure of success obtained by the salvor;
- (d) the nature and degree of the danger;
- (e) the skill and efforts of the salvors in salvaging the vessel, other property and life;
- (f) the time used and expenses and losses incurred by the salvors;
- (g) the risk of liability and other risks run by the salvors or their equipment;
- (h) the promptness of the services rendered;
- (i) the availability and use of vessels or other equipment intended for salvage operations;
- (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

Considering how the test has been applied, there have been no Malaysian cases on point. Instead, we look to American cases, where the wealth of literature can be found and acts as persuasive authority. Indeed, United States (US) cases are preferred to English cases because where the United Kingdom is concerned. In fact, with respect to the Salvage Convention, the United Kingdom made a reservation that the Convention does not apply when the property involved is maritime cultural property of pre-historic, archaeological or historic interest and is situated on the sea-bed”.⁵⁵ In contrast, the United States Supremacy Clause considers the Constitution, Federal Statutes and US treaties to be “the supreme law of the land”⁵⁶ and has accepted the Salvage Convention without reservation. In *Colombus-*

⁵⁵ *Brice* at [4-25].

⁵⁶ United States of American Constitution U.S. Const. art. VI, cl. 2.

America,⁵⁷ both the District Courts and the Court of Appeal recognized and stressed the value of the intense scientific research which had gone into the salvor's endeavours and the educational benefits of their work. The Court of Appeal applied the law of salvage and took into account, in addition to the normal criteria, "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salvaged" in awarding damages.

Heritage Inc. and Mr Bernard Bodd are well recognised in the area of salvage and have carved for themselves an area of expertise in historic wrecks recovery. It is only to be expected that they would have the best equipment and technique available for the recovery of the wreck which they put to good use hence fulfilling Articles 13(i) and (j), where applicable. The wreck, according to our information, was found by Heritage Inc. after "extensive research and study of records at the maritime archives of Astoria", "some years of endless survey" and more, evidence of the time and effort put in by Heritage Inc, fulfilling Articles 13(e) and (f). In addition, Heritage Inc. was also required, pursuant to the 1995 Agreement, to place on deposit with the Respondent the sum of up to USD \$1,250,000 that in the event the exploration does not generate sufficient revenue to pay the Governments expenses, could well be forfeited to pay such. Furthermore, at all material times of the project itself, the Government was to be considered the owner of the shipwreck. In spite of the much disadvantaged position and the lack of any prospect of recovery of profit, Heritage Inc. signed the agreement and went ahead with the salvage project. Although there was no eventual loss due to the highly successful nature of the salvage, the risk of liability and possible losses could have been substantial, hence the high award should be accorded in relation to Article 13(g). Applying the law to our facts, it is undisputed that Heritage Inc. has

⁵⁷ [1995] AMC 1985.

salvaged artefacts amounting to as much as USD \$616 million, a clear indication of a high value and the success of their efforts being reaped, as stated in Article 13(a) and (c).

Also, the wreck has received praise from the National Geographic as the most “bedazzling underwater treasures ever found today” and a maritime exhibition in 2000 showcasing recovered artefacts from the Coeur de l’Ocean it successfully doubled “the number of tourist visits to the National Museums.” Furthermore, Heritage Inc. is in the midst of negotiating an ongoing television documentary deal with International Broadcasting Company to help educate the public and raise awareness about the rich historical and cultural value of the Coeur de l’Ocean.

As this is a wreck in question, there is no issue of the promptness of services rendered as provided for by Article 13(h), or danger to lives and property as in Article 13(d). In this light, having recovered USD \$616 million worth of artefacts is proof of their specialist techniques and careful care of the entire matter. Also, in the light that there is no determination of whether Heritage Inc.’s acts have resulted in damage to the eco-system in the area,⁵⁸ there can be no assumption made against Heritage Inc. with respect to Article 13(b).

All the facts point towards obvious conclusions – that there was massive labour, and resources, financial and otherwise invested into the salvage, that although not being in impending peril, it was still in substantial danger and the act of successful salvage did greatly contribute towards preservation of historical and archaeological value and was greatly beneficial to not just the people and tourists of Rolga but also the benefit of the world

⁵⁸ Further Clarifications at para. 30.

population at large. For the many reasons stated above, it only makes sense therefore, for the salvors to obtain a huge remuneration based on salvage principles.

As from *Colombus-America* itself, it makes sense for the salvors to gain a large percentage of the profits due to their immense efforts taken.⁵⁹ The suggested amount, using *Colombus-America* as a good gauge would be up to 80% of the profits.⁶⁰ Considering the entire wreck as of now to be appraised at roughly USD \$616,298,000, not including items whose value has yet to be determined, the immediate amount that Heritage Inc. should be entitled to, should reach the range of around USD \$493,744,000. As Heritage Inc. is mainly a private company with little experience and interest in preservation of the artefacts, it is inclined to sell it to parties that will be better able to appreciate such artefacts and allow for the world at large to benefit from the rich historical and educational value of such artefacts. As such, irrespective of which artefacts these may be, it is submitted that Heritage Inc. should be allowed to apply salvage principles, claim for a monetary reward amounting to 80% of the value of these artefacts and would at most exercise its option to possess the remaining artefacts for one or two items only which it should be allowed to request for.

B. Even if the contract provision is held to be valid, this does not preclude the application of salvage principles.

Even when a salvage agreement is concluded and it provides for the basis of rights and obligations of the parties, if all other elements of salvage are present, it will fall under the Admiralty Jurisdiction. In the UK case of *Admiralty Commissioners v. Valverda (Owners)*,⁶¹ it was noted that a salvage is determined by its substance and “it is untrue that where there is

⁵⁹ [1995] A.M.C 1985.

⁶⁰ *Ibid.*

⁶¹ *Admiralty Commissioners v. Valverda (Owners)* [1938] A.C. 173.

a contract as to a salvage it ceases to be a salvage".⁶² Although an increasing number of salvages are regulated by agreement, they are still dealt with and paid for in accordance with the maritime law of salvage hence the salvage principles as stated above should apply.

VI. CONCLUSION

Heritage Inc., well recognised in the area of salvage, put in a large amount of finance, resources and effort into the discovery and salvage of the Coeur de l'Ocean. It took a huge risk in injecting funds into the project, and in spite of the much disadvantaged position and the lack of any prospect of recovery of profit, signed the 1995 and fulfilled to the best of its ability the provisions of the 1995 Agreement. It is with great regret that the Respondent recklessly interfered with Heritage Inc's rights and performance on multiple occasions. This is through no fault of Heritage Inc., which has more than played its role in unearthing one of the most 'bedazzling underwater treasures ever found today'. As such, Heritage Inc. submits that the arbitrator find for him as summarized below.

Heritage Inc. submits that salvage rights apply by virtue of the Salvage Convention and the 1995 Agreement. However, the respondent has interfered with Heritage Inc's salvage rights and performance under the 1995 agreement by (1) entering into the Astoria Agreement and (2) ratifying the 2001 Convention and (3) by allowing other tour operators to organize and make profits from visiting activities to the site, including the taking of photographs.

Furthermore, Heritage Inc. has exclusive rights to profit and organize from visiting activities to the wreck site, including the taking of photographs as there exists an express /implied term conferring the benefit. It is further submitted that the American approach in allowing for exclusive rights should be considered.

⁶² *Ibid* at 202.

Finally, the calculation of profits and/or distribution of artefacts between the parties should be made solely on the basis of salvage legal principles. Indeed, in light of the inequitable terms concerning distribution, the Sharing Arrangements should be disregarded and salvage principles, applied. Even if the contract provision is held to be valid, this does not preclude the application of salvage principles.