

LAWASIA MOOT COMPETITION 2009

International Center of Arbitration

THE CASE CONCERNING CERTAIN MATTERS THE SHIPWRECK, COEUR DE L'OCEAN

Benevolent Heritage Inc.
(Claimant)

v.

The Government of Rolga
(Respondent)

MEMORIAL OF THE CLAIMANT

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STATEMENT OF JURISDICTION

Benevolent Heritage Inc and the Government of Rolga have submitted this dispute to the International Arbitration Center pursuant to article 10 of the 1995 Agreement. This International Arbitration Center's jurisdiction is invoked under Article 16 read with Article 17 of the UNCITRAL Model Law on International Commercial Arbitration. The Parties shall accept any Judgment of the Center as final and binding upon them and shall execute it in its entirety and in good faith.

QUESTION PRESENTED

I.

Whether the Government of Rolga has interfered the salvage right and performance of Benevolent Heritage Inc. which was gura under 1992 agreement by allowing the Aquatic view to

II.

Whether Benevolent Heritage Inc. has Exclusive rights of photographing and documenting of the Coeur de l' Ocean;

III.

Whether the calculation of profits and/or distribution of artifacts between the Parties are to be made solely on the basis of salvage legal principles;

STATEMENT OF FACTS

In 1990, Benevolent Heritage Inc. submitted a proposal to Rolga Cultural Heritage Committee for the survey and recovery of significant historical wreck, Coeur de l’Ocean. Coeur de l’Ocean was Astorian warship lost in a severe monsoon in the territorial see of Rolga in 1800’s. When Coeur de l’Ocean was sunken, it was carrying a substantial cargo of coins which were looted from Zamzala.¹ Pursuant to the then existing law of Rolga, the relevant authority approved their proposal. While Heritage Inc. launched the salvage project, the present government of Astoria has not made any claims to or rights in the cargo of the shipwreck² and also did not communicate refusal of salvage.

In those days of Heritage Inc.’s salvage activity, there was the rise of treasure hunting at sea due to technological advancement³ and the illustrious history. The existence of old archival record has also lured treasure hunters into the area and historic shipwrecks were inevitably exposed to illegal treasure hunting activities. In this circumstance, though Heritage Inc. was under no obligation to provide salvage services, Heritage Inc. discovered the Coeur de l’Ocean with their own expenses and recovered many of artifacts from the shipwreck. Rolga government recognized salvor’s achievement as successful and finally approved the further project and signed in agreement, Partnering Agreement Memorandum (PAM) in 1995.

PAM set forth the principal terms of the agreement. It is clear from the PMA that the basis of the agreement was that Heritage Inc. would explore the shipwreck and recover items from the site in return for a share in the artifacts raised, or their proceeds of sale. Indeed, under

¹ Zamzala is the ancient trading city and is now part of the territory of the State of Rolga.

² Further Clarification Article 4

³ Moot Problem A. Background Information and Facts Leading to the Dispute 3

the terms of the agreement, Heritage would get 80% of the “appraised value and/or selling prices of the Artifacts” up to \$45m, 50% from \$45m to \$500m, and 40% above \$500m. There were also provision in respect of the expenses of the project, intellectual property and merchandising rights, and commercial confidentiality and provision for the formulation of a joint marketing plan for the “placement and sales of the remaining artifacts” once the figure of \$45m reached.

In 2000, The Rolga government was a member of UNESCO and was a party to the negotiations that led to the Convention’s adoption.⁴ The Convention’s regime is based on the fundamental archaeological principle that underwater cultural heritage should be protected in situ wherever possible.⁵ Moreover, Rule 2 of the Annex makes it clear that the prohibition related to the *sale* of recovered artifacts, rather than other forms of exploitation⁶ whereas the 1995 Agreement permit sale of recovered artifacts.

In 2001, Rolga government entered into an agreement on the protection of Astorian Wrecks with Astoria. In this agreement, Astoria transfers all its right, title and interest regarding to wrecked ancient vessels of the Astoria lying on or off the coast of Rolga and articles to Rolga government. Further, Rolga recognizes Astoria has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in the Agreement.

In 2001, while the Heritage Inc has carried out salvage project, the Government allowed

⁴ “which later led to the adoption of the United Nations Convention in the Protection of the Underwater Cultural Heritage in Paris on 2nd November 2001.”

⁵ In the UNESCO Convention 2001, Article 2 sets out the objectives and general principles of the Convention. It provides that the underwater cultural heritage shall be preserved for the “benefit of humanity” (Art. 2(3)), and that “preservation in situ...shall be considered as the first option...”

⁶ “The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, brought or bartered as commercial goods. ”

Aquatic View⁷ to organize exclusive underwater trips to view the wreck of Coeur de l'Ocean. Aquatic View gained USD \$500,000 solely on ticket sailings. The Aquatic View staff also took photographs and made video clips of wrecks and posted these materials on their website. Then, Aquatic view has engaged a songwriter to write song entitled 'Cour de l'Ocean' and commercialized the song within CD as souvenirs. At that time, Benevolent Heritage Inc. was proceeding the television documentary deal with an International Broadcasting Company.

Heritage Inc. raised an objection of these issues to the attention of the Rolgan Historic Monument Executive Agency but Agency could not deal with the matter. Benevolent Heritage Inc. hereby went to reconsider their business with Government of Rolga. While Benevolent Heritage Inc. and the Government of Rolga went to finalizing the distribution of artifacts of the wreck, Benevolent Heritage Inc. brought a suit against the Government of Rolga for unfair distribution of artifacts which violates the 1995 agreement.

