

**LAWASIA MOOT COMPETITION**

**2009**

**IN THE INTERNATIONAL CENTER OF ARBITRATION**

**HO CHI MINH CITY, VIETNAM**

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**BENEVOLENT HERITAGE INC**

*Claimant*

**v**

**THE GOVERNMENT OF ROLGA**

*Respondent*

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**MEMORIAL FOR THE CLAIMANT**

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## **STATEMENT OF JURISDICTION**

The present dispute is submitted to this Arbitral Tribunal pursuant to article 10 of the Partnering Agreement Memorandum. In accordance with such article, each party will accept the decision of the Tribunal as final and binding.

## **QUESTIONS PRESENTED**

### **I.**

Whether the Partnering Agreement Memorandum is valid and enforceable;

### **II.**

Whether salvage law is applicable in this case and the Claimant be accorded rights of a salvor;

### **III.**

Whether the distribution of artefacts between the Parties (or the calculation of the Claimant's reward) is to be made solely on the basis of salvage legal principles;

### **IV.**

Whether the Claimant has exclusive rights of photographing and documenting the Coeur de l' Ocean;

### **V.**

Whether the Respondent has interfered with the Claimant's rights and performance under the 1995 Agreement (A) when it allowed Aquatic View to organise and make profits from visiting activities to the site including the taking of photographs ; and (B) if assuming the Agreement with Astoria is applicable to the Coeur de l' Ocean, when it entered into such bilateral treaty in 2003; and (C) if assuming the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage prohibited the

application of salvage law or altogether the sale of the artefacts, when it ratified such  
Convention in 2005.

## **SUMMARY OF FACTS**

In 1800, a vessel with the name “Coeur de l’ Ocean” was on a military expedition to the ancient city of Zamzala, which is now part of the territory of the State of Rolga. In or around 1800, while en-route to another destination, a monsoon struck, driving the vessel into waters off the coast of Rolga. The vessel was confirmed to be carrying a large amount of cargoes, which constituted both commercial shipments and other war booty. For more than 200 years, the wreck remained submerged in water. During this period of time, there were no known salvage attempts or ownership claims.

In the 1980s, illegal treasure hunting was rampant in Rolga and the lack of Rolgan policing made historic wrecks in Rolgan waters the target of looting.

In 1990, Benevolent Heritage Inc, a company incorporated under Rolgan law, submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant wrecks. The extensive research and study of records led to the discovery of what was believed to be the sunken Coeur de l’ Ocean 10-12 nautical miles off the baseline of Rolga. Subsequently, Benevolent Heritage signed the Partnering Agreement Memorandum with the Government of Rolga, which set forth, among other things, the terms of the excavation project – including the requirement of the submission of a project plan regarding the equipment, personnel and

methodologies to be employed in the exploration of the wreck site, the fees and deposit amounting altogether US\$1,280,000 for obtaining the recovery permit, the sharing arrangements of artefacts recovered, and the merchandising rights Benevolent Heritage was to receive.

In 2000, a maritime exhibition was set up within the National Museum by the Government of Rolga to showcase some of the recovered artefacts from the wreck of the Coeur de l' Ocean, which led to the doubling of tourist visits to the National Museums.

In 2001, Rolga entered into an agreement on the "Protection of Astoria Wrecks" with the Government of Astoria in 2001 in which Astoria agreed to transfer all its right, title and interest in and to wrecked ancient vessels of Astoria in Rolgan waters to Rolga.

In or around the same year, Rolga granted a permit to allow Aquatic View, a tour operator, to organise exclusive underwater trips to view the wreck of the Coeur de l' Ocean. So far the company has sold 25 tickets at the price of US\$ 20,000 each. Aquatic View has also been taking photographs and making video clips of the wrecks and has posted these materials on their website as promotional materials for the trips. In addition, the company made songs and souvenirs using the name "Coeur de l'

Ocean”. Benevolent Heritage asserts that these activities have jeopardised their ongoing television documentary deal with an international broadcasting company.

In 2003, the parties took steps in finalising the distribution of artefacts recovered, when Benevolent Heritage asserted unfair distribution contrary to the Partnering Agreement Memorandum.

In 2005, Rolga ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.

The relevant artefacts are now in the custody of Rolga.

## SUMMARY OF PLEADINGS

- I. The Partnering Agreement Memorandum is valid and enforceable. This is because either Rolga was the owner of the wreck of the Coeur de l' Ocean at the time Benevolent Heritage's recovery operations took place – due to Rolga's sovereign prerogative which vests title in and to all unclaimed wrecks within its territorial waters in the State of Rolga; or that Rolga's lack of ownership with regard to the wreck did not render the performance of the Partnering Agreement Memorandum impossible.
  
