
2009 LAWASIA INTERNATIONAL MOOT COMPETITION

IN THE INTERNATIONAL CENTRE OF ARBITRATION

HO CHI MINH, VIETNAM

**CASE CONSIDERING
PROCEEDINGS IN ROLGA**

2009

BENEVOLENT HERITAGE INC.

(Claimant)

v.

THE GOVERNMENT OF ROLGA

(Respondent)

MEMORIAL OF THE RESPONDENT

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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 rights and performance under the 1995 Agreement by entering into Agreement with Astoria in 2001?

- (ii) Has the Respondent interfered with the Claimant's 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 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

Coeur de l' Ocean

The Coeur de l' Ocean was an Astorian ship sent to conquer the city of Zamzala (now part of the territory of the State of Rolga) in 1800. After the sacking of Zamzala, the Coeur de l'Ocean; which was laden with exotic goods, royal jewellery and other riches of the Palace of Zamzala, as well as cargo of unknown origin; sank due to a storm while enroute to an unknown destination. Currently, it is located 12 nautical miles from the baseline of Rolga.

Rolga

Since its independence from Astoria just 50 years ago, Rolga has mainly relied on agriculture and eco-cultural tourism to further its economic development. However, since the 1980s, technological advancements have led to Rolga's extraordinary collection of historic sunken war wrecks becoming the target of rampant looting by illegal treasure hunters. The situation is exacerbated by the lack of policing in maritime areas and lack of awareness of the significance of the artefacts to the country.

Benevolent Heritage Inc.

The appearance of the Claimant – Benevolent Heritage Inc. (“Heritage Inc.”); which was owned by Mr Bernard Bodd, a salvor well known for his expertise in historic wrecks recovery, in 1990 and its interest in discovering the Coeur de l'Ocean was thus very welcome because it provided the Rolgan government with the means to recover at least some of the artefacts within its territorial waters before they were looted away. Approval to survey

Rolgan waters for the wreck was awarded and Heritage Inc. did not disappoint. It took only three years for Heritage Inc to discover the wreck of the Coeur de l’Ocean on 1 June 1993.

The Partnering Agreement Memorandum (“1995 Agreement”)ⁱ

Following that, the Rolgan government approved an extensive recovery project to be carried out by Heritage Inc. and together, they signed the 1995 Agreement which provided for:

- (i) Recovery of artefacts to proceed according to a project plan approved by the Rolgan government and supervised by two government representatives;
- (ii) Sharing and marketing arrangements of the artefacts, net of agreed selling expenses, between them; and
- (iii) Heritage Inc. to be granted the right to use the name ‘Coeur de l’Ocean’ in the sale and marketing of the wreck on the condition that the Rolgan government would get three percent of its gross sales of merchandise.

The contract provided minimally for supervision by the Rolgan government, with the possibility of up to two representatives to monitor and record the exploration. The Agreement expressly provided for Sharing Arrangements which detailed the distribution of artefacts between parties. In addition, the granting of rights was specifically limited to that of merchandising related income.

In the process leading up to the approval and signing of the 1995 Agreement, Heritage Inc. was already allowed to conduct a pre-disturbance survey to aid their subsequent salvage efforts.

ⁱ Moot Problem Appendix (1).

Other subsequent agreements

In line with other developments in international law, being a responsible state and part of the international community at large, Rolga subsequently ratified the 2001 UNESCO Convention for Protection of Underwater Cultural Heritageⁱⁱ and signed an agreement with Astoria concerning the protection of Astorian wrecks off the Rolgan coast (“2001 Agreement”).ⁱⁱⁱ These were in line with our duties as a responsible state, with no information given to Heritage Inc. since these were entirely our own state’s obligations, separate from our private commercial contract involving them.

Engagement of other companies

As much as Rolga received accusations of being involved in “commercial exploitation”, being the work done by Rolga, and the confirmation that there had been carelessness that resulted in the mishandling and destruction of artefacts by Heritage Inc. which was considered to be a great loss to mankind, this was seen in the best light, regarded kindly and not pursued harshly. To aid Heritage Inc. with their work, raise public awareness of the wreck and better the public image of the area, we permitted Aquatic View to sell tickets for tours that were organized to the wreck area. Entirely independent of this, Aquatic View also chose to film videos and take photographs for publicity purposes.

ⁱⁱ UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris, 2 November 2001. [“2001 Convention”]

ⁱⁱⁱ Moot Problem Appendix (2).

Deterioration of salvage situation

Heritage Inc., in 2003, felt that further investments would only be harmful to the company and there was a shift instead to the distribution of the artefacts. In addition, such proceedings have been commenced, asserting interference with many of their rights.

SUMMARY OF PLEADINGS

The Respondent argues that it has not interfered with the Claimant's rights and performances under the 1995 Agreement. Although it did enter into agreement with Astoria, there is nothing in the agreement to suggest that the claimant's rights are in any way altered. All the provisions have been included for in the project plan itself. Also, Astoria's share of the wreck comes from the portion that Rolga gets allocated, hence not infringing upon the Claimant at all.