⁷ a specialized tour operator

SUMMARY OF PLEADING

HERITAGE IS ENTITLED TO A LAWFUL SALVAGE RIGHT UNDER SALVAGE PRINCIPLES

Under the salvage legal principles, Heritage is a lawful salvor. Heritage Inc. voluntarily and successfully salvaged the Coeur de l' Ocean which is in marine peril. Moreover, even though the owner had a right to refuse a salvage, it did not refuse. Therefore, Heritage satisfies conditions for a valid claim.

HERITAGE HAS BEEN INTERFERED WITH SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY THE PERFORMANCES OF THE GOVERNMENT OF ROLGA

Heritage has a right as a salvor in possession. However, Rolga's following exercise disturbed the salvage right and performance of Heritage. Firstly, The Agreement with Asotiria in 2001 is incompatible with Heritage's right under the 1995 Partnering Agreement. The 2001 agreement interferes with its right to sole possession and Astoria's right to partly engage to the disposition of artefacts counters to Heritage's right when merchandising artefacts. Second, the ratification of the 2001 UNESCO Convention interferes with Heritage's salvage right. Artefacts from the Coeur de l' Ocean shall not be commercially exploited for trade or speculation or speculation or irretrievably dispersed under UNESCO Convention and Heritage's salvage rights under 1993 agreement cannot be guaranteed since the convention shall not apply the law of salvage unless conditions under Article 4 are satisfied. Third, Rolga interfered with the salvage right and performance by allowing Aquatic view's activities; Aquatic view infringed Heritage's salvor-in-possession status by visiting the wreck., invaded Heritage's exclusive right of photograph and documentation and invaded Heritage's exclusive right to use the name 'Coeur

de l' Ocean'.

HERITAGE HAS AN EXCLUSIVE RIGHT OF PHOTOGRAPHING AND DOCUMENTING OF COEUR DE L' OCEAN

First, Heritage's exclusive photographic right is not an unprecedented remedy in salvage principles. Heritage's constructed possession, granted by an inchoate lien, include exclusive photographic right. And its right to not be interfered with salvage operation includes an exclusive right of photographs and documentation. Second, Salvage principles allow for the incorporation of principles of intellectual proplerty law, especially exclusive photographic rights, into the extant law, under the following rationales; Exclusive phtographic right should be granted to protect a salvor's privileged and valuable commercial information; Heritage's exclusive right of intellectual property is justified under principles of equity; Heritage can require an exclusive photographic right as alternative means to make a profit where its reward on archaeological artefacts is not fully provided; and Granting an exclusive photographic right to Heritage is desirable for the protection of the wreck

THE CALCULATION OF PROFITS AND DISTRIBUTION OF ARTIFACTS BETWEEN THE PARTIES TO BE MADE BY NOT ONLY SALVAGE LEGAL PRINCIPLES BUT OTHER NORMS

Provisions of the 1995 partnering agreement directly reflects the traditional salvage principles which apply only salvage law to calculation of reward. Heritage is lawfully entitled to salvage award under salvage legal principles, therefore, under the law of salvage only commercial consideration is required in calculation of award and distribution of property.

I. HERITAGE IS ENTITLED TO A LAWFUL SALVAGE RIGHT UNDER SALVAGE PRINCIPLES

1. The law of finds shall not be applied but law of salvage governs the case

The general maritime law of salvage did not apply to *abandoned* shipwrecks, which were governed by the “harsh, primitive, and inflexible” common law of finds, which expressed “the ancient and honorable principle of ‘finders, keepers.’”⁸ Thus, a preliminary question in this case to certain the salvage right under the salvage law is whether the wreck or other property has been abandoned.⁹

At that time, Astoria had an ownership of the wreck and, by applying express abandonment standard with the consideration that the Coeur de l’ Ocean was a warship¹⁰, the shipwreck was construed to not be abandoned since Astoria did not expressly abandon the wreck and, hence, the law of salvage is applied

2. Under the salvage principles Heritage satisfies conditions for valid claim

a. Requisites for being a lawful salvor have been fulfilled here

To qualify as a salvor under the law of salvage, Heritage must satisfy three conditions¹¹ which is to voluntarily and successfully rescue property in marine peril.¹² Heritage’s services to Coeur de l’ Ocean satisfies these three elements and entitle it to its right of salvor in possession. This will be contended later.

⁸ Hener v. U.S., 525 F.Supp. 350, 356, 1982 AMC 847, 856 (S.D.N.Y. 1981)(“harsh, primitive and inflexible”); Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065, 1988 AMC 1109, 1116 (1st Cir. 1987)(“finders, keepers”).

⁹ See, e.g., *Martha’s Vineyard Scuba*, 833 F.2d at 1064-65, 1988 AMC at 1116; *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 435 F.3d 521, 2006 AMC 305 (4th Cir. 2006)(holding that the law of finds did not apply to the sunken vessel *Titanic*); *Adams v. Unione Mediterranea di Sicurta*, 220 F.3d 659, 2000 AMC 2788 (5th Cir. 2000)(whether salvage or finds applied to sunken cargo).

¹⁰ See *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va.1999)

¹¹ The salvor must show that the rescued ship was in “marine peril,” that the service was rendered voluntarily, and that, due in part or in whole to the salvor’s efforts, the salvaging was at least partially successful.