- II. The law of salvage is applicable to the recovery operations of Benevolent Heritage so that Benevolent Heritage should be accorded rights of a salvor. The legal requirements for salvage are satisfied, and the 1989 Salvage Convention is applicable. The principle of sovereign immunity under the Salvage Convention does not apply, because it is not proved on the preponderance of evidence that the Coeur de l' Ocean was either a warship or a state-owned vessel of Astoria. Nor does the 2001 UNESCO Convention exclude the application of salvage law since the exception provided under the 2001 UNESCO Convention is satisfied.
  
- III. As a matter of salvage legal principle, Rolga is bound by the method of distribution of artefacts as stipulated in the Partnering Agreement Memorandum. The Agreement with Astoria does not operate to split the artefacts between

Astorian and Rolga museums, because it is not proven that the Coeur de l' Ocean was a vessel to which the treaty applies – that is, a vessel owned by Astoria. Nor does the 2001 UNESCO Convention render unenforceable the clause in the Partnering Agreement Memorandum regarding the distribution of artefacts, as the sale of artefacts is permitted in certain circumstances under the Convention, and such criteria are satisfied in this case. In the alternative, in the event this Tribunal finds otherwise, Benevolent Heritage is nevertheless entitled to a salvage award under the 1989 Salvage Convention.

- IV. Benevolent Heritage enjoys exclusive rights of photographing and documenting of the Coeur de l' Ocean since they form part of the Claimant's trade secrets. In addition, as a matter of public policy, the above rights should be recognised as forming part of the possessory rights of Benevolent Heritage in the capacity of a salvor.
- V. Rolga interfered with the Benevolent Heritage's possessory rights when it allowed Aquatic View to organise and make profit from visiting activities to the wreck site, and infringed Benevolent Heritage's exclusive merchandising rights under the Partnering Agreement Memorandum when it acquiesced to Aquatic View's making profit from photographs, songs and souvenirs which are associated with the name "Coeur de l' Ocean". In the event the Agreement

with Astoria is applicable to the Coeur de l' Ocean, the entering into such a bilateral treaty interfered with Benevolent Heritage's collateral rights under the Partnering Agreement Memorandum. In the event the 2001 UNESCO Convention prohibited the application of salvage law or altogether the sale of artefacts, the ratification of such convention also interfered with Benevolent Heritage's collateral rights under the Partnering Agreement Memorandum.

## PLEADINGS

### I. THE PARTNERING AGREEMENT MEMORANDUM (“1995 AGREEMENT”) IS BOTH VALID AND ENFORCEABLE

#### A. The Respondent had title to the Coeur de l’ Ocean at the time the 1995 Agreement was entered into

Contractual salvage occurs when a rescuer has a valid and enforceable contract with *the owner* to recover his/her property in peril of the sea.<sup>1</sup>

The Claimant’s position is that the Respondent had acquired title to and thus became owner of the Coeur de l’ Ocean by way of sovereign prerogative,<sup>2</sup> pursuant to section 379 of the Malaysian Merchant Shipping Ordinance 1952 – with which Rolgan laws have to be considered *in pari materia*.<sup>3</sup>

1. The original owner’s title to the wreck was impliedly abandoned through the passage of time

The principle of sovereign prerogative applies to all unclaimed wrecks.<sup>4</sup> The Respondent had acquired title to the Coeur de l’ Ocean by way of sovereign prerogative as there was legal abandonment of ownership of the Coeur de l’ Ocean by its owner.

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<sup>1</sup> *Benedict on Admiralty*, 7<sup>th</sup> edn (Revised) (New York: Matthew Bender, 2002), Chapter XIII, § 13.01

<sup>2</sup> See eg *Blackstone’s Commentaries on the Laws of England*, Vol 1, pp 290, 292; Brice, *Brice on Maritime Law of Salvage*, 4<sup>th</sup> edn (London: Sweet and Maxwell, 2003) at pp 274-276

<sup>3</sup> Further Clarifications, p 1, ¶ 8; see also *Halsbury’s Laws of Malaysia* (2008 Reissue) (Malaysia: Butterworths Asia, 2008), Vol 1(1), pp 40, 54, ¶¶ 10.030, 044

<sup>4</sup> *Ibid*. See also Brice, *supra* n 2

While it is not known whether any acts of express abandonment<sup>5</sup> were made by the original owner, it is submitted that in any event the original owner had, through the passage of time, impliedly abandoned their ownership rights in the Coeur de l' Ocean.