Under the 2001 Convention that was ratified, there was no specific provision that interfered with the Claimant's rights. The Claimant's actions come under professional salvage as opposed to commercial exploitation, and it is important to remember that the basic principle behind the law of salvage is to encourage salvors. Besides, even the many provisions asking for high standards of care to be taken and for the use of the "best practicable means" are too vague to be construed against the Defendant. It should also be noted that the best of means could still end up with adverse results in situations that coincide with the worst of human errors.

The Claimant, cannot be considered a salvor carrying out a salvage operation, in line with Article 1 of the International Convention on Salvage. In recognising such, there are no salvage principles that can apply, and neither does the Claimant have a possessory right in any sense of the word. Furthermore, based on the simply worded agreement, it is plain for all to see. There is no express provisions that has provided for an exclusive right to take photographs and document Coeur de l' Ocean, much less and form of interference with such

non-existent rights. The US cases such as *Titanic* can only be used as mildly persuasive, since the facts were very different and it is after all in a different country. There is also, expectedly, no implied term for exclusivity since it would fail both the ‘business efficacy’ and ‘officious bystander’ test.

On distribution, it should as a last point be noted that there is already express provision in the contract that has provided Sharing Arrangements for the artefacts that have been salvaged. This is in accordance with party autonomy and contract law and salvage law, as such, is expressly prevented from applying. Even if they should apply, due to the inadequate job done as salvors, their remuneration or reward under salvage laws, would too, be rather minimal. Also, in the event that the Claimant’s should want to advance this claim, it should be noted that they could be potentially time-barred since it is likely that six years has already lapsed since the time they have ended salvage activities at the wreck site.

PLEADINGS

I. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE PARTNERING AGREEMENT MEMORANDUM BY ENTERING INTO THE AGREEMENT ON THE "PROTECTION OF ASTORIAN WRECKS" WITH THE GOVERNMENT OF ASTORIA.

As a precursor to understanding if there has been a breach of the Claimant's rights and performances under the Partnering Agreement Memorandum ("1995 Agreement"), it is necessary to determine the said rights and performances. They are:

- 1) The right to own and possess 40% of the appraised values and/or selling prices of the remaining artefacts, net of agreed selling expenses; in addition to 40% of proceeds from sale of first \$45 million worth of artefacts¹ (since the aggregate appraised value of the recovered items have exceeded USD\$500 million).²
- 2) The right to use the name 'Coeur de l'Ocean' with the sales and marketing of merchandise related to the wreck (exclusive of artefacts).³
- 3) Performance in the form of exploration, conservation and documentation of the artefacts recovered.⁴
- 4) Performance in the form of the formulation of a joint marketing plan with the Respondent for the placement and sale of the remaining artefacts.⁵

¹ Moot Problem Appendix (1) at cl. 5.

² Moot Problem Further Clarifications at para 18.

³ *Supra* note 1, cl. 6.

⁴ *Ibid*, cl. 2.

⁵ Moot Problem Appendix (1) at cl. 5.

Of the 4 points, it is submitted that only Point 1 could be affected by the 2001 Agreement, specifically an interference of the Claimant's rights over the distribution of recovered artefacts⁶.

For the purposes of comparison, the key principles in the Respondent's agreement on the "Protection of Astorian Wrecks" with the Government of Astoria ("2001 Agreement") are:

- (i) Unnecessary splitting of closely similar objects should be avoided and institutions that accommodate samples should not disperse them any further⁷.
- (ii) Unique or rare objects that form a meaningful assemblage should not be split, but if so, perfect replicas should be made to complete the assemblage⁸.
- (iii) A representative series of samples is to be made available to a museum each in Rolga and Astoria⁹.
- (iv) Distribution of specimens can only be considered after recovery is complete or if a representative sample can be assembled with fair certainty¹⁰.

It is presumed that there will be a sufficient number of artefacts recovered to satisfy both the 1995 Agreement and the 2001 Agreement, such that unique or rare items can be distributed between only Astoria and Rolga to satisfy Point (iii); while a greater portion of the numerically more abundant artefacts can be apportioned to the Claimant to satisfy Point 1. Based on the above, it is submitted that the Points (i) and (ii) do not prevent the Claimant from taking possession of its allocated portion of the artefacts. Point (iii) would prevent the Claimants from taking possession of some of the rarer artefacts such as the bronze cannons

⁶ *Ibid.* at cl. 5.

⁷ 2001 Agreement at cl. 2.

⁸ *Ibid.*

⁹ *Ibid.*, at cl. 6.

¹⁰ *Ibid.*, at cl. 7.

with Astorian marks and the silver daggers with precious stones¹¹, since these would be accorded to Rolga and Astoria for curation purposes; but would not hinder their rights to own and possess artefacts worth 40% of the aggregate appraised value. Point (iv) only results in a delay in distribution until recovery is complete but has no impact on the Claimant's final allocated portion. In sum, none of the Claimant's rights and performance under the 1995 Agreement is affected by the Respondent signing the 2001 Agreement.

A second possible area that the Claimant may attempt to assert interference in its rights and performance under the 1995 Agreement would be with respect to the delays and costs imposed under "Treatment of material recovered"¹². The 2001 Agreement provides that treatment of the artefacts recovered cannot await distribution because "most articles are fragmentary and in need of immediate chemical conservation and stabilization in the laboratory as soon as they are recovered"¹³. The requirement for additional procedures for the treatment of the artefacts, if not contemplated by the 1995 Agreement, could well lead to increased costs and delays for the Claimant, hence interfering with its rights under the 1995 Agreement. However, such details have not been provided for in the 1995 Agreement, while the specific workings of the approved project plan¹⁴ are unavailable. In addition, if the artefact fragments were in such need of immediate protection, it is most likely that the Claimant would already have to subject them to said treatment before storing them for future distribution.

II. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY

¹¹ Moot Problem, para. 12, Items 8 and 20.

¹² 2001 Agreement at cl. 3.

¹³ *Ibid.*

¹⁴ 1995 Agreement at cl. 2.

RATIFYING THE 2001 UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE.

The Respondent, by ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (“2001 Convention”), has not interfered with the Claimant’s salvage rights and performances under the 1995 Agreement. Ratifying the 2001 Convention not only did not render the 1995 Agreement invalid, but reinforced the Respondent’s right to engage the Claimant in the recovery of the artefacts. The 1995 Agreement remains valid in its entirety for three reasons:

First, ratification only binds the Respondent, as a State, to the 2001 Convention and not the Claimant, a private corporation¹⁵. Thus, the Claimant’s rights and performance under the 1995 Agreement will not be subject to the obligations imposed by the 2001 Convention at all. Even though the State, in this case Rolga, is bound by the 2001 Convention; it is the State’s responsibility to renegotiate and alter its obligations under the 1995 Agreement or to make reservations to the 2001 Convention. The above has no bearing upon the Claimant.

Second, the Claimant’s rights and performance under the 1995 Agreement do not run contrary to the objects and purposes of the 2001 Convention and thus, the Respondent will not have to alter or terminate performance of the 1995 Agreement in order to fulfil its obligations under the 2001 Convention. Article 6(3) of the 2001 Convention states that the 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

¹⁵ Vienna Convention on the Law of Treaties, 1969, Articles 2(a) and (b).

the purposes of this Convention.” Furthermore, under the Vienna Convention on the Law of Treaties, 1969 [“VCLT”], to which the Respondent is a party, States are bound to fulfil their treaty obligations in good faith¹⁶. That includes informing the Claimant of its intention to ratify the 2001 Convention and altering or terminating performance of the 1995 Agreement if it ran contrary to the objects and purposes of the 2001 Convention. The responsibility to do that however, lies with the Respondent and not the Claimant.

The purpose of the 2001 Convention is to protect and preserve underwater cultural heritage from commercial exploitation¹⁷, destruction¹⁸, irretrievable dispersal¹⁹ and looting²⁰ stemming from: (1) unauthorized activities for commercial gain or (2) legitimate activities without regard to the proper methodology of archaeological excavation²¹. Performance under the 1995 Agreement is authorized by the Respondent and does not fall under the first category of activities. The required submission of a project plan²², monitoring by government representatives²³, and formulation of a joint marketing plan²⁴ for recovered artefacts under the 1995 Agreement show that performance of the 1995 Agreement does not fall within the second category of activities and are in line with the purposes of the UNESCO Convention 2001. In addition, should there truly be inconsistencies, it is the duty of the Respondent to negotiate for there to be changes under the existing 1995 Agreement and without which, there is no interference with the Claimant’s rights.

¹⁶ *Ibid* at Article 26.

¹⁷ *Ibid* at Article 2(7).

¹⁸ *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage* (General Conference, 28th Session, 28C/39, 4 Oct 1995) at para 4. [“Prelim Study”]

¹⁹ UNESCO, “Information Kit: UNESCO Convention on the Protection of the Underwater Cultural Heritage” at 13 [“Info Kit”].

²⁰ *Supra*. note 18.

²¹ Preamble to the UNESCO Convention 2001 at Paras 6-8; *Prelim Study* at para. 11.

²² 1995 Agreement at cl. 2.

²³ *Ibid.*, cl. 4.

²⁴ *Ibid.*, cl. 5.

Third, if there be any doubt at all, the Respondent had the right to conclude the Agreement with the Claimant regardless of whether Astoria had passed on any interests or ownership of the wreck to Rolga. The wreck of the Coeur de l’Ocean lies 12 nautical miles (“nm”) from Rolga’s baseline²⁵ which is within the territorial sea, and thus the sovereignty, of Rolga. This gives the Respondent the right to deal with the wreck as it sees fit, including engaging the Claimant to recover it, as provided for by the 1995 Agreement. This is reinforced by Article 7(1)²⁶ which gives State Parties “the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their... territorial sea”.

From a presumptive and argumentative perspective, the two provisions in the 2001 Convention that seem most likely to affect the Claimant’s rights and performance under the 1995 Agreement are: Article 2(6) and Article 2(7).²⁷ Article 2(6) states that “recovered underwater cultural heritage must be handled in a way to ensure its long-term preservation” which could possibly interfere with the Claimant’s rights by imposing a higher standard expected of them. There have been reports that describe a wreck as something that has “reached an equilibrium with the environment”²⁸, and recognises that “their removal from the sea-bed will almost certainly ensure their loss, unless they are immediately treated by relatively sophisticated techniques at the hands of specialist conservators.”²⁹ On the other hand, although salvage works began as early as in 1995, the table of artefacts³⁰ is clear evidence that a substantial amount of the artefacts recovered have indeed been successfully preserved for many years already, proving Article 2(6) unfounded.