¹² Satisfaction of conditions will be examined significantly in a financial claim. *Infra*. III

b. Even though Astoria as the owner had a right to refuse a salvage, it did not properly refused salvage

The owner has a right to refuse salvage which means that a salvor cannot claim for its rights, but only owners in actual possession of vessels may. Courts have affirmed the principle that “[w]hen providing salvage service, a salvor acts on behalf of the owner in saving the owner's property even though the owner may have made no such request or had no knowledge of the need. The law of salvage presumes that the owner desires the salvage service.”¹³ The court also acknowledged that in those cases where salvage had been refused, the owner was in actual possession and thus could respond to the marine peril.^{14,15} However, Astoria has not been in actual possession of Coeur de l’ Ocean since 1800s and there was no involvement toward the Coeur de l’ Ocean.

Moreover, even where an owner has a right to refuse salvage, it must be timely and direct. “Casual observations” are not enough.¹⁶ Here, Astoria did not effectively communicate refusal of salvage and even, it has not claimed for the title of the wreck.

3. It is proper to claim toward Rolga for ensuring its salvage right and reward not only by the 1995 areement but by salvage principles

a. Rolga can be considered as an owner of the wreck by Merchant Shipping Ordinance 1952(Domestic Law of Rolga)

In 1952 Rolga enacted the Merchant Shipping Ordinance which explicitly applies to the remains of ships situated in the “Rolgan waters”. When a wreck is not claimed by the owner

¹³ *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir. 1998), *Sea Hunt*

¹⁴ See 3A Martin J. Norris, *BENEDICT ON ADMIRALTY: SALVAGE* § 116 (7th ed. 1993)

¹⁵ In *International Aircraft Recovery, LLC, Id.*, District Judge James Lawrence King addressed this very issue, finding that even “[B]y the late 1800’s ... the right of an owner or Captain to refuse salvage assistance to a vessel in maritime peril was relegated to instances where the vessel was not then in any maritime peril.” 54 F.Supp.3d at 1180.

¹⁶ *The LAURA*, 81 U.S. 336, 344 (1872)

within one year after it came into the possession of the receiver, the receiver has all the right to sell the wreck.¹⁷ The proceeds of the sale shall be paid to the Treasury after deducting all expenses incurred by him including payment to salvor. Therefore, the Rolga government might implement its rights instead of the owner by Merchant shipping Ordinance 1952.

b. Even if Rolga's ownership over the wreck by the ordinance is not enough, Rolga has become a successor of the wreck in 2001

In the 2001 agreement, Astoria explicitly transferred its right, title, interests in the Coeur de l' Ocean. Therefore, Rolga has a duty to compensate Heritage as a successor of the wreck.

c. Rolga has been considered to have ownership under 1995 Agreement

Under the provision 5 of the 1995 agreement, parties agreed to regard Rolga as an owner of the wreck. I explicitly set that Rolga "shall at all time be considered the owner of the shipwreck."

Accordingly, it is convinced that Heritage is a lawful salvor on the basis of salvage principles and therefore Heritage is entitled to preclude what breaches its rights.

II. HERITAGE HAS BEEN INTERFERED WITH SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY THE PERFORMANCES OF THE GOVERNMENT OF ROLGA

A. Heritage's right as a salvor in possession

Once these factors are established, maritime law creates a salvage lien in the recovered property for the salvor.¹⁸ Since this is a case of shipwreck, Heritage has inchoate right in not only salvaged property but submerged property for a reasonable period¹⁹

¹⁷ Merchant Shipping Ordinance 1952, art. 66(5)

¹⁸ See 3A Martin J. Norris, *Benedict on Admiralty*, § 137, at 10-1 to 10-2. (rev. 7th ed. 1989)

¹⁹ See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999); *Moyer v. The Wrecked and Abandoned Vessel, Known as the Andrea Doria*, 836 F. Supp. 1099, 1104 (D.N.J. 1993)

First, Heritage maintains a right of possession in the property until completion of salvage operation and grant of financial retribution.²⁰ The concept of possessory rights includes a broad bundle of privileges given at the discretion of the court. Another protection granted to Heritage is the right of an exclusive salvor to conduct its operations free from the interference of others.²¹ Both of these measures encourage the orderly and non-destructive salvaging of delicate wrecks.

B. Rolga’s exercise disturbed the salvage right and performance of Heritage

1. Agreement into Astoria in 2003 is incompatible with the 1995 Agreement

The 2001 Agreement is a bilateral treaty devoted to underwater cultural heritage. Its main object is providing better protection to historical wrecks where both countries share genuine ‘historical and cultural’. Nowhere the 2001 Agreement pays any consideration to salvor of the wreck. Under the 1995 Agreement, Rolga agreed to the project toward Coeur de l’ Ocean for the exclusive aim of private commercial gain and quick financial return. Yet salvage activities and salvor’s right including proper awards are implicitly excluded by the 2001 Agreement as radically incompatible with its basic aim.

a. The 2001 agreement interferes with Heritage’s right to sole possession

Astoria and Rolga agreed, without Heritage’s consent, “Astoria has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from” Coeur de l’ Ocean. It harms an inchoate lien of Heritage which grant its exclusive possession over artefacts of the wreck.

b. Astoria’s right to partly engage to the disposition of artefacts contradicts with

(explaining that “this exception looks to the future, with the ‘reasonable likelihood’ that the salvage operation will result in other portions of the shipwreck being brought into the... court”) (citations omitted).

²⁰ See 3A Benedict, supra note 20. at 11-1 to 11-2.

²¹ See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999).

Heritage's right when merchandising artefacts

According to the guiding principles set out by the 2001 agreement, Rolga should set up a Committee to determine the disposition and subsequent ownership of the recovered articles between Rolga and Astoria. In this regard, The right to decide upon how to make merchandising income, derived from the “joint marketing plan” since the total proceeds exceeded \$45m, may be harmed where the disposition is made though the principles of the 2001 Agreement.