Since there are no international conventions which expressly lay down a rule of express abandonment, the burden of proof rests on proponents of this position<sup>6</sup> to show that this practice existed as customary international law by way of a "general practice accepted as law".<sup>7</sup>

The courts of the United States of America have long held that the passage of time is a proper basis upon which to draw the inference of abandonment. Case law has established that a presumption of abandonment arises when there is a substantial passage of time along with the absence of affirmative action by the original owners to assert title and ownership.<sup>8</sup> In *Treasure Salvors v Unidentified, Wrecked and Abandoned Sailing Vessel*,<sup>9</sup> the court considered it a stretch of a "fiction to absurd

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<sup>5</sup> It is the Claimant's position that the Coeur de l' Ocean was not a state-owned vessel of Astoria, and accordingly the Bilateral Treaty with Astoria is inapplicable in the present case. See Section III.A.2

<sup>6</sup> *The North Sea Continental Shelf Cases (Germany v The Netherlands; Germany v Denmark)* [1969] ICJ Rep 3

<sup>7</sup> See Statute of the International Court of Justice, 24 Oct 1945, art 38, para 1(b)

<sup>8</sup> See eg *Treasure Salvors v Unidentified, Wrecked and Abandoned Sailing Vessel* (1978) 569 F.2d 330 at 337; *Klein v Unidentified, Wrecked and Abandoned Sailing Vessel* (1985) 758 F.2d 1511 at 1514; *Martha's Vineyard Scuba Headquarters v Unidentified, Wrecked and Abandoned Steam Vessel* (1987) 833 F.2d 1059 at 1064-1065

<sup>9</sup> (1978) 569 F.2d 330

lengths” to treat a wrecked vessel whose location had been lost for centuries as though its owner existed.<sup>10</sup> There are also numerous cases in which the courts treated foreign vessels as abandoned due to the long passage of time.<sup>11</sup>

Other jurisdictions, including Singapore<sup>12</sup> and Norway,<sup>13</sup> also have reported cases that more or less recognise that a sufficient passage of time implies abandonment. It is submitted that there is no consistent practice of domestic courts requiring an express abandonment of sunken vessels; rather, quite contrarily, the above cases show that there are instances where domestic tribunals have accepted that abandonment of title may be implicated from the fact that the vessel has sunken for a long period of time and throughout that period of time the original owner has not made any assertions of ownership regarding the sunken vessel or its cargoes.

In this case the original owner’s title to the *Coeur de l’ Ocean* – a wreck submerged in water for more than 200 years – has been impliedly abandoned through the passage of time. Consequently, given that the exact location of the wreck is

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<sup>10</sup> *Ibid.*, at 337

<sup>11</sup> *Deklyn v Davis* (1824) 1 Hopk Ch 154 at 154; see also *Treasure Salvors*, *supra* note 8; *Platoro Ltd v Unidentified Remains* (1978) 614 F.2d 1051; *Cobb Coin Co v Unidentified, Wrecked and Abandoned Sailing Vessel* (1981) 525 F.Supp 186; *MDM Salvage v Unidentified Vessel* (1986) 631 F.Supp 308; *Marx v Government of Guam* (1988) 866 F.2d 294

<sup>12</sup> *Simon v Taylor* [1975] 2 *Lloyd’s Rep* 338 at 342

<sup>13</sup> *Nordsjø Dykker Co v Høyding Skipsopphugging* (1970) 135 *Norsk Retstidende* 346 at 349

between 10-12 nautical miles from Rolga's baseline,<sup>14</sup> and that Rolga's territorial waters extend 12 nautical miles from the relevant baseline,<sup>15</sup> the Coeur de l' Ocean was an unclaimed abandoned wreck located within Rolga's territorial waters.

2. Rolga had, by way of sovereign prerogative, acquired title to the unclaimed Coeur de l' Ocean which is located within its territorial waters

Given that there were no claims to ownership, Rolga had acquired title to and became owner of the Coeur de l' Ocean by way of sovereign prerogative, pursuant to section 379 of the Malaysian Merchant Shipping Ordinance 1952 with which Rolgan laws have to be considered *in pari materia*.<sup>16</sup>

Accordingly, Rolga had good title over the Coeur de l' Ocean and the artefacts thereof prior to the 1995 Agreement being entered into. As Rolga had the capacity to enter into such contract, the 1995 Agreement is both valid and enforceable.

**B. Alternatively, the Respondent's lack of ownership in relation to the Coeur de l' Ocean at the time the 1995 Agreement was entered into did not render the performance of the contract an impossibility, and the Respondent is estopped from denying the existence of the 1995 Agreement**

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<sup>14</sup> Further Clarifications, p 1, ¶ 1

<sup>15</sup> Moot Problem, p 7, ¶ 16

<sup>16</sup> Further Clarifications, p 1, ¶ 8; see also *Halsbury's Laws of Malaysia*, supra n 3, Vol 1(1), pp 40, 54, ¶¶ 10.030, 044

Assuming, *arguendo*, that the Respondent did not have title to the wreck of the *Coeur de l' Ocean* at the time the 1995 Agreement was entered into, this does not prevent the 1995 Agreement from being valid and enforceable.