²⁵ United Nations Convention on the Law of the Sea, Montenegro Bay, 10 December 1982, Articles 2 and 3 [“UNCLOS”].

²⁶ 2001 Convention, Article 7(1).

²⁷ *Ibid* at Article 2(6) and 2(7).

²⁸ *Prelim Study* at para. 31.

²⁹ *Ibid*.

³⁰ Moot Problem at para 12.

Article 2(7)³¹ states that “underwater cultural heritage shall not be commercially exploited”. The result of this if proven true, will be that under Article 18(1)³², that the “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.” This simply means Heritage Inc. might be deprived of its share of what it has salvaged, clearly being an interference on their rights, since a Sharing Arrangement³³ has been provided for. It is as such important to look at the definition as to what would constitute ‘commercial exploitation’. Although ‘commercial exploitation’ is not defined in the 2001 Convention, the reason for its prohibition can be discerned through other provisions within, and from the objects and purposes of, the 2001 Convention. From the examples provided in the preparatory documents³⁴, commercial exploitation is prohibited because the recovery of artefacts on the basis of commercial profit leads to the disregard of their archaeological, historical and scientific importance; and often, the destruction of the wreck³⁵. Instead, it is submitted that a more likely interpretation of the Claimant’s role would be that provided under the Annex, Rule 2(a)³⁶ which states “the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities”. This has also been clarified as distinctly not being “commercial exploitation of underwater cultural heritage for trade or speculation”.³⁷

³¹ 2001 Convention at Article 2(7).

³² *Ibid* at Article 18(1).

³³ 1995 Agreement at cl. 5.

³⁴ Info Kit at 7.

³⁵ See also: *Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument of the Protection of the Underwater Cultural Heritage* (Executive Board, 151st Session, 151 EX/10, 12 March 1997) at para. 45.

³⁶ 2001 Convention at Annex, Rule 2(a).

³⁷ *Ibid* at Annex, Rule 2.

Analysed with the facts of our case: Mr. Bodd is a well known salvor with professional expertise in historic wrecks recovery, at the Claimant's helm; and has received the approval and supervision of the Respondent to carry out the salvage. The performance of the 1995 Agreement falls squarely within Rule 2(a). Although there is indeed a Sharing Agreement³⁸ that has provided for the split of the artefacts of the wreck, considering the high costs involved in the wreck itself and the highly specialised nature of work carried out, it cannot be possibly considered under the 2001 Convention to come under "commercial exploitation". Without the promise of any monetary benefit at all, it is more likely that no salvor would have stepped forward with the intention of retrieving the wreck, possibly an even greater loss for the good of mankind, in terms of knowledge and the wealth of historical and cultural significance the wreck bears. The Claimant's reward is instead adequate in the light of the work being done and is not to the detriment of society as a whole.

The next most likely allegation would be with respect to the Claimant having failed to "use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities... incidentally affecting underwater cultural heritage."³⁹ Although it has been established as a fact that "artefacts were destroyed due to poor handling by Heritage Inc. personnel"⁴⁰, it is unclear as to whether or not the best practicable means have been used. Furthermore, Heritage Inc. and Mr. Bernard Bodd, being experts in the area of historic wrecks discovery and salvage, would likely have at their disposal the best methods with which to carry out this salvage. Without clear facts or information to the contrary, we submit that Heritage Inc. has fulfilled its duties to the best of its ability and artefacts destroyed due to poor handling can partially be attributed to the inevitable fragile nature of the artefacts and the nature of salvage work itself. In addition, the Convention only provides

³⁸ 1995 Agreement at cl. 5.

³⁹ 2001 Convention at Article 5.

⁴⁰ Moot Problem at para. 34.

for the best practicable means being used, however, even with the best salvage procedure of sorts in place, there is still the possibility that there could be room for human error or other unforeseen circumstances to affect the results of such means. The vague provision cannot be used against Heritage Inc. to assert that their rights have been interfered with.

In sum, the 1995 Agreement is not invalidated or compromised in any way by the ratification of the 2001 Convention. In spite of analysing the most likely few assertions of the Claimant, it has been proven that none of them fulfil the criteria of there being an interference with their rights.

III. THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCES UNDER THE 1995 AGREEMENT BY ALLOWING OTHER TOUR OPERATORS TO ORGANIZE AND PROFIT FROM VISITING ACTIVITIES TO THE SITE INCLUDING THE TAKING OF PHOTOGRAPHS.

First and foremost, it would be prudent to, in examining the question, lay down the pertinent rights and performances that the Claimant has been accorded in relation to the issue. With regard to tour operations, organizing and profiting, the Claimant has no rights at all. There is nothing in the 1995 Agreement that has accorded the Claimant the rights to organise tours to the site and profit via such action, including the taking of photographs.

The Claimant might attempt to argue that it has a possessory right, being the salvor of the wreck, in accordance with *R.M.S. Titanic*.⁴¹ However, according to Article 1 of the Salvage Convention,⁴² “salvage operation” is any act or activity undertaken to assist (1) a vessel or any other property (2) in danger in navigable waters or in any other waters whatsoever. However, in applying Article 1, *Coeur de l’ Ocean* fails on both grounds. The salvage done to a wreck can hardly be said to be assisting, since the wreck itself is in no need of assistance, having lain on the sea-bed for centuries and would be fine staying there for another few centuries more.

