

# **LAWASIA MOOT COMPETITION 2009**

International Center of Arbitration

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

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Benevolent Heritage Inc.  
(Claimant)

v.

The Government of Rolga  
(Respondent)

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### **COUNTER-MEMORIAL OF THE RESPONDENT**

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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.

**QUESTIONS PRESENTED**

**I.**

Whether the Government of Rolga has interfered the salvage right and performance of Benevolent Heritage Inc. which was gura under 1992 agreement byallowing 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**

Rolga Cultural Heritage Committee accepted the proposal of Benevolent Heritage Inc. as approving the survey and recovery of historical warship, 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.<sup>1</sup> 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 shipwreck<sup>2</sup> and also did not communicate refusal of salvage.

Benevolent Heritage Inc. discovered the Coeur de l’Ocean 20 kilometers off the coast of Rolga and recovered some artifact from the shipwreck. In 1995, the Rolga government eventually approved the project and reached agreement with Heritage Inc. to conduct further exploration of Coeur de l’Ocean. The full text of the agreement revealed that if what were called “artifacts” with a total monetary value of anything up to \$45 million were recovered then sale proceeds would be split 20:80 in Heritage’s favor; between \$45 million and \$500 million and the split would be 50:50; anything above \$500 million and it would be 60:40 to the Rolga government. However it made no article gives the exclusive right of photographing and documenting which explicitly exclude other operators.

In 2001, Rolga government ratified UNESCO Convention. The Convention’s regime is based on the fundamental archaeological principle that underwater cultural heritage should be protected in situ wherever possible. However, the convention made no provision in respect of

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<sup>1</sup> Zamzala is the ancient trading city and is now part of the territory of the State of Rolga.

<sup>2</sup> Further Clarification Article 4

ownership of underwater cultural heritage and was not intended to interfere with existing ownership rights.

In 2003, Rolga government entered into an agreement on the protection of Astorian Wrecks with the Government of Astoria. On this agreement, it is said that “Astoria transfers all its right, title and interest in and to wrecked ancient vessels of the Astorian lying on or off the coast of Rolga and in and to articles thereof to Rolga.” Further, it also explains that “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.” The Government of Rolga was soon pressed to designate the wreck of Coeur de l’Ocean and its site as restricted area under the new law but Rolga government didn’t take any action.

In 2003, though Rolga government allowed Aquatic View, a specialized tour operator to organize exclusive underwater trips to view the wreck of Coeur de l’Ocean, Aquatic View only had 25 customers who dove onto the wreck site. The Aquatic View staff also took photographs and made video clips of wrecks and posted these materials on their website as promotional materials. Then, Aquatic view has engaged a songwriter to write song entitled “Cour de l’Ocean” which was different name from “Coeur de l’Ocean”.<sup>3</sup>

In those days of allowing Aquatic View to view the wreck site, Benevolent Heritage Inc. individually made a contract with International Broadcasting Company. In this regard, Benevolent Heritage contended that the activities of the tour operator have endangered their ongoing television documentary deal with an International Broadcasting Company. Benevolent Heritage Inc. went to reconsider their business with Government of Rolga. Thereof, Benevolent Heritage Inc. and the Government of Rolga went to finalizing the distribution of artifacts of the

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<sup>3</sup> In 1995 agreement, Rolga government only granted the right to use the name, “Coeur de l’Ocean” in association with sales and marketing of merchandise

wreck according to salvage legal principles including the 1995 agreement.

However Benevolent Heritage Inc. sued the Government of Rolga for unfair distribution of artifacts which violates the 1995 agreement and hereby Rolga government went to accept the suit.

### **SUMMARY OF PLEADING**

Rolga Government had the right to allow salvage operation by Heritage Inc. Without prejudice to sovereign immunity upon warship, Coeur' de I Ocean , Rolga government sought to recover underwater cultural heritage because the shipwreck "used to be" a warship with no designation of cemetery. In addition, there was no claim to the shipwreck from Astoria and once the voluntary salvage operation with good faith begins, even the original owner cannot refuse it. Whether Rolga follows domestic legal framework(Merchant Shipping Ordinance of 1952) or international law(United Nations Convention on the Law of the Sea), Rolga tried to identify the existence of historical value and protect heritage in a way of salvage by asking Heritage to work on it. In the end, Rolga confirmed its position by entering into agreement wih Astoria, "Protection of Astorian Wreck" which was also an effort to try to preserve the underwater cultural heritage.

First, the Rolga's behavior did not interfere with salvage right by Heritage. The agreement with Astoria never intended to infringe the salvage right and performance of heritage Inc. Heritage might have been threatened with its portion of salvage award, but different two agreements focus on different interest by different parties. Not only has the form of salvage award been monetary reward precedently, but also both parties have obligation to formulate joint market contractually. Therefore, interests sought by two agreements both can be satisfied by selling to National museums or Government.

Ratification of UNESCO convention has not breached the salvage right, either. Rolga had time for the convention to enter into force and ratification itself never harmed any salvage performance. Also, UNESCO can be compatible with law of salvage because economic utilization, which the convention contradicts to as one of the major principles, does not always

entail the destruction or anti-preservation of underwater cultural heritage.

Also, permission for Aquatic View(AV) to visit and photograph did not go beyond the line of salvage right. AV's visitation can be one of the innocent passage guaranteed by United Nations Convention on the Law of the Sea and activities were held within territorial sea under the permission of Rolga. Besides, there is no proof of intervening or harming any salvage operation of Heritage. Extension of salvage right up to every right to the shipwreck is "too much".

Second, regarding exclusive rights to Heritage, there is no agreed article granting exclusive rights of photographing and documenting to Heritage Inc. in the agreement of 1995. Also, granting exclusive rights of photographing and documenting to Heritage cannot be justified under the Copyright law and Trademark law. Photo of artifact cannot be a "device" used to distinguish goods or services and trademark concepts may not be applicable to public, physical structures. Furthermore, granting exclusive rights of photographing and documenting cannot be justified by other forms of Intellectual property protection.