The Respondent's lack of title with regard to the wreck of the *Coeur de l' Ocean* did not render the performance of the contract impossible. A mistake nullifies the parties' consent only where the agreement reached was based on a fundamental mistaken assumption.<sup>17</sup> The fundamental mistaken assumption must render the performance of the contract impossible.<sup>18</sup> It must be noted that the Respondent entered into a bilateral treaty with the Government of Astoria ("Agreement with Astoria") in 2003, in which Astoria agreed to transfer "all its right, title and interest in and to wrecked ancient vessels of the Astoria lying on or off the coast of Rolga and in and to any articles thereof to Rolga..."<sup>19</sup> Artefacts have already been successfully recovered by the Claimant. Rolga is now the owner of the *Coeur de l' Ocean*. The Respondent now has the capacity to enter into the 1995 Agreement and the Claimant has already fulfilled its legal obligations under the 1995 Agreement. There is no reason for the Respondent not to respect and honour its obligations under the contract.

Given that the Respondent has performed the contract by allowing the Claimant to

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<sup>17</sup> *Brennan v Bolt Burdon* [2005] 1 QB 303 at 314, referring to the case of *Great Peace Shipping Co Ltd v Tsavliris Salvage Ltd* [2003] QB 679.

<sup>18</sup> *Ibid.* See also Brice, *supra* n 2 at p378 ¶ 5-172

<sup>19</sup> Moot Problem, p 5, ¶ 9

conduct the salvage operations to its detriment without warning the Claimant their lack of title, the Respondent is also estopped from denying the existence of the 1995 Agreement.<sup>20</sup>

In *MaRae v Commonwealth Disposals Commission*,<sup>21</sup> the plaintiffs entered into a contract of sale to buy a wrecked oil tanker, only to find that the tanker did not exist after having spent considerable time and money searching for it. While the defendant pleaded common mistake, the High Court of Australia rejected the view and held that the plaintiffs were entitled to damages for breach of contract, since there was an undertaking by the defendant by implication that the subject-matter existed. Analogically, there should also be an implied undertaking on the part of the Respondent that they had the capacity to conclude the 1995 Agreement, which deals with in a substantial part the distribution of artefacts to be recovered from the wreck site – an arrangement that can only be possibly made by the owner. Accordingly, this implied undertaking overrides the effect of a possible mistake.

## **II. THE LAW OF SALVAGE APPLIES IN THE PRESENT CASE SO THAT THE CLAIMANT SHOULD BE ACCORDED RIGHTS OF A SALVOR**

### **A. The legal requirements for salvage are satisfied**

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<sup>20</sup> *Spiro v Lintern* [1973] 3 All ER 319 at 327-328

<sup>21</sup> (1950) 84 CLR 377

The law of salvage applies to the Claimant's recovery operations as the requirement of "marine peril" is satisfied.<sup>22</sup> Common law has long recognised recovery services rendered to sunken wrecks as being salvage operations.<sup>23</sup> The proposition that "the danger for underwater cultural heritage has passed"<sup>24</sup> is founded on a fundamental misunderstanding, as least insofar as it relates to English salvage law.<sup>25</sup> A vessel (including an ancient wreck) or cargo found on the seabed would be treated as being "immobilised", and this is a well recognised category of danger in salvage law.<sup>26</sup> Likewise, the Australian High Court in *Robinson v Western Australian Museum*<sup>27</sup> held that "[s]alvage is not limited to recovery of property in or from a ship which is actually in distress; it extends to the recovery of property in or from a ship which has lain at the bottom of the sea for a long time."<sup>28</sup>

American courts have also found that shipwrecks and artefacts at the bottom of the sea are, as a matter of law, in marine peril, as they are in danger of being lost

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<sup>22</sup> *Halsbury's Laws of England*, 5<sup>th</sup> edn (London: Butterworths, 2008), Vol 94, ¶ 928

<sup>23</sup> See eg *HMS Thetis* (1833) 166 ER 312; *The Cadiz and the Boyne* (1876) 3 Asp MLC 332; *The Egypt* (1932) 44 L1 L Rep 21

<sup>24</sup> Bueno Aires Draft Convention on the Protection of the Underwater Cultural Heritage, Commentary on Article 4

<sup>25</sup> Brice, "Salvage and the Underwater Cultural Heritage" (1996) 20 *Marine Policy* 337 at p 339