2. Ratification of the 2001 UNESCO Convention interferes with Heritage's salvage right

a. Artefacts from the Coeur de l' Ocean shall not be commercially exploited for trade or speculation or speculation or irretrievably dispersed under UNESCO Convention

In addition that the ICOMOS Charter unequivocally declares that the commercial exploitation of historic wreck is fundamentally incompatible with its preservation,²² the 2001 UCH Convention provides in Rule 2 of Annex that the “commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage.” “Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”

It is clear that this rule attempts to ensure that artefacts are not regarded as commercial goods. Because the convention is designed in a way that excludes the commercialization of historic wreck, the application of salvage to the recovery of historic wreck is fundamentally incompatible with professional archaeological practice as expressed in the Annex. Because it also creates a conflict with article 2(7) of the Convention, which declares that historic wreck

²²“Commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the heritage.” ICOMOS, Charter on the Protection and Management of Underwater Cultural Heritage (1996), available at http://www.international.icomos.org/charters/underwater_e.pdf, introduction

should not be exploited commercially, it is more explicit that the interpretation should take the non-application of salvage law as the fundamental governing principle which contradicts to the 1995 Agreement.

b. Heritage's salvage rights under 1993 agreement cannot be guaranteed since the convention shall not apply the law of salvage unless conditions under Article 4 are satisfied

The argument that salvage law is at odds with the preservation of historic wreck was generally accepted during negotiations and was given effect in article 4, which provides:

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage

or law of finds, unless it:

- a) is authorized by the competent authorities, and
- b) is in full conformity with this Convention, and
- c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.²³

The official commentary to the ILC draft Convention's article²⁴ shows that salvage law and the preservation of historic wreck, which is the main aim for the convention, are incompatible.

3. Rolga interfered with the salvage right and performance by allowing Aquatic

²³ UCH Convention Art.4

²⁴ "It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is... The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value." O'Keefe & Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 *Ocean Dev. & Int'l L.* 391 (1994). at 408-09. Beginning on page 404, the text of the convention forms an untitled appendix to the article by O'Keefe & Nafziger, *Id.*, at 404

view's activities

a. The extent of Rolga's authority and right which Rolga granted to Aquatic view

Aquatic view's authorized right in "organizing exclusive underwater trips to view the wreck" can extend to bundle of rights. To organize exclusive underwater trips to view the wreck, following activities are naturally required ; visiting the wreck site, taking photographs and making video clips of the wreck and using them for promotional purpose, and other activities of commercial use of photos, movies, documentations or the name of the Coeur de l' Ocean.

This means that Aquatic view's activities are in the nature of what Rolga could foresee at the time of the permission in 2001. Therefore, by permitting actions of Aquatic view, Rolga interfered with Heritage's salvage right and performance and breached the 1995 Partnering Agreement.

b. Aquatic view infringed Heritage's salvor-in-possession status by visiting the wreck(the right of the possession in the property and the right of exclusive salvor to conduct salvage operations)

The fact that another is at the wreck site can easily interfere with Heritage's salvor-in-possession status. First, the right of the possession granted under general salvage law includes access to the ship and control over a limited area around the ship.²⁵ Heritage is also entitled to exclusive right of visiting the wreck as a possessory right and therefore Rolga could not allow other party to visit the wreck site.

Second, Heritage has the right of an exclusive salvor to conduct its operations free from the interference of others.²⁶ Thus, if Heritage, the salvor in possession appears able to complete the salvage successfully, it has the right to exclude others from participating in the salvage

²⁵ See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999).

²⁶ See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999).

operations, even if the owner requests the salvor to accept assistance from subsequent salvors.²⁷ Heritage is required to undertake salvage efforts with due diligence, in an ongoing manner, and to be clothed with some prospect of success.²⁸ By allowing another to enter the wreck site, even if the visit is limited to viewing and taking photographs, Heritage might place in danger its continued status as a salvor-in-possession by making itself vulnerable to that it was not adequately protecting the wreck site, and exercising an exclusive presence there.

c. Aquatic view invaded Heritage's exclusive right of photograph and documentation

Heritage has the exclusive right of photograph and documentation.²⁹ The rationale for the extension of exclusive possession to exclusive right of photograph and documentation will be contended later.

For Heritage, it would be impossible to monitor the photographic (or potential artifact recovery/disturbance) activities of Aquatic view. The inability to monitor such activities, when it has the responsibility to do so, may cause irreparable harm.

In addition, if Heritage could not able to dive due to interference from Aquatic view, Heritage would have lost opportunities that it would otherwise have to recover artifacts and photograph. This is due to the fact that the wreck is deteriorating and rusting away. Accordingly, loss of salvage season would cause irreparable damage to Heritage's efforts because certain access would inevitably be lost.

Furthermore, irreparable harm was caused, as Heritage issued to the Rolgan Historic Monument Executive Agency in 2001, it lost the opportunity to obtain revenue from the media contract it was negotiating with an International Broadcasting Company. Since posting photos

²⁷ *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567, 1981 AMC 1857, 1865 (5th Cir. 1981).

²⁸ *R.M.S. Titanic*, 924 F.Supp. at 720.