In addition, it also fails the ‘danger’ element of the test. The Report of the International Law Association Cultural Heritage Committee (‘ILACH Committee’) commented that “for underwater cultural heritage the danger has passed... ..and that it may be in greater danger from salvage operations than from being allowed to remain where it is.”⁴³ Indeed, with regard to policy, the ILACH Committee elaborated that “the major problem is that salvage is motivated by economic considerations; the salvor is often seeking items as fast as possible rather than undertaking the painful excavation and treatment of all aspects of the site that is necessary to preserve its historic value.” In addition, referring to persuasive authority, the Canadian court in *HM v Mar Dive*⁴⁴ held that a vessel sunk in Lake Erie was *not* in danger (save from unskilled recovery of artefacts) and recognised that underwater historic sites can be put at risk by such efforts. Therefore, in this case, salvage principles cannot apply since this cannot even count as being a salvage operation and as such no possessory right that stems from salvage law can arise.

⁴¹ *R.M.S. Titanic v. Wrecked and Abandoned Vessel* 9 F. Supp. 2d 624 (1998). [“Titanic District Court”]

⁴² International Convention on Salvage, London, 28 April 1989. [“Salvage Convention”]

⁴³ Geoffrey Brice, *Brice on Maritime Law of Salvage*, 4th ed. (London: Sweet & Maxwell, 2003) at 4-09.

⁴⁴ *HM v. Mar Dive* [1997] A.M.C. 1000 (Ontario Court, Canada, General Division).

IV. THE CLAIMANT HAS BEEN ACCORDED NO EXCLUSIVE RIGHT IN CONTRACT, EXPRESS OR IMPLIED, TO TAKE PHOTOGRAPHS OR DOCUMENT THE WRECK SITE OF THE COUER DE L' OCEAN.

A. The Claimant has no express right to take photographs, document or organize tours to the wreck site.

First and foremost, there is no express right according the Claimant with exclusive rights to take photographs, document or organize tours to the wreck site. The clause about Merchandising Income⁴⁵ is solely a right to use the name, and not a right over all merchandise and other related items pertaining to the wreck. In addition, the clause has never clearly stated or provided for the inclusion of photographs, which, taken to its logical conclusion, can only mean that it was either not within the scope of the agreement or was meant to be excluded.

B. The Claimant also has no implied right to exclusively take photographs, document or organize tours to the wreck site.

There is also no implied term within the 1995 Agreement that the Claimant owns the exclusive rights of photographing and documenting of the Coeur de l' Ocean and to organize and profit from visiting activities to the site. The current test under common law for the existence of an implied term was stated in the case of *B P Refinery (Westernport) Pty Ltd v.*

⁴⁵ *HM v. Mar Dive* [1997] A.M.C. 1000 (Ontario Court, Canada, General Division)

President, Councillors and Ratepayers of the Shire of Hastings.⁴⁶ It was stated as a two-part test, comprising of the ‘business efficacy’ test as stated by Bowen LJ in *The Moorcock*⁴⁷ and the ‘officious bystander’ test as formulated by MacKinnon LJ in *Shirlaw v. Southern Foundries*.⁴⁸ The ‘business efficacy’ test states “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 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’ test 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.’”

Application of the tests have differed amongst the various common law jurisdictions: conjunctively, as applied in the Singapore Court of Appeal case of *Chua Choon Cheng v. Allgreen Properties Ltd*⁴⁹ and disjunctively, from the recent Privy Council case of *Attorney General of Belize v. Belize Telecom Ltd*⁵⁰. The Malaysian Court of Appeal however, was unclear as to whether the tests were to be used disjunctively or conjunctively in the case of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd*, [“Sababumi”],⁵¹ since it was held that the disputed implied term would fail both. Similarly, in our case, the alleged implied term of exclusivity would fail both tests.

⁴⁶ *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.)

⁴⁷ *The Moorcock* (1889) 14 P.D. 64 at 68

⁴⁸ *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206 at 227

⁴⁹ *Chua Choon Cheng v. Allgreen Properties Ltd* [2009] SGCA 21 at para. 63.

⁵⁰ *Attorney General of Belize v. Belize Telecom Ltd* [2009] UKPC 10 at [26]-[27]

⁵¹ *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 M.L.J. 587. [“Sababumi”]

With respect to the ‘business efficacy’ test, exclusivity of rights claimed hardly increases the business efficacy of the transaction. The defining factor is “necessity and not mere reasonableness”, as stated by Lord Wilberforce in *Liverpool City Council v. Irwin*.⁵² Taking a pragmatic view, courts have always had a strong regard for party autonomy in the area of contract law, and the reason why the Court of Appeal reversed the decision by the lower court in *Sababumi* was because it felt that the judge was reading in terms that were never intended by the parties. The threshold to be satisfied is a high one and if the implied term is found necessary to be read in, regardless of how unfair it may be, then it is not the court’s role to change what the parties have willingly contracted for. In the 1995 Agreement, clause 6 granted the use of the name “Coeur de l’ Ocean” with the sales and marketing of merchandise related to the wreck of Coeur de l’Ocean. As merchandise refers to items sold for commercial profit, this would clearly exclude the organization of tours and other activities. Also, since the express terms of this contract are perfectly clear and free from ambiguity, and the contract is capable of functioning without the addition of any term, there is no need to imply any terms for reasons of business efficacy or otherwise.⁵³ Furthermore, clause 6 of the 1995 Agreement is focused on the use of the name Coeur de l’Ocean and rather than other items; for instance photographs, which rely on images themselves to promote the wreck instead of the name. Thus there seems no reason why there should be an implied term for the exclusivity of photographs and documentation.