<sup>26</sup> *Ibid.*

<sup>27</sup> (1977) 138 CLR 283

<sup>28</sup> *Ibid.*, at 330

through the actions of the elements.<sup>29</sup> The law of salvage is applied when ships or their cargo have been recovered from the bottom of the sea by those other than their owners.<sup>30</sup> In *Columbus-America Discovery Group v Atlantic Mutual Insurance Company*,<sup>31</sup> the United States Court of Appeals for the 4<sup>th</sup> Circuit held that the wreck concerned, found lying on the seabed 7000 feet deep, was in a situation of “danger” for the purpose of a salvage award. The court stated that

“[w]hile it is true that the ocean itself presents no danger to the essential nature of gold and similar substances, it is also true that any value that our society attributes to gold depends entirely on the ability of someone to assert a property interest in it. Because property is far less certain of being recovered once it has sunk, especially when it has sunk in deep water, we perceive that its sinking sharply increases the degree of danger to its continued existence and utility as property.”<sup>32</sup>

As warned by the court in *Cobb Coin*,<sup>33</sup> every day lost in the salvaging effort means fewer artefacts recovered for the benefit of society. Natural phenomena may

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<sup>29</sup> *Benedict on Admiralty*, *supra* n 1, Chap XIII, § 13.07. See also eg *Treasure Salvors v Unidentified, Wrecked and Abandoned Vessel* (1978) 569 F.2d 330; *Cobb Coin Co v Unidentified, Wrecked and Abandoned Sailing Vessel* (1981) 525 F.Supp 186; *RMS Titanic v Haver* (1999) 171 F.3d 943

<sup>30</sup> *Columbus-America Discovery Group v Atlantic Mutual Insurance Co* (1992) 974 F.2d 450 at 459

<sup>31</sup> (1995) 56 F.3d 556

<sup>32</sup> *Ibid.*, at 573

<sup>33</sup> *Cobb Coin Co v Unidentified, Wrecked and Abandoned Sailing Vessel* (1981) 525 F.Supp 186 at 217

move the cargo deeper in the sand, causing the artefacts to be forever buried in the sand undiscovered.<sup>34</sup> Such loss of information would irreparably harm not only the plaintiff, but also all parties interested in recapturing and preserving the historic treasures of the sunken fleet.<sup>35</sup>

Accordingly, the wreck of the *Coeur de l' Ocean* was in danger prior to the Claimant's salvage operations took place, either due to it being "immobilised" or in danger of being lost through the actions of the elements.

## **B. The 1989 Salvage Convention is applicable**

### **1. Rolga is a signatory to the 1989 Salvage Convention**<sup>36</sup>

The Respondent is a party to the 1989 Salvage Convention.<sup>37</sup> Since the Respondent is a monist state,<sup>38</sup> international conventions have the force of domestic law once they are ratified.<sup>39</sup> Article 2 of the 1989 Salvage Convention stipulates that the Convention "shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party". The present

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> LEG/CONF.7/27. 2 May 1989

<sup>37</sup> Moot Problem, p 7, ¶ 17(a)

<sup>38</sup> Further Clarifications, p 1, ¶ 7

<sup>39</sup> G.J. Wiarda, in A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1992), p 17

arbitral proceedings deal with rights of the Claimant as a salvor under the 1995 Agreement, which is in essence a salvage contract. Article 1(a) of that Convention defines a “salvage operation” as “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever”. Provided that this Tribunal accepts the Claimant’s submission that the wreck is in danger,<sup>40</sup> the recovery activities of the Claimant will be “salvage operations” to which the 1989 Salvage Convention covers.

Vietnam, the seat of the present proceedings, is one such State Party referred to in article 2; and thus the 1989 Salvage Convention shall apply in this case.

2. The “non-application to state-owned vessels clause” of the 1989 Salvage Convention does not apply

a. *The sunken Coeur de l’ Ocean cannot indefinitely retain the status of a ship under international law*

The Claimant’s case is that the Coeur de l’ Ocean is no longer a “ship” / “vessel” in the legal sense and thus its wreck is not entitled to sovereign immunity under article 4 of the 1989 Salvage Convention.

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<sup>40</sup> See Section II.A

The principle of sovereign immunity relates to “ships”, which are commonly defined as vessels having the ability to navigate.<sup>41</sup> Article 1(b) of the 1989 Salvage Convention defines a vessel as “any ship or craft, or any structure *capable of navigation*”. (emphasis added) A sunken ship, having lost the characteristics of a ship and no longer capable of navigation, should cease to be a vessel<sup>42</sup> to which article 4 applies, and therefore be subject to the same salvage rules and principles as any other sunken wreck.<sup>43</sup>

American courts, too, have held that sovereign immunity may be lost due to the deterioration of the physical condition of the wreck.<sup>44</sup> In *Baltimore, Crisfield & Onancock Line v United States*,<sup>45</sup> the Court of Appeals for the 4<sup>th</sup> Circuit held that since the wreck in question was no longer a navigable and usable vessel, it could no longer be granted the classification of a vessel.<sup>46</sup>

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<sup>41</sup> L. Migliorino, “The Recovery of Sunken Warships in International Law” in B. Vukas (ed.), *Essays on the Law of the Sea* (1985), pp 244-258, at p 251.