Finally, the calculation of profits and distribution of artifacts between the parties to be made solely on the basis of salvage legal principles was not envisaged by 1995 Agreement. Other standpoints should be considered to distribute the salvaged artifacts of the wreck. The 1995 partnering agreement was incomplete in respect to the distribution which reserved re-negotiation. Applying 2001 Agreement with Astoria and 2001 UNESCO Convention to the disposition of artifacts can also be justified on the basis of the emphasis on archaeological consideration by courts when posing award(recognized in customary law). They require archaeological consideration in distribution of artefacts. The distribution of artefacts should be taken under two classification of salvaged items to comply with the 2001 Agreement with Rolga c., Also, there

should be limitation in the way to dispose during the sale of Trade Goods to comply with 2001 UNESCO Convention. Heritage is not entitled to get full salvage reward which may be calculated less than what it has asserted even if applying salvage principles. Because the Coeur de l' Ocean is not in marine peril Heritage may be denied to gain full salvage award. Even if Arbitration centre holds fast to the position that historic shipwrecks were in marine peril, there are rationales within traditional salvage law which reduces Heritage's salvage award.

**I. THE GOVERNMENT OF ROLGA HAS THE RIGHT TO ALLOW SALVAGE AND HAS SOUGHT HISTORICAL SIGNIFICANCE OF UNDERWATER CULTURAL HERITAGE**

**1. Old Prejudice to “Warship” Was Not Considered by Rolga Gov.**

Key to ownership of sunken property under the law of finds is whether owner has abandoned the property. Abandonment can be express or implied, and lapse of time and nonuse by owner may give rise to inference of intent to abandon.<sup>4</sup> Warships and their remains, however, which are clearly identifiable as to the flag State of origin are clothed with sovereign immunity and therefore entitled to a presumption against abandonment of title.<sup>5</sup> Therefore, in this case, it is true that Astoria’s express abandonment<sup>6</sup> is necessary for anyone to claim the title to Shipwreck.

Nonetheless, a number of commentators believe that a sunken vessel cannot be defined as a warship, because it has been abandoned by its crew and is no longer in the active military service of the state. Therefore, the vessel is no longer under the exclusive jurisdiction of the flag state.<sup>7</sup> If this is the case, then warships that are underwater cultural heritage for the purposes of the preservation may not qualify for sovereign immunity.

In addition, special protection upon a military vessel tends to be overemphasized by some countries and contemporary regimes to be immune from unrestricted salvage operation. This is because when providing salvage service, a salvor is allowed to act on behalf of the owner in saving the owner's property even though the owner may have made no such request

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<sup>4</sup> Bemis v. RMS Lusitania 884 F.Supp. 1042 (1995)

<sup>5</sup> *Digest of United States Practice in International Law*, pp. 999-1006 (Dept. of State 1980)

<sup>6</sup> “U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment.”, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels* 221 F.3d 634, 2000 A.M.C. 2113 (2000)

<sup>7</sup> Craig Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage" (2002) 51 I.C.L.Q. 98 at 527, n. 74

or had no knowledge of the need. In other words, because the law of salvage presumes that the owner desires the salvage service,<sup>8</sup> sovereign immunity was utilized and strengthened for states in order to own the underwater “treasures” as the importance of archaeological value of underwater heritage is put under highlight.

2. **There Was Neither Claim to Title nor Refusal by Astoria to Salvage of the Shipwreck**

The abandonment may be implied as by an owner never asserting any control over or otherwise indicating his claim of possession.<sup>9</sup> Also, the maritime law rejects attempts by owners to refuse salvage when they are not in actual possession of a vessel.<sup>10</sup> Where a vessel was in danger of being lost so far as any timely effort to save her was contemplated, the vessel was open to a voluntary salvor acting in good faith with reasonable judgment and skill and that salvage services could not be “refused”.<sup>11</sup>

3. **It Constitutes “Unclaimed Wreck” of the Merchant Shipping Ordinance of 1952 in Malaysia**

“Where no owner establishes a claim to any wreck found in the Federation ... within one year after it came into his possession, the receiver<sup>12</sup> shall sell the same, and shall pay the proceeds of the sale into the Treasury ... after deducting therefrom the expenses.<sup>13</sup>” “Where any vessel is wrecked, ... at any place on or near the coasts of the Federation, and services are rendered by any person in assisting that vessel or saving the cargo ... there shall be

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<sup>8</sup> R.M.S. Titanic, Inc. v. Haver 171 F.3d 943 C.A.4 (Va.), (1999)

<sup>9</sup> H.R.Rep. No. 100-514(I), at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366

<sup>10</sup> R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 963

<sup>11</sup> The Laura, 81 U.S. (14 Wall.) 336, 20 L.Ed. 813 (1871)

<sup>12</sup> "receiver" means receiver of wreck, Art. 366. Interpretation, the Merchant Shipping Ordinance, 1952

<sup>13</sup> Art. 379. Unclaimed wreck, the Merchant Shipping Ordinance, 1952

payable to the salvor by the owner of the vessel, cargo, apparel or wreck.<sup>14</sup>”

In the state of being without singular legal regime upon a warship, Rolga could not help but follow its domestic law, Merchant Shipping Ordinance 1952. This provides a right to salvage a wide scope of vessels, “any vessel” within territorial water or Federation. Also, pursuant to the then existing law of Rolga, the relevant authority must approve all survey or recovery or excavation projects involving historical objects or sites.

4. **United Nations Convention on the Law of the Sea(UNCLOS) Was the Regime with Regard to Historical Objects at the International Law Level**

UNCLOS includes two provisions (Articles 149 and 303) that refer specifically to archaeological and historical objects. Even though these two articles do not specifically establish the measures to be taken by States, they establish an obligation for States Parties to preserve and protect<sup>15</sup> such objects “particular regard being paid to the preferential rights of the State of cultural origin”, etc.<sup>16</sup>

In this case, among the international legal frameworks that Rolga Government could follow was only 1982 UNCLOS.<sup>17</sup> Warship immunity within territorial sea covers limited kinds of activities.<sup>18</sup> Also, what Coeur de l’ Ocean looted had cultural origin from the area of Rolga. At least, Rolga had the obligation to preserve and protect underwater cultural heritage.

5. **The Title to Shipwreck Was Transferred without Disputes as a Result**

The underwater cultural heritage was protected by a few general principles and several

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<sup>14</sup> Salvage of cargo or wreck, the Merchant Shipping Ordinance, 1952, Art. 390.

<sup>15</sup> UNCLOS, Art. 303.

<sup>16</sup> UNCLOS, Art. 149.

<sup>17</sup> 1989 Salvage Convention entered into force in July, 1996, which might be in direct relation to salvage

<sup>18</sup> Art. 29 through 32, e.g. non-compliance, responsibility, non-commercial use by warship, etc.

bilateral and regional agreements<sup>19</sup> before the efforts, such as 2001 UNESCO Convention, to merge cultural property law with law of the sea were made. Following the practice in formality and complying with the new stream of preservation in contents, Rolga entered into the bilateral Agreement with Astoria in 2001 for the protection of Astorian wreck.