²⁹ This will be contend more significantly infra. II.

and videos on the web site made possible any access to obtain those images, it caused and would cause significant monetary loss to Heritage since the distribution of the images of the wreck on the web might preclude or reduce filming deals which could have been.

d. Aquatic view invaded Heritage's exclusive right to use the name 'Coeur de l' Ocean'

In the 1995 Partnering Agreement, Rolga got the exclusive right to use the name 'Coeur de l' Ocean' in sale and marketing and has paid a license fee in amount of three percent of its gross sales of merchandise with the name. Even though the actual name which Aquatic view used in its CDs is 'Cour de l' Ocean', not 'Coeur de l' Ocean', it infringes with Heritage's exclusive right to use the name of the wreck.

Under the trademark law, trademarks protect the private interests of trademark owners or exclusive licensees by identifying and distinguishing the source of a particular product. The traditional common-law test for trademark infringement is the "likelihood of confusion test."³⁰ The multi-factor likelihood of confusion test asks whether a defendant's use of a symbol or phrase is likely to confuse or deceive customers into thinking that there is some sponsorship between the trademark owner and the infringing mark.³¹ In assessing the likelihood of consumer

³⁰ MCCARTHY ON TRADEMARKS, *supra* note 2, 23:1, at 23-7 to -10; *see also* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 116-17 (2004) (addressing a circuit split regarding the fair use defense to the likelihood of confusion test); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992) (holding that "liability under [the Lanham Act] requires proof of the likelihood of confusion"). There are eight basic factors used to determine whether confusion is likely: "(1) strength of the plaintiff's mark, (2) relatedness of the goods or services, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) likely degree of purchaser care, (7) the defendant's intent in selecting its mark, and (8) likelihood of expansion of product lines." Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 423 F.3d 539, 548 (6th Cir. 2005) (citing the eight-factor test set forth in Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 648 (6th Cir. 1982)) (internal quotation marks omitted); *see also* AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979) (listing similar factors used by the United States Court of Appeals for the Ninth Circuit for the likelihood of confusion test); Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (establishing one of the first multi-factor likelihood of confusion tests). One of the most exhaustive multi-factor lists, used in the U.S. Patent and Trademark Office, lists thirteen separate factors for consideration. PATTISHALL ET AL., *supra* note 3, § 7.03, at 282 (citing the factors from *In re* E.I. Du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973), which were later adopted by the Federal Circuit, successor to the Court of Customs and Patent Appeals).

³¹ MCCARTHY ON TRADEMARKS, *supra* note 2, § 23:1, at 23-9. Conducting the likelihood of confusion balancing test is not "mathematical precision," but merely a "guide to help determine whether confusion is likely."

confusion between two trademarks, the similarity of the marks, the intent of the defendant, and evidence of actual confusion are the most important considerations.³² Here, using ‘Cour de l’ Ocean’ on CD as a souvenir good related to the wreck is sufficient to rise a confusion for customers. There is a severe similarity between two marks where only difference is an existence of letter ‘e’; the intent of Aquatic view to make confusion toward customer who are interested in the wreck ‘Coeur de l’ Ocean’; and the fact that customer bought CDs named for the wreck as a souvenir is radically indicates that there was a customer’s confusion between ‘Cour de l’ Ocean’

III. HERITAGE HAS AN EXCLUSIVE RIGHT OF PHOTOGRAPHING AND DOCUMENTING OF COEUR DE L’ OCEAN

A. Heritage’s exclusive photographic right is not an unprecedented remedy in salvage principles

1. Heritage’s constructed possession, granted by an inchoate lien, include exclusive photographic right

Restrictions on photography are not an unprecedented remedy in salvage law.³³ In the context of historical salvage, objects in this inchoate category should include photographic images. The practical importance of creating an archaeological record, and the legal importance of “telepossession,”³⁴ make clear the sufficient, if not primary, value of photographs of an

Gibson Guitar, 423 F.3d at 548 (quoting *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991)) (internal quotation marks omitted).

³² *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456 (7th Cir. 2000)

³³ See *Marex*, 952 F. Supp. at 830 (issuing a blanket injunction that would assuredly include photography).

³⁴ See *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, S.S. Central America*, 1989 A.M.C. 1955, 1958 (E.D. Va. 1989). The court defined telepossession as “(1) locating the object searched; (2) real time imaging of the object; (3) placement or capability to place teleoperated or robotic manipulators on or near the object, capable of manipulating it as directed by human beings exercising control from

historic wreck to salvors. As valuable property, the images of Coeur de l' Ocean should be classified as one of the ship's "artifacts," and thus the Heritage's right to them would be protected by the enforcement of the maritime lien.³⁵ The inchoate rights granted by the law of salvage would naturally extend to cover a salvor's right to control and sell these images, and thus a preliminary or directed injunction against rival salvors may include the right to prevent others from taking photographs.

2. Heritage's right to not be interfered with salvage operation includes an exclusive right of photographs and documentation

Admiralty courts have protected a salvor's ability to prevent others from photographing a wreck under the notion of preventing interference with the salvage. In such cases, others are barred from intruding on a wreck site, even to take photographs, as long as salvage operations continue.³⁶ The nature of deep-sea salvaging means that any operation by a rival salvor or tour group constitutes "interference."³⁷ Aquatic view's staffs and customers as interlopers crowd the salvage area, block access to the wreck, and possibly damage the wreck, even when present only to take photographs.³⁸ Given the great expense and restrictive time-table involved in these types of operations, a court would be well within its bounds to ban as interference any dive upon the site of the Coeur de l' OCEAN--even when the salvor-in-possession is not on the site.³⁹

B. Salvage principles allow for the incorporation of principles of intellectual proplerty law, especially exclusive photographic rights, into the extant law

the surface; and (4) present intent to control... the location of the object."

³⁵ See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 1996 A.M.C. 2497, 2499 (E.D. Va. 1996).