In the application of the ‘officious bystander’ test, although the risk borne by the Claimant is much higher since the USD \$1,250,000 deposit may be forfeited to cover the Respondent’s expenses under clause 3 of the 1995 Agreement; it must also be noted that according to clause 5 of the 1995 Agreement (Sharing Arrangements), in the event of lower

⁵² *Liverpool City Council v. Irwin* [1977] A.C. 239 at 254.

⁵³ *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*, [1973] 1 W.L.R. 601 at 609 (H.L.)

profit margins, the Claimant is also the party benefitting the most - getting up to 80% of the profit for the first \$45 million, which would go to helping them recoup these costs incurred as opposed to profiting the government at the outset. And since the Claimant was the one that put forth the proposal for the Respondent to approve, it is only logical that the Claimant should offer something in exchange for the right to salvage the wreck. Even if the Claimant were to say “oh, of course there should be such an implied term”, it is likely that, under the circumstances highlighted, the Respondent would have vehemently disagreed, hence failing the ‘officious bystander’ test. It should also be noted that the threshold for the tests are very high, since the courts are usually not willing to write the contract for the parties and will only imply a term when the intention by both parties to include such a term is very clear.

In failing both tests, and clearly not falling under a general type of agreement that has an implied rule in all such known contracts, there cannot be any term implied into the 1995 Agreement awarding exclusive rights of any kind to the Claimant. As such, whatever has not been specifically provided for under the Claimant’s rights under the 1995 Agreement are open to other parties to take part in and profit from.

C. Claimant cannot claim exclusive rights to take photographs, document and organize tours to the wreck site based on the 1982 United Nations Convention on the Law of the Sea.

Although Article 3(4)(c) in Annex III of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) confers on the operator the “exclusive right to explore for and exploit the specified categories of resources in the area covered by the plan of work. If, however, the applicant presents for approval a plan of work covering only the stage of

exploration or the stage of exploitation, the approved plan of work shall confer such exclusive right with respect to that stage only”, there are two flaws with using this provision if the Claimant decides to use it to claim exclusive rights to take photographs, document and organise tours to the wreck site.

First, Article 3(4)(c) was never meant to apply to salvage or protection and preservation of underwater cultural heritage. Annex III is titled “Prospecting, Exploration, and Exploitation”, which demonstrates that the entire Annex is meant to apply to the search and exploitation of mineral deposits⁵⁴ and not to our case. The exclusive right is also given to exploit ‘resources’ which are only used in two ways in the UNCLOS: as “living resources⁵⁵” which refers to fish and other marine life, and defined as “all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules”⁵⁶.

Second, whether there is any such approved plan of work that the Claimant may base its claim of exclusive rights on, it is mere speculation given the paucity of detailed information in the case.

⁵⁴ UNCLOS, Annex III, Article 1. See also: references to “polymetallic nodules” in Article 6 (Approval of Plans of Work).

⁵⁵ *Ibid.*, Section 2 – Conservation and Management of the Living Resources of the High Seas.

⁵⁶ *Ibid.*, Article 133.

D. Even under salvage rights, the Claimant has no exclusive rights to take photographs, document and organize tours to the wreck site.

With regard to taking photographs, the Claimant might argue that in line with the judgment in *Titanic District Court*, they have a possessory right to the wreck. It must be noted that our case at hand can clearly be distinguished from that of *Titanic District Court*. In that case, the Court awarded exclusive rights to photograph owing to the consideration that the artefacts of *Titanic* could not be sold, hence leaving the salvors with no source of income, hence saw the exclusivity of documenting the wreck as their income source. It is evidently different in our case since the Sharing Arrangements⁵⁷ already provide for a source of income so long something is successfully salvaged. In addition, there is also the Merchandising Income⁵⁸ to consider.

Presuming that salvage law does apply and the case is valid persuasive authority, we must still note that on appeal, the judgment was reversed. It was unceremoniously held that this was an unwarranted extension of salvage law and the court rejected the notion that the salvor in possession had a right, tantamount to an intellectual property right, to exclusivity in photographing the wreck.⁵⁹

Under American law, another test that courts apply in considering whether to grant a particular salvor exclusive rights over an historical wreck takes into account the effort, skill and ability of the salvor in the field of preservation of archaeological material and

⁵⁷ 1995 Agreement at cl. 5.

⁵⁸ *Ibid* at cl. 6.