## **II. ROLGA GOVERNMENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY A, B, AND C.**

### **A. The Agreement "Protection of Astorian Wreck" in 2001 Did Not Infringe the Salvage Right and Performance of Heritage Inc.**

#### **1. The Scope of "Salvage Right and Performance" is limited**

There are three elements of a valid "salvage right": the property must be (1) in marine peril and (2) successfully salvaged in whole or in part by (3) the voluntary services of the salvager.<sup>20</sup> When determining the amount of the "salvage award", however, courts take various factors into consideration.<sup>21</sup> Salvage right does not guarantee the salvage award. Therefore, courts tend to categorize the 'salvage right' and 'salvage award' with different requirements.

In this case, what the claimant is required to complain is not "Salvage right and

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<sup>19</sup> Craig Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage" (2002) 51 I.C.L.Q. 511 at 552, n. 188, including examples of these bilateral and regional agreements.

<sup>20</sup> Jean F. Rydstrom, Annotation, The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances, 30 L.Ed.2d 914 (1973); 47, § 2.

<sup>21</sup> Usually, courts in admiralty award salvagers compensation based on the six factors laid out in The Blackwall case, a U.S. Supreme Court decision from 1869. The Blackwall, 77 U.S. (1 Wall.) 1 (1869); Justin S. Stern, Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks, 68 Fordham L. Rev. 2489, 2492 (2000); 29, at 2499.

performance” but “Salvage right and award”, because the 2001 Agreement between Rolga and Astoria never covered or affected Heritage’s salvage right and performance.

2. **The 2001 Agreement with Astoria Made the Right to Salvage by Heritage More Clear**

In case the title to a warship being applied to one of the strictest standard, Sunken Military Craft Act in the US, “no salvage rights or awards shall be granted with respect to any US sunken military craft without the express permission of the US.”<sup>22</sup>

Rolga Gov. confirmed the ownership of the warship by negotiating, receiving express permission and finally making the agreement with Astoria. This agreement could rather support the position of Heritage as a completely competent salvor.

3. **The Issues of the Two Agreements Contained Are Different**

The 1995 agreement with Heritage focuses on “Salvage”, while 2001 agreement with Astoria deals with “Protection”. Whether the Rolga Gov. would allow continuing interests to Astoria on the artifacts does not affect whether the Heritage has a right to salvage or not, but whether the Heritage can guarantee the salvaged artifacts as its salvage reward.

The characteristic of interests that Astoria and Heritage each seeks is also different. While Astoria is allowed to have continuing interest for historical and cultural purposes, Heritage pursues monetary or commercial interest of appraised values or the selling price. The former lays stress on protection in kind; the latter values much of mercenary profit.

4. **Monetary Distribution Comes First for the Remaining Artifacts**

Salvage award is intended “as a reward for perilous services voluntarily rendered.”<sup>23</sup>

Except when items salvaged are “uniquely and intrinsically valuable beyond their monetary

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<sup>22</sup> (d)-(1), Section 1406, Sunken Military Craft Act, Federal Historic Preservation Laws, US.

<sup>23</sup> 3A Martin J. Norris, Benedict on admiralty: The Law Of Salvage § 15 (7th ed. 1992); § 235, at 19-5

worth, and an award *in specie* is more appropriate”<sup>24</sup> or when salvage awards can be made by award of title to the *res* under the law of finds<sup>25</sup>, the salvor's reward under the law of salvage does not come in the form of title to any of the property he rescues, but rather comes in the form of a “salvage award,” expressed as a sum of money.<sup>26</sup> Therefore, money is preferably and usually given as salvage award.

According to the 1995 agreement, monetary interests can be distributed by sharing arrangement agreed with respect to the aggregate amount of the appraised values. Even though each party owns certain percentage of remaining artifacts, both parties simultaneously have a duty to formulate a “joint marketing plan” for the placement and sales. If the marketing plan should be exercised “jointly”, either party can not perfectly possess the remaining artifacts before selling them.

5. **Rolga’s Buying As Much Artifacts As the Proportion That Heritage Possesses Meets both the Commercial and Cultural Interest**

In the instant case, the standard and method of “joint marketing plan” was not specified in this agreement, which makes it possible for Rolga to buy the relevant share of artifacts owned by Heritage. Taking into account that salvage award usually comes in the form of monetary compensation in many precedents except special cases referred above, Rolga can pay for the proportion of relevant amount of artifacts owned by Heritage for the purpose of transferring the artifacts to national museums so that it complies with the 2001 agreement for the protection of Astorian Heritage.

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<sup>24</sup> Cobb Coin, 525 F.Supp. at 198

<sup>25</sup> Platoro Ltd. Inc. v. Unidentified Remains, Etc., 695 F.2d 893, 904 (5th Cir.1983) wherein the court stated: “[w]e cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars, except where the salvage award was made alternatively with an award of title to the *res* under the law of finds.”

<sup>26</sup> Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel, 695 F.2d 893, 903-04 (5th Cir.1983)

**B. The Ratification of 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage Is Compatible with Heritage Inc. Right and Performance**

**1. Ratification of UNESCO Convention Never Prohibited Salvage Activity**

**a. *Ratification itself can not make the convention come into force***

UNESCO Convention shall enter into force 3 months after the date of the deposit of the twentieth instrument.<sup>27</sup> Ratification is only declaration of approval to a formal document such as convention or treaty. Ratification of the convention does not have legal force that binds the relevant party.

**b. *Salvage right and performance received no actual harm by the ratification of the convention***

After ratification of the convention, there has been no sign that salvage right and performance by Heritage was affected. Rather, Rolga Gov. safeguarded Heritage's salvage activity by not enforcing the new Rolga law which was designed to protect archaeological objects in the restricted area where the Heritage salvage was in progress. Finally the salvage went on and it seems to have succeeded as much as they intended to. It was Heritage's decision to finalize the agreement.

**2. UNESCO Convention Does Not Completely Block Law of Salvage**

The convention seems incompatible with law of salvage, as section (b) of Article 4 seems virtually impossible to fulfill because it seems unlikely that salvage law could be applied to UCH while conforming to the Convention. One of the major principles that could go against salvage law is "underwater cultural heritage shall not be commercially exploited."<sup>28</sup>

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<sup>27</sup> Entry into force, UNESCO Convention on the Protection of Underwater Cultural Heritage, 2001. Art. 27.