³⁶ See Marex, 952 F. Supp. at 830 (issuing a blanket injunction that would assuredly include photography).

³⁷ See R.M.S. Titanic, 1996 A.M.C. at 2499.

³⁸ See id.

³⁹ See id.

1. **Exclusive phtographic right should be granted to protect a salvor’s privileged and valuable commercial information**

Courts in admiralty have the protection of invoked photographic rights to protect a salvor's privileged and valuable commercial information. At least one court has found that general knowledge gathered by a salvor concerning a shipwreck is valuable and warrants exclusive protection.⁴⁰ The court in that case specifically listed as proprietary: “(1) the location of a particular object; (2) the characteristics of a particular site . . .; (3) technology used [by the salvor to discover and rescue the vessel]. . .; and (7) general know-how.” Logically, the exact location and characteristics of a wreck and its artifacts, along with information on the progress of a salvor's operation, can be recorded and exploited by a rival taking images of the wreck site. Courts in admiralty wishing to deter this “salvage spying” can grant a photographic injunction denying rivals access to the wreck site.⁴¹

2. **Heritage’s exclusive right of intellectual property is justified under principles of equity**

The invocation of intellectual property protection in salvage law can also be justified under principles of equity. When called upon to set salvage awards and delineate salvors' rights, courts in admiralty become courts of equity.⁴² In those instances, the courts must consider the economic harm to a salvor and the fairness of allowing a rival to profit from the salvor's work when determining a salvor's possessory rights. In cases of shipwreck, courts in admiralty have

⁴⁰ See *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, S.S. Central America, 1989 A.M.C. 1955, 1959 (E.D. Va. 1989).

⁴¹ See *Bederman & Prowda*, supra note 296, at C18.

⁴² See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (using equity to suggest that petitioner salvor should receive a large salvage award); *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, “Nuestra Señora De Atocha,”* 546 F. Supp. 919, 926 (S.D. Fla. 1981) (applying equity to determine the rights of rival salvor defendants).

recognized that the equities favor a salvor who has expended much effort and expense in locating and recovering a wreck, as opposed to a rival who merely follows the original salvor to the site and begins its own operations.⁴³ If courts decline to protect Heritage's possessory right and allow other parties to seize and market scavenged artifacts, the rival will be unjustly enriched at the expense of Heritage.⁴⁴

3. Heritage can require an exclusive photographic right as alternative means to make a profit where its reward on archaeological artefacts is not fully provided

In cases where shipwrecked vessels and their cargo have a limited market value, salvors require alternative means to make a profit, such as image marketing.⁴⁵ It is true that because of international atmosphere on protection of archaeological artifacts, it is harder for heritage to claim for reward on such items. Where Heritage has devoted time, effort, and expense to its salvaging operation, and is depending upon just compensation, not from the sale of artifacts, but from the marketing of images of the wreck, the photographs of the ship become as profitable and protectable as any other artifact.⁴⁶ Accordingly, if others were allowed to access and photograph the wreck, these rivals could market these images and deny Heritage a full profit.⁴⁷ It would be equitable, therefore, for Arbitration centre to grant the Heritage exclusive intellectual property rights in the imagery of the wreck and prohibit entry to the wreck site to rivals who would compete with or dilute the value of those images.⁴⁸

4. Granting an exclusive photographic right to Heritage is desirable for the protection

⁴³ In the case of the sunken treasure ship Nuestra Señora De Atocha, the court issued a preliminary injunction prohibiting rival salvors from interfering with and removing any artifacts from the site. See *Treasurer Salvors*, 546 F. Supp. at 929. Citing the concepts of equity and the prevention of unjust enrichment, the court claimed that irreparable injury would occur if other salvors were free to "come in and reap the benefits that are bestowed upon a finder and/or salvagor [sic]." *Id.*

⁴⁴ See *id.* at 927.

⁴⁵ See *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 924 F. Supp. 714, 724 (E.D. Va. 1996).

⁴⁶ See *R.M.S. Titanic*, 1996 A.M.C. at 2499.

⁴⁷ See *id.*

⁴⁸ See *Bederman & Prowda*, *supra* note 296, at C18.

of the wreck

Finally, granting exclusive photographic rights would reduce intrusion and damage to the Coeur de l' Ocean. Apart from discouraging a salvor from stripping wrecks, granting rights to the wreck's imagery would reduce the presence of other salvors and tourists on the site. Acknowledging the fragility of historic wrecks and the painstaking salvaging methods necessary to remove sediment and debris, courts have determined that permitting fewer salvors and divers access to the wreck site increases the chances for preservation of the vessel.⁴⁹ Much like cordoning off a delicate archaeological excavation, by limiting the access of those who come to visit the shipwreck site, such ruling would be protecting the physical and historical integrity of the wreck.

IV. THE CALCULATION OF PROFITS AND DISTRIBUTION OF ARTIFACTS BETWEEN THE PARTIES TO BE MADE BY NOT ONLY SALVAGE LEGAL PRINCIPLES BUT OTHER NORMS

A. Provisions of the 1995 partnering agreement directly reflects the traditional salvage principles

The basis of the agreement was that Heritage would explore the shipwreck and recover items from the site in return for A SHARE IN THE ARTEFACTS RAISED, or A SHARE IN THEIR PROCEEDS OF SALE. Indeed, under the terms of the agreement, Heritage would get

⁴⁹ In the case of the sunken treasure ship Nuestra Señora De Atocha, the court issued a preliminary injunction prohibiting rival salvors from interfering with and removing any artifacts from the site. See *Treasurer Salvors*, 546 F. Supp. at 929. Citing the concepts of equity and the prevention of unjust enrichment, the court claimed that irreparable injury would occur if other salvors were free to “come in and reap the benefits that are bestowed upon a finder and/or salvagor [sic].” *Id.*

80% of the “appraised value and/or selling prices of the Artefacts” up to \$45m, 50% from \$45m⁵⁰ to \$500m, and 40% above \$500m. Distribution of artefacts only by basic salvage principles is naturally derived from the 1995 PAM.