⁵⁹ *R.M.S. Titanic v. Haver* (1999) A.M.C. 1330.

information; for example by the taking of photographs, carrying out historical research⁶⁰. In *MDM Salvage*, 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. After taking into account the effort, skill and ability of each of the salvors in the field of preservation of archaeological material and information, the court held that: 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 their near-term ability to salvage the wreck. From the facts of the present case, 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” by the Claimant and that there have been allegations of “commercial exploitation” of the artefacts.⁶¹ Also, the efforts of the Claimant were clearly not directed towards the preservation of archaeological integrity of the area. This is demonstrated by their abrupt cessation of salvage activities upon realising that the Respondent were moving towards greater protection of underwater cultural heritage through the 2001 Agreement and the ratification of the 2001 Convention⁶².

V. WITH RESPECT TO DISTRIBUTION OF ARTEFACTS, SALVAGE PRINCIPLES SHOULD NOT APPLY.

⁶⁰ *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

⁶¹ Moot Problem, para. 10.

⁶² *Ibid.*, at para. 12

A. The distribution of artefacts has expressly been provided for in the contract and salvage principles should have no application.

As Kennedy notes, it is a general rule of thumb that a person is assumed to intend the natural consequences of his own acts. Moreover, parties are prima facie bound by their agreements. In particular, the parol evidence rule confirms the binding nature of the written expression of an agreement where the parties reduce it to writing. These observations are as applicable to salvage agreements as to other agreements. Thus, where parties have signed a salvage agreement, “prima facie unless the contrary is proved, they must be considered to be cognizant of the contents of the instrument, and to have intended to bind themselves accordingly to its tenor. This is the natural presumption, and is also the presumption of law.”⁶³

In the *Unique Mariner (No.2)*, Brandon J stated that the rights and obligations of parties to a Lloyd’s Form contract are governed by the terms, express or implied, of that contract but that the general maritime law of salvage applies only in so far as it is expressly or impliedly incorporated into the contract.⁶⁴ Brandon J had followed Lord Diplock’s approach in *The Tojo Maru*⁶⁵ that the proper approach to determine the obligations of contractors under Lloyd’s Form is to consider, first, what would be the salvage contractor’s liability under the general English law of contract and then to examine what, if any, differences flow either in principle or on the authority of previous decisions, from the special characteristics of salvage services.

⁶³ *The True Blue* (1843) 2 W. Rob. 176 at 181.

⁶⁴ *Unique Mariner (No.2)* [1979]1 Lloyd’s Rep. 37 at 50-51.

⁶⁵ *The Tojo Maru* [1972] A.C. 242 at 292.

In our case, distribution has been adequately provided for in the 1995 Agreement, under Clause 5 for Sharing Arrangements. As such, distribution of artefacts should be made solely in accordance with the provision in the contract. This view is supported by Article 6(1)⁶⁶ stating the Convention shall apply to any salvage operations “save to the extent that a contract otherwise provides expressly or by implication.” In light of the express provision provided for and agreed for by both parties,⁶⁷ there is no room for salvage principles to play any substantive role since party autonomy should prevail.

It should also be noted that application of the law of salvage, which encourages the removal of artefacts from the sea-bed for commercial purposes, is completely unsuitable for protecting and preserving underwater cultural heritage and should not be applied in any circumstance. The function of salvage law is to encourage the recovery of goods at sea which are in danger of being lost⁶⁸. However, a wreck which has been on the sea floor for centuries, such as the Coeur de l’Ocean, will be preserved with little degradation until they are removed from their environment, unless they are immediately treated by conservators⁶⁹. That is the reason why almost all countries exclude the wrecks of their warships from salvage operations⁷⁰ and why salvage legal principles should continue to be excluded when the present case is arbitrated upon.

As the wreck in this case has already been appraised at value of USD \$616,298,000, which is a value above \$500 million, the split of the proceeds of sale should be divided 60%

⁶⁶ Salvage Convention at Article 1.

⁶⁷ 1995 Agreement at cl. 5.

⁶⁸ Info Kit at para. 30.

⁶⁹ *Ibid.* at para. 31.

⁷⁰ *Ibid.* at para. 33.

for the Government and 40% for Heritage Inc.. In addition, it should also be noted that the Rolgan government has, in having ratified the United Nations Convention on the Protection of the Underwater Cultural Heritage of 2001, an additional interest in line with Article 20 of the Convention to “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.” In line with such, the artefacts that the government should be accorded, in line with the 60% split, would be a range of items, including at least one of every of its kind and a priority in those deemed to be particularly rare as these would have an inherent richer educational value to the international community and the whole of mankind at large. For example, they should be entitled to the sole silver container and silver pendant,⁷¹ as well as both of the silver daggers with precious stones.⁷² In terms of value, this should in total, amount to 60% of the entire profit of the wreck, as provided for in the Agreement.

As a side consideration, in line with the interests and benefit of humanity at large, it would make sense to allocate the less common objects to Rolga and part of that percentage due to Rolga to Astoria as well, which could help in better preserving the historical and cultural value and making it available to scientists as well as tourists for their benefit.

B. Even if salvage principles are presumed to apply, the Claimant may be time-barred against advancing any claim.

⁷¹ Moot Problem, para. 12, items 9 and 11.

⁷² *Ibid.*, item 20.

In the event that the claimant's argument is adopted and salvage principles are taken to apply, something that the respondent entirely denies, should happen, it should be noted that Article 23 will apply⁷³ and the Claimant shall be "time-barred if judicial or arbitral proceedings have not been instituted within a period of two years" commencing "on the day on which the salvage operations are terminated". Being 2009, a good 6 years from the time Heritage stopped salvage works, the Claimant's, even if they once had a right, clearly do not have one anymore.