<sup>42</sup> W. Riphagen, “Some reflections on ‘functional sovereignty’” (1975) 6 *Netherlands Yearbook of International Law* 121 at p 128

<sup>43</sup> See eg S. Dromgoole and N. Gaskell, “Draft Convention on the Protection of the Underwater Cultural Heritage 1998” (1999) 14(2) *The International Journal of Marine and Coastal Law* 171, at pp 183 – 184; and C. Forrest, “An International Perspective on Sunken State Vessels as Underwater Cultural Heritage” (2003) *Ocean Development & International Law* 41, at p 45

<sup>44</sup> *Baltimore, Crisfield & Onancock Line v United States* (1944) 140 F.2d 230

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, at 234

The Coeur de l' Ocean sunk more than 200 years ago and is no longer capable of navigation. Accordingly, it should not be entitled to sovereign immunity; and should be subject to a claim for salvage under the 1989 Salvage Convention in the same manner as a privately owned vessel.

*b. Further, the Coeur de l' Ocean was not entitled to sovereign immunity at the time it was salvaged by the Claimant since it is not proved that she was a state-owned vessel used for non-commercial purposes or was a warship*

The exemption of salvage law due to sovereign immunity under the 1989 Salvage Convention applies only to either “state-owned vessels used for non-commercial purposes” or “warships”.<sup>47</sup> In the *Corfu Channel Case*,<sup>48</sup> it was held that the party making a factual allegation has the burden of proving it on the preponderance of the evidence. In the present case it is not proven that it is more likely than not that the Coeur de l' Ocean was either a warship or a state-owned vessel used for non-commercial purposes. In the absence of such preponderance of evidence, the wreck will not be within the exemption provided under article 4 of the 1989 Salvage Convention. While the Coeur de l' Ocean was used for military purposes,<sup>49</sup> the military function may be purely incidental, given that the division

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<sup>47</sup> 1989 Salvage Convention, art 4(1)

<sup>48</sup> *The Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4

<sup>49</sup> Further Clarifications, p 1, ¶ 5

between private and state-owned vessels at that period of time is not clear-cut. An example may be privateers in the medieval and early modern era, which were prevalent<sup>50</sup> prior to the 1856 Declaration of Paris,<sup>51</sup> being defined as “armed vessels that are owned, equipped and officered by one or more private persons, but sailing under a commission [from a state], which empowers the [vessel] to attack and seize vessels or other property of its enemy.”<sup>52</sup> The *Coeur de l’ Ocean* may well be a privately owned ship which has an ancillary or incidental military purpose.

Assistance may also be sought from the United Nations Convention on the Law of the Sea (1982 UNCLOS), which sets out three criteria in defining a “warship”, namely that (1) the vessel must bear external marks showing its nationality; (2) the commanding officer must be duly commissioned with his or her name appearing in the appropriate service list; and (3) the vessel must be manned by a crew under regular armed forces discipline.

Although the 1982 UNCLOS definition is intended for modern navies and is not easily applied to historic ships, one of the underpinning policies behind the recognition of sovereign immunity by the 1989 Salvage Convention is that

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<sup>50</sup> C. Forrest, “Sunken State Vessels as Underwater Cultural Heritage” (2003) *Ocean Development & International Law* 41, at p 43

<sup>51</sup> Declaration of Paris, 16 Apr, 1856, art 1, 115 *Consol TS* 1, 15 *Martens Nouveau Recueil* (ser 1) 791

<sup>52</sup> *Cyclopaedia of Political Science, Political Economy, and the Political History of the United States* (New York: Maynard, Merrill, and Co, 1899), §III.92.1

non-commercial state-owned vessels may contain sensitive and confidential information crucial to the state's security interests.<sup>53</sup> A wreck sunk in the sea for more than 200 years would unlikely still be of any strategic military or intelligence importance to the state owner.<sup>54</sup> As a result, since both conventions deal with aspects of maritime law, the rule of interpretation *in pari materia*<sup>55</sup> should apply where the definition of "warships" in the 1982 UNCLOS can be used as an aid in construing the 1989 Salvage Convention.