<sup>28</sup> UNESCO Convention on the Protection of Underwater Cultural Heritage, 2001 Art. 2 (7)

It is true that salvage law usually functions opposite to the preservation of the archaeological value of underwater cultural heritage, but economic utilization of UCH does not necessarily work against preservation. If underwater cultural heritage was recovered by salvage operation, they can be “deposited, conserved and managed in a manner that ensures its long-term preservation”<sup>29</sup> by transfer to museums and exhibition for the benefit of human kind. If they are still under water, which is preferable as first option<sup>30</sup> by the Convention, public access to in situ underwater help commercial incentives such as the sale of television rights or marketing the images as confirmed in Rule 7 of the Annex.<sup>31</sup>

In the instant case, even though Heritage was able to own its relative share of the remaining artifacts according to the 1995 Agreement, their placement and sales are put under a joint marketing plan. The artifacts cannot be traded, sold, bought or bartered as commercial goods.<sup>32</sup> Also many decisions of courts in rewarding salvage were made based on policy consideration that it is inappropriate to allow salvors to recover artifacts for the purpose of selling them.<sup>33</sup> However, selling them to Rolga Gov. or National Museum of Rolga is not selling as commercial goods but rather receiving compensation for salvage operation. Therefore, ratification of UNESCO Convention never intended to interfere with salvage right and award right for Heritage.

**C. Rolga did not infringe Heritage’s salvage right and performance by allowing Aquatic view’s activities.**

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<sup>29</sup> UNESCO Convention on the Protection of Underwater Cultural Heritage, 2001 Art. 2 (6)

<sup>30</sup> UNESCO Convention on the Protection of Underwater Cultural Heritage, 2001 Art. 2 (5)

<sup>31</sup> Rule 7. "Public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management." Annex, UNESCO Convention

<sup>32</sup> Rule 2. Annex, UNESCO Convention

<sup>33</sup> Subaqueous Exploration and Archaeology, Ltd. v. Unidentified Wrecked and Abandoned Vessel, Chance v. Certain Artifacts Found and Salvaged from the Nashville

1. **Heritage's salvage right is not allowed to prohibit Rolga's authority over its territorial sea and Aquatic's right to innocent passage under the law of sea**

United Nations Convention on the Law of the Sea prescribes innocent passage of the ships. "Ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."<sup>34</sup> Also, "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state".<sup>35</sup>

In the instant case, Aquatic View's activities to organize tour on the Rolgan territorial sea, especially visiting the surroundings of the wreck, shall not be considered to be prejudicial to the rules of international law and therefore they have the right of innocent passage in some part. Therefore, in order to commit itself to the duty under the article 24 which states "the coastal states shall not hamper the innocent passage", Rolga gave Aquatic View a permission to visit the wreck site. Heritage's salvage right cannot preclude Rolga's jurisdiction. the control over its territorial sea and Aquatic View's right to travel the sea under the permission of the coastal state. Therefore, it is inappropriate to extend Heritage's salvage right to exclusive visiting rights.

2. **Permitting exclusive right to access would run counter to the purpose of salvage.**

The law of salvage grants salvage right for the purpose of encouraging salvor's salvaging activities. However, a salvor would be reluctant to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.<sup>36</sup> Extension of salvage right to an exclusive right to access the wreck site is totally counter to the main purpose of

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<sup>34</sup> United Nations Convention on the Law of the Sea, Art. 17

<sup>35</sup> United Nations Convention on the Law of the Sea, Art. 19

<sup>36</sup> The Protection of the Underwater Cultural Heritage, Roberta Garabello, Tullio Scovazzi. P.68

the law. If Tribunal presumed Heritage's exclusive rights to access and recognize Aquatic View as an intruder in this case, it might contradict to the purpose of law of salvage.

**3. Aquatic view did not interfere with salvage operation.**

Under salvage law, salvor may have the right to salvage the wreck free from interference of rivals.<sup>37</sup> In the Titanic case, the district court felt that having other divers on the Titanic wreck site, even for solely photographic purposes, would compromise RMST's preservation efforts and would constitute interference<sup>38</sup> and RMST would potentially "incur substantial monetary losses" by being unable to fulfill contractual obligations and commitments related to the salvage.<sup>39</sup>

However, in this case, it is doubtful that Heritage Inc. was unable to fulfill contractual obligations and commitment due to Aquatic view's activities since only 25 people dove onto the wreck site<sup>40</sup> for many years. In this regarding, Aquatic view did not interfere Heritage's salvage operation, hereby, Heritage Inc. cannot contend that they have the right to prevent rivals from visiting the wreck site.

**4. Aquatic View's activities is not adverse to Heritage's right with respect to the public interest factors**

Noting that salvage law encourages efforts to save property and that, meanwhile, international conventions encourage the preservation of archeological and historical objects on the high seas, case law demonstrates that it is beneficial for a single salvor to return imperiled property to its owner and that it is in the public interest for a salvor to salvage the

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<sup>37</sup> See R.M.S. Titanic, 9 F. Supp. 2d at 635-36.

<sup>38</sup> See R.M.S. Titanic, 9 F. Supp. 2d at 636

<sup>39</sup> See R.M.S. Titanic, 9 F. Supp. 2d at 637. The court noted RMST's \$1.5 million charter contract with IFREMER and a \$6 million licensing agreement with The Discovery Channel and NBC, both contingent upon RMST successfully completing its salvage for the season. See id.

<sup>40</sup> Only 25 tickets were sold for several years.

wreck. However, salvage law does not favor “a single salvor;” it protects the first salvor to begin saving property from *forcible* interference, but only so long as the first salvor is able to save the vessel<sup>41</sup> Salvage cases often involve claims by multiple salvors.<sup>42</sup> Similarly, *Columbus-America, supra*, involved multiple salvors seeking to share a salvage award; neither the passage cited by the district court<sup>43</sup> nor anything else in the case supports the notion that admiralty law favors a “single salvor.” The tribunal should notice that Aquatic View’s visiting the Coeur de l’ Ocean when Heirtage was not salvaging would not adversely affect these public interest factors.

Moreover, it is the sense that research and limited exploration activities concerning the wreck should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance<sup>44</sup> in the United States public policy. As declared in this legislation, it is clear. Exploration activities, like Aquatic view, that enhance public knowledge of the *Coeur de l’ Ocean* without physically altering or disturbing salvage operation are consistent with public interest.

### **III. THE HERITAGE DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L’OCEAN.**

#### **A. There is no agreed article granting exclusive rights of photographing and**

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<sup>41</sup> *The John Gilpin*, 13 F. Cas. 675, 676 (S.D.N.Y. 1845); *The Henry Ewbank*, 11 F. Cas. 1166, 1170-71 (C.C.D. Mass. 1833).