Firstly, the distribution of artefacts is in the realm of the 1989 Salvage Convention. The generally accepted view is that the general salvage law was not so confined to salvage of a vessel or goods coming from a vessel.⁵¹ The Salvage Convention 1989 defines “property” to mean “*any property not permanently and intentionally attached to the shoreline and includes freight at risk*”.⁵² Furthermore, art. 30(1)(d) permits Contracting States to reserve the right not to apply the provisions of the Convention “when the property involved is maritime cultural property of prehistoric, archeological or historic interest and is situated on the sea-bed.”⁵³ The clear implication is that if Rolga do not make the permitted reservation the Salvage Convention 1989 will apply to historic shipwrecks and artefacts from the wreck,⁵⁴ which in turn supports the proposition that the Convention applies generally to all salvage from shipwrecks. Also, before the Convention came into force, courts often held that the general maritime law of salvage applied to the retrieval of property from shipwreck⁵⁵. When Rolga ratified the 1989 Salvage

50 \$45m is the figure which would mean that the cost of both parties had been fully covered and the financial reward reaped by Heritage would make the project from its point of view commercially worthwhile, bearing in mind the risks it bore.

51 *Id.* See, e.g., *Broere v. Two Thousand One Hundred Thirty-Three Dollars*, 72 F.Supp. 115, 1947 AMC 1523 (E.D.N.Y. 1947)(salvage reward for retrieving money found in wallet of floating corpse).

52 Salvage Convention 1989, *supra* note 1, art. 1(a)(salvage operation), art. 1(c)(property). The exclusion of property permanently and intentionally attached to the shoreline mirrors the decision in *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 7 S.Ct. 336 (1887)(floating drydock permanently moored to shore not property subject to salvage).

53 *Id.*, art. 30(1)(d).

54 David Bederman, *Historic Salvage and the Law of the Sea*, 30 U. Miami Inter-Am. L. Rev. 99, 110-11 (1998)[hereafter *Bederman, Historic Salvage*]; David Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 *Widener L. Symp. J.* 163, 171 (2002)[hereafter *Bederman, Old Challenges, New Trends*]; Craig Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 *J. Mar. L. & Com.* 309, 347 (2003).

55 *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978); *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing vessel*, 549 F.Supp. 540, 1983 AMC 1018 (S.D. Fla. 1982).

Convention, there was no certain reservation which may not apply the salvage principles of convention and therefore, the basis of salvage principles governs when there is a salvage reward claim.

Furthermore, in the 1995 PAM it is implicit that it specifies traditional salvage principles directly. Here, the amount of reward is determined by both parties; \$45m is the figure which would mean that the cost of both parties had been fully covered and the financial reward reaped by Heritage would make the project from its point of view commercially worthwhile, bearing in mind the risks it bore. Hence, changes in Heritage's interests share reflect its salvage reward what should be granted after successful salvage. Accordingly, provisions indicate to apply salvage principles directly. If there are other considerations such as archaeological or historical significance when determine the distribution of artefacts among parties, a reward in the context of salvage law cannot be guaranteed, meaning Heritage can be harmed on its reliance interest.

B. Heritage is lawfully entitled to salvage award under salvage legal principles

1. The requisites for salvage have been satisfied here

a. *The Coeur de l' Ocean is in marine peril*

Courts have uniformly found that shipwrecks and artifacts at the bottom of the sea are, *as a matter of law*, in marine peril, as they are in danger of being lost through the actions of the elements.⁵⁶ Courts usually found that underwater shipwrecks were in marine peril, because sunken vessels and their cargoes were in danger of being lost forever.

⁵⁶ *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 569 F.2d 330, 337 (5th Cir. 1978), the Fifth Circuit decisively held that an already-wrecked object on the seabed was still subject to marine peril. *Id.* at 337. See also *Platoro Ltd., Inc. v. Unidentified Remains*, 695 F.2d 893, 901 (5th Cir. 1983). This Court concurs: a sunken wreck is in marine peril as a matter of law. *Bemis v. RMS LUSITANIA*, 99 F.3d 1129, 1996 WL 525417, *3 (4th Cir. 1996), *affg*, 884 F. Supp. 1042, 1051 (E.D. Va. 1995)

Here, before the salvage activity by Heritage, there were risks to be harmed, ruined or even stolen by treasure hunter. Moreover, unless Heritage provided salvage services, the archaeological information of the Coeur de l' Ocean would be hard to access, which also means that the historical data of the Coeru de l' Ocean was endangered to be lost.

b. Heritage's salvage services to Coeur de l' Ocean are voluntary

The key to determining whether Heritage's action was voluntary is to see if that Heritage was under any obligation to render assistance. The only reference in the Salvage Convention 1989 to the issue of who may claim salvage reward is to be found in art. 17, which provides:⁵⁷

No payment is due under the provisions of this Convention unless the services rendered exceed what can reasonably be considered as due performance of a contract entered into before the danger arose.