It is also provided that the *Coeur de l' Ocean* was carrying, on her last known voyage, a large amount of cargo, many of which constituted commercial shipments,<sup>56</sup> including a large quantity of silver coins with Astorian marks.<sup>57</sup> The nature of the cargo is evidence that even if the vessel was owned by Astoria prior to its sinking, she does not fall within the concept of "non-commercial vessels" as expressed in article 4 of the 1989 Salvage Convention.

In any event, as submitted above, the burden rests upon the Respondent to prove, by preponderance of the evidence,<sup>58</sup> that the *Coeur de l' Ocean* was a state-owned

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<sup>53</sup> C. Forrest, *supra* n 50, at p 43

<sup>54</sup> *Ibid.*

<sup>55</sup> *R v Loxdale* (1758) 1 Burr 445 at 447

<sup>56</sup> Moot Problem, p 2, ¶ 1

<sup>57</sup> *Ibid.*, p 6, ¶ 12

<sup>58</sup> *The Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4

non-commercial vessel of Astoria and/or that the it was a warship, whether or not the definition from the UNCLOS is to be adopted.

In the absence of such evidence, the principle of sovereign immunity under article 4 of the 1989 Salvage Convention will not apply.

**C. Other international conventions do not prohibit the application of salvage law**

1. The United Nations Convention on the Law of the Sea (1982 UNCLOS) specifically preserves the application of the law of salvage to maritime waters to which it applies

Although article 303(1) of the 1982 UNCLOS<sup>59</sup> imposes upon states a duty “to protect objects of an archaeological and historical nature found at sea”, article 303(3) states that “nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges”. The 1982 UNCLOS therefore specifically preserves the application of the law of salvage to maritime waters to which it applies.

2. The UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Convention) allows for an exception for salvage law to be applied to the wreck of the Coeur de l’ Ocean

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<sup>59</sup> UN Doc A/Conf 62/122; (1982) 21 ILM 1261; ratified in Rolga in 1993 (Moot Problem, p 7, ¶ 16)

While article 4 of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage<sup>60</sup> expressly states that “[a]ny activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage...”, it also provides an exception if three criteria are met, if the activity so concerned: (a) is authorised by the competent authorities; (b) is in full conformity with this Convention; and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Since the salvage operations undertaken by the Claimant were authorised by the Government of Rolga, condition (a) is satisfied.

As regards condition (b), it is submitted that the salvage operations of the Claimant have been in full conformity with the Convention.

According to the Preamble of the Convention, recovery of underwater cultural heritage is permitted if it is “necessary for scientific or protective purposes”. The recovery project is essential for the protection of the integrity of the artefacts of the Coeur de l’ Ocean. It is already known that the existence of old archival records in Astoria regarding maritime adventures and disasters at sea in the waters surrounding Rolga have lured treasure hunters into the area.<sup>61</sup> A Rolgan non-governmental

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<sup>60</sup> Doc 31 C/24, Paris, 3 Aug 2001; ratified in Rolga in 2005 (Moot Problem, p 7, ¶ 16)

<sup>61</sup> Moot Problem, p. 2, ¶ 3

organisation – the Historical and Cultural Society of Zamzalah – has also reported “rampant lootings of historic wrecks in territorial waters of Rolga due to lack of policing in maritime areas and lack of awareness of the significance of the artefacts to the country”.<sup>62</sup> In the absence of any effective regime or government support, whether legally or politically, in Rolga to combat illegal treasure hunting in its territorial waters – as seen from the fact that the Rolgan Historic Monument Executive Agency is being both understaffed and lacking in funds<sup>63</sup> – *in situ* preservation of the Coeur de l’ Ocean is impracticable regarding its protection and management.<sup>64</sup> This is particularly evident in the present case, where the revelation of the location of the wreck site will attract many other treasure hunters to the site, causing not only disturbance to the artefacts buried with the wreck of the Coeur de l’ Ocean, but also a potential permanent destruction of precious Rolgan cultural heritage. In short, it is submitted that the discovery of the Coeur de l’ Ocean has made the site vulnerable to the hands of unscrupulous illegal treasure hunters, such that excavation is necessary for the “ultimate protection”<sup>65</sup> of the wreck.