<sup>42</sup> 2 SCHOENBAUM, ADMIRALTY & MARITIME LAW § 15-5 at 510; *see, e.g., The Henry Ewbank*, 11 F. Cas. at 1175-76. Similarly,

<sup>43</sup> 974 F.2d at 460-61

<sup>44</sup> Provided, That, pending adoption of the international agreement described in section 6(a) [16 U.S.C. § 450rr-4(a)]

**documenting to Heritage Inc. in the agreement of 1995.**

Pursuant to the agreement of 1995, the relevant article would be Merchandising Income.<sup>45</sup> It granted the right to use the name Coeur de l’Ocean in association with sales and marketing of merchandise related to the wreck of Coeur de l’Ocean. Undoubtedly, it is impossible to interpret this article gives the exclusive right of photographing and documenting because it is limited to the use of name and it does not explicitly exclude other operators to photograph and document. In this regard, it is necessary to review whether the photographic and documenting rights can be conferred under the doctrine of expansion of salvage law<sup>46</sup> and/or intellectual property law.

**B. By granting the exclusive rights to visit and photograph, it exceeds the maximum salvage award authorized by law**

One ground for granting exclusive photographic rights was to allow Heritage “to at least recoup its investment in the salvage operations.” There is, of course, no evidence that Herit's others’ dives place in jeopardy Heritage's ability to “recoup its investment.” Moreover, even if An arbitration centre can grant such exclusive rights, the grant here violates controlling salvage law. The object of a salvage proceeding is to grant the salvor an award for its efforts.<sup>47</sup> Such an award is usually in money, but may also be *in specie*<sup>48</sup>. In any event, the International Convention on Salvage, 1989, to which the United States is a party, provides that a salvage

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<sup>45</sup> In 1995 PAM, Article No. 5 Sharing Arrangement is just dealing with distribution matter. Even though the parties were agreed to formulate a joint marketing plan, it could not be interpreted to give exclusive rights to Heritage Inc.

<sup>46</sup> See Bederman & Prowda, Jurisdiction: A United States Admiralty Court Can Award and Enforce Salvage Rights in a Shipwreck in International Waters, 30 J. Mar. L. & Com. 296, at C18. (1999).

<sup>47</sup> See *Columbus-America*, 974 F.2d at 468.

<sup>48</sup> *Id.* at 469.

award “shall not exceed the salved value of the vessel and other property.”<sup>49</sup> Here, exclusive rights to visit and photograph the Coeur de l’ Ocean is remuneration that necessarily exceeds the salved property's value and is thus prohibited by salvage law internationally.

**C. Granting exclusive rights of photographing and documenting to Heritage cannot be justified under the Copyright law and Trademark law**

**1. Granting exclusive phtographic rights is an inappropriate extension under the Copyright law**

Copyright law would provide a salvor with protected rights in any specific images or document it makes of submerged vessel, but the law would also grant any subsequent salvor the same right in images and document the subsequent salvor creates<sup>50</sup>. The court in the case of RMST had no intention of explicitly granting a copyright to RMST, but what it granted was essentially that the right to photograph, duplicate and distribute the photographs.<sup>51</sup>

Under the 1996 WIPO Copyright treaty, which is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, the author’s property interest in works that he or she created should be protected as far as to Copyright protection extends to distribute a work<sup>52</sup>, to rent a work<sup>53</sup>, and to communicate to

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<sup>49</sup> *Id.*, Article 13.3, *reprinted in* 3A MARTIN J. NORRIS, BENEDICT ON ADMIRALTY at B-25 (7th ed. rev. 1997).

<sup>50</sup> See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 9 F. Supp. 2d 380, 384. 1998 AMC 2421, 2440

<sup>51</sup> See supra note 624, 638.

<sup>52</sup> WIPO Copyright treaty § 6

<sup>53</sup> See *id.* §7

public<sup>54</sup>.

However, Berne Convention for the Protection of Artistic and Literary Works 1886 limit this protection to literary and artistic works. Photographing and documenting is sure to belong to those categories.<sup>55</sup> Even though they are secondary or derivative work of the original wreck, the treaty would also consider these “creations” protected works as they are secondary, or derivative, images of the original wreck.<sup>56</sup>

In this context, the shipwreck itself cannot be copyrighted because Heritage Inc. did not create the shipwreck, *Coeur de l’Ocean*<sup>57</sup>. Thus, Heritage’s rights in copyright would be limited to protection against the copying and distribution of the images or document they created and multiple parties would be permitted to photograph the wreck, make documentaries and write song about it.

In this regards, Heritage Inc.’s argument that they have proprietary interest in the physical wreck itself such as exclusive right of photographing and documenting is incorrect. Since Heritage Inc. was just finder and not owner, Heritage Inc. would have no proprietary interest in the physical wreck itself<sup>58</sup>. The only thing that the Heritage Inc. can do is to appeal court to prohibit competitor from producing or distributing illicit copies of the salvor's copyrighted image and document.

Additionally, if the subsequent salvor is denied to access to the ship wreck or the site, it may be also prohibited to take photo or made document of the ship wreck. Therefore, because a salvor does not have a copyright in the wreck itself, a salvor would have no claim to prevent

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<sup>54</sup> See id. § 8

<sup>55</sup> See Berne convention for the Protection of Literary and Artistic Works. §4 Criteria of Eligibility for Protection of Cinematographic Works, Works of Architecture and Certain Artistic Works

<sup>56</sup> See id. § 6

<sup>57</sup> See *Hunt v. Pasternack*, 192 F.3d 877, 878 (9th Cir. 1999)

<sup>58</sup> See *Bederman & Prowda*, supra note 296, at C18.

other salvors from diving onto the wreck site, hereby making its own original image or document of the wreck<sup>59</sup>. This injunction would limit a rival's ability to create and distribute the offending work, but it would not physically prohibit the infringer from visiting the site and creating its own derivative work<sup>60</sup>. According to copyright law, therefore, Heritage Inc. cannot prohibit other salvors from accessing and photographing a sunken wreck.