C. Even if Article 13 applies, the Claimant will still only be entitled to a very small portion of the appraised value of the artefacts retrieved from the salvage.

Even if the Salvage Convention applies, it is submitted that the portion as received by the Claimant would only be minimal. It is recognized that based on salvage legal principles, the distribution of artefacts should be determined by the eight factors from Article 13(1)⁷⁴:

- (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;

⁷³ Salvage Convention at Article 23.

⁷⁴ *Ibid.* at Article 13(1).

- (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.

By and large, with reference to the factual scenario at hand, the salvors have scarcely fulfilled their duties adequately and should not be entitled to large profits. Although the Claimant have salvaged over USD \$616 million worth of artefacts, the entire wreck was estimated at being worth over \$1 billion, so such huge finds can only be said to be within expectation. Clauses (a) and (c) have to be read in the context and seen in proportion to the amount actually recovered, which in this case, is although not completed, not in a particularly high range. All the work that was done prior to the salvage itself, for instance the research as to the venue of the wreck itself cannot be taken to be part of the salvage service, since it was undertaken voluntarily and with its own level of commercial risk itself. The time, although being an element set out in Article 13(f), is not merely but the shortness or length of the operation, but as Dr Lushington observed, “the real value of the services rendered.”⁷⁵ The risk and liability under Article 13(g) is minimal since there were realistic evaluations of the value exceeding USD \$1 billion prior to the salvage efforts starting.⁷⁶ Furthermore, the efforts and money the Claimant has dedicated to the salvage itself has already been taken into

⁷⁵ *The General Palmer* (1844) 5 Not of Cas. 159n.

⁷⁶ Moot Problem at para 5

account in providing for the Sharing Arrangements,⁷⁷ with in the event of the profits being low, Heritage Inc. being entitled a large share (of up to 80%) to help it recoup its losses or costs and keep its liability and risk level to the bare minimum. Article 13(d) is with respect to dangers such as casualties on the ship as well as circumstances such as engine breakdown or fire⁷⁸, entirely irrelevant in our case. Article 13(e) considers the efforts taken by the salvors to avert such danger to property as well as to life.⁷⁹ Articles 13(h), (i) and (j) can entirely be ignored since they focus on salvage that involves scenarios where time is of the essence and the salvage is being done with respect to saving a vessel or crew, irrelevant in the case of a wreck. Read in light of Articles 13(b) and (e), the salvage reward always reflect the knowledge, skill and work displayed in the performance of the salvage service,⁸⁰ hence good conduct, promptitude courage and diligence will be rewarded. Since this however, is a wreck, the most that can be derived is the initiative of the Claimant in stepping forth to salvage the wreck. Concerning 13(b) on harm to the environment, it has been confirmed by a government underwater archaeologist stationed on site that “many of the artefacts (eg. Chinese porcelains) were destroyed due to poor handling of objects” which Heritage Inc. should be held solely responsible for. These acts have been criticized as being “a great loss to humankind”. This goes to show that there has been carelessness on the part of Heritage Inc. which is likely to have had an impact on the underwater environment that they were working in, considering the delicate balance of marine life and fragile nature of a wreck site.

In summary, the principles that should govern the distribution are those already stated for in the Sharing Arrangements.⁸¹ In the event of these not being applicable and salvage principles coming into play, Heritage Inc. should be entitled to either the 40% as provided for

⁷⁷ 1995 Agreement at cl. 5.

⁷⁸ Francis D. Rose, *Kennedy and Rose The Law of Salvage*, 6th ed. (London: Sweet & Maxwell, 2002) at 1411.

⁷⁹ *The Bartley* (1857) Swab. 198.

⁸⁰ *The Pergo* [1987] 1 Lloyd's Rep 582 at 587.

⁸¹ 1995 Agreement at cl. 5.

in the 1995 Agreement or a lesser amount due to their careless salvage work done for with the wreck of Coeur de l’Ocean.

VI. CONCLUSION

The Claimant has tried in vain to impose liability on the Respondent on every conceivable ground available to it. The Respondent, however, has demonstrated, without a doubt, that it had not interfered with the Claimant’s rights and performance under the 1995 Agreement when it took positive steps to protect, preserve and teach the world about the rich cultural heritage left behind by the people of the ancient city of Zamzala. Whether it was the ratification of the 2001 Convention, conclusion of the 2001 Agreement with Astoria or engaging of tour operators to increase awareness about the Coeur de l’Ocean; it left plenty of room for the Claimant to continue its performance and to obtain its rights under the 1995 Agreement.

No exclusive rights to take photographs, give tours, make documentaries or even use the name of the Coeur de l’Ocean were given to the Claimant: whether explicitly or impliedly under the 1995 Agreement; under the UNCLOS, or under salvage principles.

And lastly, the distribution of artefacts as provided by the 1995 Agreement was clear and perfectly able to meet the needs of the Claimant and Respondent without unfairness towards any party. Claiming under the Salvage Convention may be time barred. And even if salvage principles could be invoked, the Claimant would only be entitled to a miniscule portion of the artefacts.