Heritage was neither master nor crew who was engaged to the vessel and was under no obligation to provide these services.⁵⁸

c. Heritage's salvage services to Coeur de l' Ocean have been successful

Heritage has been successful in saving some property until a salvage award will be granted. The Supreme Court, in *The "Sabine"*, stated that "[p]roof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perishes...no compensation will be allowed."⁵⁹ However, here, Heritage followed its duty to successfully salvage the wreck and artefacts and these activities conferred a benefit on the salvaged property and, therefore, entitles Heritage to an award.

⁵⁷ Salvage Convention 1989, art.17

⁵⁸ See *Brown v. Johannsen*, 88 F.2d 107, 109 (4th Cir. 1989).

⁵⁹ See *The SABINE*, 102 U.S. at 384; *U.S. Dominator, Inc. v. Factory Ship ROBERT E. RESOFF*, 768 F.2d 1099, 1104 (9th Cir. 1985)

2. **Only commercial consideration is required from the salvage legal principles** ⁶⁰

a. ***Principal reward⁶¹ in money should be firstly considered***

The basic structure of the Salvage Convention 1989 is to give the salvor the right to payment of salvage reward by the owners of the salvaged property in proportion to their respective salvaged values.⁶² If the owner appears and pays the salvage award, the lien is discharged and the owner takes the property clear of the salvage lien. If the sale of salvaged property yields too little to satisfy the salvor's lien for a reward⁶³ then all of the proceeds from the sale of the salvaged property are paid to the salvor.

Therefore, Heritage is entitled to claim its salvage award for the amount of the value agreed in 1995 Agreement. Furthermore, when granting the reward to Heritage monetary award shall be firstly considered.

b. ***Exceptional reward in kind should also be considered***

Though the salvor does not have a direct right to title in the property, courts may award the salvor title to the property instead of the proceeds of the sale, if it becomes apparent to the court that the proceeds from the sale would clearly be inadequate to pay the salvor its full

60 The principal method of enforcing a salvor's award is through the recognition of a salvor's lien in the property saved. The maritime lien arises from the moment salvage service is performed and, as with any other lien, secures the payment of the as-yet-to-be-determined salvage award. Such liens are a temporary encumbrance of the property saved, lasting only until payment of a salvage award can be made.

61 RMST case, 286 F.3d 194 (April 21, 01)

62 Salvage Convention 1989, supra note 1, art. 13(2). See also, id., art. 21(1) (duty of person liable for salvage reward to provide security on request).

63 Article 13 of the 1989 International Salvage Convention is headed "Criteria for fixing the reward", and states that;

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salvaged value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimising 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 rise 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.

reward.⁶⁴

Here, there are artefacts whose value cannot be determined at this moment, which makes impossible quick and just reward to Heritage. Therefore, in this case, titles of artefacts should be granted to Heritage in amount of its entitled share.

C. Specific distribution which Heritage requires

1. Calculation of Heritage's share in profits as a reward in money

For a reaward, reward in money should be considered at first and it is a share in the amount of appraised values for the artefacts in the context of the 1995 Agreement. The aggregate amount of appraised values for the artefacts(excluding artefacts of which value is unknown yet) is \$63,789,000⁶⁵. Items following are in this category : Gold ingots and bullions, Gold bars, Silver ingots, Silver coins with Astorian marks, Copper planks, Silver containers, Bronze forks, Silver pendant, Ornaments, Elephant tusks, Chinese porcelains, Swords bearing some Arabic words, and Silver daggers with precious stones. If total appraised value is estimated below \$500m, Heritage will get 50% share, indicating. On the other hand, if total appraised values above \$500m, Heritage will get 40%, \$25,515,600. However, it is less possible that total is above \$500m since uncalculated amount may not be over about \$440m so Heritage requires \$31,894,500 for reward of these items.

On the other hand, titles of the artefacts remain to Rolga. For the payment to Heritage, Rolga may decide to sell artefacts or keep them and pay by money of Treasury. Heritage will not

64 "Comparing the value of artefact and appropriate salvage award, the court simply convey title in the artefact to a salvor, essentially providing a salvor what is analogous to a "deed in lieu of foreclosure." Ballard & Archbold, supra, P.27-28

65 US Dollar

intrude the way how Rolga make profits.

2. **Distribution of Heritage's share in artefacts as a reward in kind**

Titles of items whose value is not determined at this moment should be granted in amount of an entitled share to Heritage. Courts may exceptionally award the title, if it becomes apparent to the court that the proceeds from the sale would clearly be inadequate to pay the salvor its full reward.⁶⁶ Moreover, in the 1995 Agreement, parties agreed when net proceeds above \$45m, a joint marketing plan will be implemented, meaning that Heritage also has a right to require award in specie. Items following are in this category : Indigo, Tobacco, Bronze cannon with Astorian marks, Comb, Olives and pickles, Unknown Liquid, Cannon balls, and Spices. Here, it is hard to grant a reward in money for commercially unevaluated items at some moment, therefore, it would be just for Heritage to get artefacts in the amount of its share, 50%.

Once the reward is paid, whether in money or in kind, "the reward becomes the property of the salvor to do what it wants"⁶⁷. Therefore, to make commercial gain, Heritage can decide to sell them in the open market or to museums and also can determine to sell them separately or within a collection. Rolga cannot intervene when Heritage decide how to make profits from its artefacts and enforce archaeological consideration to Heritage. If Rolga does, it is akin to breach Heritage's property right in their private property.

⁶⁶ "Comparing the value of artefact and appropriate salvage award, the court simply convey title in the artefact to a salvor, essentially providing a salvor what is analogous to a "deed in lieu of foreclosure." Ballard & Archbold, supra, P.27-28

⁶⁷ Ballard & Archbold, Lost Liners, Tronto, 1997, p.28