2. **Granting photographic rights is an inappropriate extension under the Trademark law**

a. ***Photo of artifact cannot be a “device” used to distinguish goods or services.***

Trademark law, as governed by the trademark treaty may prevent a subsequent salvor from taking and using commercially a derivative image of a wreck that an original salvor had already registered as a trademark<sup>61</sup>. In order to qualify for trademark protection, a mark must be a “device” used to distinguish goods or services.<sup>62</sup> Additionally, it requires being distinctive and not deceptively similar to any other mark.<sup>63</sup> However, it is incorrect to consider the photo of shipwreck is device because historic artifact would clearly not qualify as a “word, name, symbol, or device” adopted by company and used to distinguish a product in commerce.<sup>64</sup>

b. ***Trademark concepts may not be applicable to public, physical structures.***

If Heritage Inc. insists that there be possibility of confusion by permitting competitors to take photographs, Heritage Inc. must prove that the subsequent image is so similar to its own mark that it causes customer confusion<sup>65</sup>. Although the trademark principles of “dilution” and “right of publicity” may give a salvor broader rights against subsequent salvors taking multiple

<sup>59</sup> See Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 914 (7th Cir. 1996)

<sup>60</sup> See id

<sup>61</sup> See supra notes 394-95 and accompanying text.

<sup>62</sup> See generally Chisum & Jacobs, Donald S. Chisum & Michael A. Jacobs, Understanding Intellectual Property Law §5C

<sup>63</sup> See i.d.

<sup>64</sup> See i.d.

<sup>65</sup> This would be difficult for an original salvor to demonstrate if a rival took its own distinct image.

and distinct images of a wreck, these trademark concepts may not be applicable to public, physical structures such as shipwrecks.<sup>66</sup> Therefore, a salvor cannot gain a protected interest in the wreck it is salvaging.

**D. Granting exclusive rights of photographing and documenting cannot be justified by other forms of Intellectual property protection**

Some other forms of intellectual property protection is “right of publicity” in common law. It is usually afforded to celebrities<sup>67</sup>. If it would apply to ancient shipwreck it requires the protected subject to be an actual human being. Expanding “the right of publicity” to a historic artifact would be unreasonable.

The law of trade secrets could be applied to the historic shipwreck. To protect trade secret protection under the law of trade secret, information must be confidential, secret, and must be related to the operation of a business.<sup>68</sup> Moreover, it should have commercial value.<sup>69</sup> In this case, the ship wreck wouldn’t qualified as “secret” and hadn’t “commercial value” to its survival as a business. Therefore, it wasn’t entitled to exclude others from approaching the wreck site.

**IV. THE CALCULATION OF PROFITS AND DISTRIBUTION OF ARTIFACTS BETWEEN THE PARTIES TO BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES WAS NOT ENVISAGED BY 1995 AGREEMENT**

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<sup>66</sup> See supra note 400 and accompanying text.

<sup>67</sup> See Robert P. Merges et al., *Intellectual Property in the New Technological Age* 40 at 772-88

<sup>68</sup> See id 40 at 22

<sup>69</sup> See Donald S. Chisum & Michael A. Jacobs. *Understanding Intellectual Property Law* 40, § 3C, at 3-14

**A. Other standpoints should be considered to distribute the salvaged artefacts of the wreck**

**1. The 1995 partnering agreement is incomplete in respect to the distribution which reserves re-negotiation**

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 80% of the “appraised value and/or selling prices of the Artefacts” up to \$45m, 50% from \$45m to \$500m, and 40% above \$500m.

On the area where reconciliation between commercial and archeological interests is hard to achieve, it did not make clear (1) whether it was the intention of the parties only to sell coins raised from the site, or to sell other types of artefacts as well. It also did not make clear (2) whether all sales would take place on the open market in order to raise the best price, or whether some artefacts might be sold in a different way, for example by offering them for sale as a collection to public museums or similar institutions.

Accordingly, it is hard to conclude that only applying the basis of salvage legal principles can be derived from 1995 PAM. Provisions are insufficient to determine how and to whom salvaged artefacts shall be sold as well as the certain amount of salvage reward. Other standards should be applied such as archaeological or historical significance when consider the distribution of the artefacts other than only commercial value which the basic salvage law suggests.

2. **Applying 2001 Agreement with Astoria and 2001 UNESCO Convention to the disposition of artefacts can also be justified on the basis of the emphasis on archaeological consideration by courts when posing award**

Some courts applying the general maritime law have supplemented the traditional *Blackwall* factors in cases involving historic shipwrecks, expressly stating that the salvage reward should reflect the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salvaged.<sup>70</sup> A court applying the Salvage Convention 1989 should still be able to take that factor into account if it were inclined to do so, because the list of criteria in art. 13 is apparently not exclusive, leaving room for consideration of other relevant criteria.<sup>71</sup>

Firstly, Courts have required an archaeological duty of care in a claim for a salvage award. In *Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*<sup>72</sup> [[hereinafter *Cobb Coin II*], the court held that to state a claim for a salvage award on a shipwreck, which is historically and/or archaeologically significant, the salvor must document to the admiralty court that he adequately preserved the shipwreck's archaeological provenience.<sup>73</sup>

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<sup>70</sup> See, e.g., *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468, 1992 AMC 2705, 2728 (4th Cir. 1992). See also *Bederman, Old Challenges, New Trends*, supra note 116, at 168

<sup>71</sup> (2006) 163 F.C.R. 151 (Fed. Ct. Austl.), aff'd (2007) 163 F.C.R. 183 (Full Ct. Fed. Ct. Austl.).

<sup>72</sup> 549 F. Supp. 540 (S.D. Fla. 1982).

<sup>73</sup> See *id.*; see also *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft*, 54 F. Supp. 2d 1172, 1181-82 (S.D. Fla. 1999) (extending this rule to apply to submerged historic aircraft); *Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 208 (S.D. Fla. 1981) (“There can be no suggestion that federal admiralty procedures sanction salvaging methods which fail to safeguard items and the invaluable archeological information associated with the artifacts salvaged.”). Therefore, whether or not salvors use an archaeological duty of care is not left merely for consideration in determining the amount of a salvage award. But see *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (stating that “the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salvaged” should be taken into account in determining the salvage award). Unfortunately, the court in *Cobb Coin II* stated that salvors need not employ professional archaeologists. See *Cobb Coin II* 549 F. Supp. at 559. While not requiring that salvors use professional archaeologists, the court in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 546 F. Supp. 919, 927-28 (S.D. Fla. 1981), noted favorably that Melvin Fisher had employed archaeologists and historians to record the provenience of artifacts recovered, preserve and catalogue them, and conserve them so they could be viewed by the public. For a definition and discussion of provenience, see

Also, the court in *Marex International, Inc. v. Unidentified, Wrecked & Abandoned Vessel*<sup>74</sup> followed the court in *Cobb Coin II* and mandated that salvors demonstrate that they used an archaeological duty of care in salvaging historic shipwrecks before allowing them to recover under either the law of salvage.<sup>75</sup> The rationale for requiring an archaeological duty of care on salvors was given by the court in *MDM Salvage, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*:<sup>76</sup> “Archaeological preservation, on-site photography, and the marking of sites are particularly important . . . as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era.”<sup>77</sup>

Second, shipwrecks should not be disposed of only under traditional salvage principles, which were established for purposes other than the protection of archaeological information for general welfare of the public.<sup>78</sup> As the Indiana Supreme Court stated, although in a different context, “[t]he information in these sites expands our knowledge of human history . . . and thus enriches us as a state, nation and as human beings. The general welfare of the public is greatly enhanced by such knowledge.”<sup>79</sup>

Arbitration centre should recognize not only that commercial gain for Heritage’s salvage

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infra note 115.

<sup>74</sup> 952 F. Supp. 825 (S.D. Ga. 1997).

<sup>75</sup> See *id.* (requiring “provenience data” to be documented by recording and mapping the location and depth of the vessel and the artifacts in relation to each other and the vessel).

<sup>76</sup> 631 F. Supp. 308 (S.D. Fla. 1986).

<sup>77</sup> See *id.* at 312 (noting that the parties had not sought to preserve the archaeological integrity of the shipwreck site). This court did not indicate whether an archaeological duty of care was required of salvors in order to state a claim for salvage, but it did state that such would be “a significant element of entitlement to be considered when exclusive salvage rights are sought.” *Id.* at 310.

<sup>78</sup> One commentator even suggested that “[e]ntrepreneurial motives for recovery and sale of artifacts from shipwrecks can reasonably be regarded as contrary to the fundamental objectives of salvage.” McWilliams, *supra* note 122, at 19-20. Unfortunately, many courts in the United States have stated that one’s motives for engaging in salvage are irrelevant. See *supra* note 27. Nevertheless, the entrepreneurial motives of treasure salvors, that is, to maximize profits and keep their discoveries, is not supported by traditional admiralty law and “does not further the notion of preservation of historical or archaeological value. For this reason, the law of shipwrecks is no longer applicable to historic wrecks.” Larsen, *supra* note 106, at 55.

<sup>79</sup> *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1005 (Ind. 1989).

reward is important but that information recovered from these sites will enrich us all, as we learn about our common cultural heritage so archaeological standpoints should be concerned.

3. **2001 Agreement with Rolga and 2001 UNESCO Convention requires archaeological consideration in distribution of artefacts**

a. ***To comply with the 2001 Agreement with Rolga, the distribution of artefacts should be taken under two classification of salvaged items***

Under the Arrangement, the articles removed from the wrecks are distinguished in three categories, depending on whether they are abundant samples, less abundant samples or rare and even unique objects. The Arrangement aims at the fulfilment of those “historic, educational, scientific and international considerations” which “make the deposition of representative collections in the museums of the Astoria and Rolga most desirable”. In this regard, it provides its general aim, the purpose of ensuring that representative series of statistical samples and sufficient examples of the rare objects will be deposited in the museums of the Astoria and Rolga to convey the variety and contents of each wreck to both the public and to scholars while, at the same time, ensuring that major projects of scholarly research will not be impeded by over fragmentation of the collection.

Therefore, in developing a solution to balance private sector and academic cooperation, it may be useful to consider defining different categories of artifacts; (a) Cultural Artefacts, those whose economic resource value outweighs their archaeological significance, and (b) Trade Goods, those whose cultural importance should preclude sale or dispersal. While this is an artificial distinction to satisfy both agreements in 1995 and 2001, it provides a point for classifying artifacts according to their archaeological significance to a cultural assemblage.

Trade goods are characterized by large quantities of similar or duplicate items that have

been mass-produced with the original goal of trade and dispersion of these artifacts. Their inclusion in the assemblage is a result of a simple twist of fate, not a clue to the shipboard culture. Three issues may be useful in making this distinction : (1) the number of duplicates on site, (2) the ease of recording or replicating the artifacts, and (3) archaeological value versus value of return to stream of commerce.

***b. To comply with 2001 UNESCO Convention, there should be limitation in the way to dispose during the sale of Trade Goods***

Where excavation is so justified, recovered underwater cultural heritage “shall be deposited, conserved and managed in a manner that ensures its long-term preservation”.(Art. 2(6)) and “shall not be commercially exploited”(Art. 2(7)). Commercial exploitation of historic wrecks can take a variety of forms, but Rule 2 of the Annex makes it clear that the prohibition relates to the sale of recovered artefacts, rather than other forms of exploitation.<sup>80</sup>

A second clause to Rule 2 goes on:

“This Rule cannot be interpreted as preventing:

(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34 [which relate to the keeping together of the project archives including artefacts]; and is subject to the authorisation of the competent authorities.”

Part (b) of the second clause appears to represent an exception to the prohibition on sale.

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<sup>80</sup> The first clause of Rule 2 provides:

“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 suggests that the deposit of UCH with a custodian, including its sale to that party, is permitted provided that it is possible to reconstitute the entire collection, and provided that authorisation is obtained from the “competent authorities”. This would appear to allow for the sale of the whole of an assemblage, or perhaps significant parts of an assemblage, to museums or other similar institutions, where it would be properly looked after and “available for professional and public access” (Annex, Rule 33). However, it would not allow for the sale of material on the open market. Therefore the distribution of artefacts should be generally in accordance with the Annex and, as far as Rule 2 is concerned, be emphasised that ‘cultural artefacts’ would be disposed of in accordance with provision b).

Also, one additional consideration in allowing the sale of artifacts would be to minimize loss of access to the dispersed pieces by keeping track of their ultimate disposition. This would serve to provide some access to the artifacts even though they have been sold. When Heritage is allowed to sell a collection of trade goods, following above provisions, it should submit the information of tracks of disposition.

**B. Heritage is not entitled to get full salvage reward which may be calculated less than what it has asserted**

**1. Even if applying salvage principles, Heritage may be denied to gain full salvage award.**

**a. *The Coeur de l’ Ocean is not in marine peril***

Heritage argued that whether historic shipwrecks are in marine peril is *as a matter of law* and that courts uniformly hold that historic shipwrecks are in need of salvage services because

the shipwrecks are in peril. However, there are checkered history of decisions, in the United States and also internationally. Whether an historic shipwreck is in marine peril has most recently been addressed by a Canadian court.<sup>81</sup> The Crown argued that salvaging or raising the vessel posed more of a threat to the vessel than leaving it undisturbed.<sup>82</sup> The court, diverging from most courts in the United States on the subject, as well as from the opinions of Judges Stephen and Mason in *Robinson*, held that the Atlantic was not in marine peril.<sup>83</sup> The court stated that “salvage efforts can upset the equilibrium achieved over time in underwater historic sites and actually create peril by exposing the objects to new environmental stimuli which can accelerate deterioration.”<sup>84</sup>

***b. Even if Arbitration centre hold fast to the position that historic shipwrecks are in marine peril, there are rationales within traditional salvage law which reduce Heritage’s salvage award.***

Firstly, any peril that exists with historic shipwrecks is *de minimus*, and therefore a salvage award should either be reduced or denied altogether.<sup>85</sup> Instead of rescuing shipwrecks

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<sup>81</sup> See *Ontario v. Mar-Dive Corp.*, [1996] 141 D.L.R.4th 577. This case was recently discussed in detail. See generally Steven R. Yormak, *Canadian Treasure: Law and Lore*, 30 *J. Mar. L. & Com.* 229, 229 (1999).

<sup>82</sup> See *Mar-Dive*, 141 D.L.R.4th. at 592. The salvors argued that the vessel was in peril of being destroyed by zebra mussels. See *id.* However, the court was persuaded by the testimony of a marine archaeologist who stated that the exposed portion of the Atlantic was not large enough for a significant number of zebra mussels to attach themselves. See *id.* If a large number of mussels could not attach themselves to the ship, then the combined weight of the mussels would not pose a threat of causing the ship's structural collapse. See *id.*

<sup>83</sup> See *id.* at 637-38.

<sup>84</sup> *Id.* at 638. The court stated that the salvors had placed the wreck in peril due to their unskilled and unscientific recovery of artifacts. See *id.* Moreover, the court noted that “[u]nscientific removal of artifacts damages the value of the wreck.” *Id.*; see also *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 568 F. Supp. 1562, 1568 (S.D. Fla. 1983) (noting that unskilled and unscientific removal of artifacts from shipwrecks actually creates marine peril), *aff’d*, 758 F.2d 1511, 1515 (11th Cir. 1985).

<sup>85</sup> This suggestion is based on the sixth factor enumerated in *Blackwall*. See *supra* note 48 and accompanying text. These six factors originally came from *Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869), and have been followed by most courts. See, e.g., *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333, 339 (2d Cir. 1983) (ranking factors by importance); *W.E. Rippon & Son v. United States*, 348 F.2d 627, 628-29 (2d Cir. 1965) (approving of factors enunciated in *Blackwall*). A few courts have followed the factors set forth in *Blackwall*, but stated that extra factors should also be taken into consideration when fixing a salvage award. See, e.g., *Columbus-America Discovery Group*, 974 F.2d at 468 (stating an additional factor is “the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salvaged.”); *The Sandringham*, 10 F. 556, 573 (E.D. Va. 1882) (stating

from peril, salvors actually place shipwrecks in peril if the salvors are not properly trained or do not employ sound archaeological principles and techniques. However, at least one court was of the opinion that “salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded.”<sup>86</sup>

Second, Heritage do not possess, and have not exhibited, the necessary “skill” to receive a salvage award.<sup>87</sup> By recovering artifacts without properly recording their provenience and context, treasure salvors have de facto looted the site. The traditional penalty for looting or plundering salvaged property has been to significantly diminish or deny a salvage award.<sup>88</sup> “[t]he fact that plaintiff failed to employ proper archeological techniques in removing artifacts from the shipwreck may reduce the amount of any salvage award.”<sup>89</sup>

Third, artifacts recovered without adequate contextual information are less valuable than artifacts with such information, or an award could be denied altogether by holding that artifacts without such information are valueless.<sup>90</sup> As J. Barto Arnold III stated, “[w]hen the incalculable loss of historical, social, and anthropological data resulting from the removal of artifacts from a shipwreck site without proper archaeological controls is thrown into the balance the matter of value could be interpreted in a negative sense in determining the salvage award.”<sup>91</sup>

In fact, during the salvage and recovery operation, some salvaged items were destroyed. Moreover, in a notion that the harmness toward artefacts was occured by poor handling of Heritage personnel due to its inadequate skill, Heritage’s salvage activity created peril which cannot appear unless salvage is done by Heritage. Therefore, this fact should be used in

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another consideration should be “[t]he degree of success achieved, and the proportions of value lost and salvaged”).

<sup>86</sup> *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992).

<sup>87</sup> This suggestion is based on the second factor enumerated in Blackwall. See supra note 48 and accompanying text

<sup>88</sup> See Martin J. Norris, *Misconduct of Salvors*, 18 *Brook. L. Rev.* 247, 249-50 (1952).

<sup>89</sup> *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1516 (11th Cir. 1985) (Kravitch, C.J., specially concurring in part and dissenting in part).

<sup>90</sup> This suggestion is based on the fifth factor enumerated in Blackwall. See supra note 48 and accompanying text.

<sup>91</sup> Arnold, *Some Thoughts on Salvage Law*, supra note 123, at 176.

determining the size of the salvage award.

### **C. Specific distribution which Rolga is required to do**

#### **1. Distribution of trade goods**

In Rolga government's suggestion, Trade goods are those whose economic resource value outweighs their archaeological significance. They can be distinguished and the subject of ordinary commercial sale. Items following are in this category : Gold ingots and bullions, Gold bars, Silver ingots, Silver coins with Astorian marks, Copper planks, Indigo, Tobacco, Olives and pickles, Elephant tusk, Chinese porcelains, and Spices.

Artefacts, classified as a trade good, can be taken by Heritage who might make monetary gain by sales in the market, for the amount of its share. However, when Heritage makes profit by selling artefacts, it should be complied with 2001 Agreement and UNESCO Convention. It should sell to museums with a complete collection and sell with records which help easy access when educational or academic needs.

#### **2. Distribution of cultural artefacts**

Cultural artefacts are those whose archaeological importance should preclude sale or dispersal. It should be retained as part of the project achieves. Items following are in this category : Bronze cannon with Astorian marks, Silver containers, Bronze forks, Silver pendant, Comb, Unknown liquid, Ornaments, Cannon balls, Swords bearing some Arabic words, and Silver daggers with precious stones

Titles of these artifacts shall remain in Rolga and the government may keep it.<sup>92</sup>

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<sup>92</sup> Does not deal with the deposition to the country of origin. Only consider the problem of title.

However, there would be a payment to Heritage as much as its interests and it should be made by the money of Treasury and Rolga shall not sell those artefacts and deposit them in Rolgan or Astorian museum.