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<sup>62</sup> *Ibid.*

<sup>63</sup> Further Clarifications, p 2, ¶ 16

<sup>64</sup> See 2001 UNESCO Convention, Rule 7 of the Annex

<sup>65</sup> *Ibid.*, Rule 4

Therefore, the recovery project undertaken by the Claimant, backed up by extensive research and study of the methodologies with regard to the conservation and documentation of artefacts retrieved from the shipwreck,<sup>66</sup> and which is approved and monitored by the Government of Rolga, is a viable means which the integrity and wholeness of the artefacts of the Coeur de l' Ocean can be protected. The objectives of the recovery operations are in conformity with the spirit of the 2001 UNESCO Convention as enshrined in article 2(3) – to “preserve underwater cultural heritage for the benefit of humanity”. The recovery operations of the Claimant have resulted in a maritime exhibition set up within the National Museum by the Government of Rolga in 2000, showcasing some of the recovered artefacts from the Coeur de l' Ocean. The effect of the showcase was that it doubled the number of tourist visits to the National museums,<sup>67</sup> thereby promoting greater awareness among citizens of Rolga of their cultural heritage. The showcasing of such recovered artefacts in national museums may also be a long-lasting way in which cultural heritage may be preserved for appreciation by mankind and their future generation. Consequently, the salvage activities of the Claimant fully complied with the Convention, thereby satisfying condition (b).

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<sup>66</sup> Partnering Agreement Memorandum, § 2

<sup>67</sup> Moot Problem, p. 4, ¶ 6

In addition, given that a detailed project plan was prepared by the Claimant setting forth the equipment, personnel and methodologies to be employed in the exploration of the wreck site as well as arrangements for the conservation and documentation of any artefacts that may be retrieved from the shipwreck,<sup>68</sup> and that such plan was subsequently approved by the Government of Rolga, the artefacts are excavated in accordance with scientific and archaeological procedures. Consequently, the artefacts were accorded maximum protection during the recovery process, thus satisfying condition (c).

Accordingly, with all conditions satisfied, the application of salvage law in this present case is permissible under the 2001 UNESCO Convention.

### **III. THE DISTRIBUTION OF ARTEFACTS BETWEEN THE PARTIES (OR THE CALCULATION OF THE CLAIMANT'S REWARD) IS TO BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES**

#### **A. The Respondent is bound by the method of distribution of artefacts as stipulated in the 1995 Agreement as a matter of salvage legal principle**

1. The 1995 Agreement expressly provides for the method of distribution of artefacts retrieved

Clause 5 of the 1995 Agreement expressly provides for the sharing arrangements between the Claimant and Respondent in respect of the distribution of artefacts and

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<sup>68</sup> Partnering Agreement Memorandum, § 2

the calculation of profits. The Claimant will get 80% of the appraised value and/or selling prices of the artefacts up to \$45 million, 50% from \$45 million to \$500 million, and 40% above \$500 million. As stipulated in the 1989 Salvage Convention, “salvage operations which have had a useful result give right to a reward”.<sup>69</sup> It is also a principle of salvage law that the owner is bound by the salvage agreement as to the amount of the salvage reward.<sup>70</sup> Since artefacts were successfully recovered by the Claimant, thereby relieving them of the danger of being “lost through the actions of the elements”,<sup>71</sup> the Claimant is entitled to the reward as agreed by both parties in the 1995 Agreement.

Given that the appraised value of artefacts currently remaining in the custody of the Respondent exceeds \$616 million<sup>72</sup>, the Claimant is entitled to own and possess its relative share (ie 40%) of the artefacts, pursuant to clause 5 of the 1995 Agreement.

2. The Bilateral Treaty is not applicable since the Coeur de l’ Ocean is not a state-owned vessel of Astoria

The Claimant repeats the submissions advanced above at Sections I.A.1 and II.B.2.b, namely that either Astoria had impliedly abandoned the Coeur de l’ Ocean

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<sup>69</sup> 1989 Salvage Convention, art 12

<sup>70</sup> *Halsbury’s Laws of England, supra* n 22, Vol 94, ¶ 944

<sup>71</sup> As pleaded above in Section I.B.1

<sup>72</sup> Further Clarifications, p 2, ¶ 18. This figure does not include items whose value is not yet determined.

through the passage of time, or that it is not proven that the Coeur de l' Ocean was a state-owned vessel of Astoria. Accordingly, the Bilateral Treaty (together with the “Guiding Principles”), which is directed only to “property and assets” of Astoria,<sup>73</sup> shall not operate to split the artefacts recovered from the Coeur de l' Ocean between Astorian and Rolgan museums, since the Coeur de l' Ocean is not a wreck to which the Bilateral Treaty applies.

3. The 2001 UNESCO Convention does not render clause 5 of the 1995 Agreement unenforceable

- a. *The 2001 UNESCO Convention does not entirely prohibit the deposition of underwater cultural heritage*

While it is acknowledged that the 2001 UNESCO Convention deems the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal as fundamentally incompatible with the protection and proper management of underwater cultural heritage,<sup>74</sup> an exception is provided by the proviso of Rule 2, which states, *inter alia*, that:

“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

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<sup>73</sup> Moot Problem, p 5, ¶ 9

<sup>74</sup> 2001 UNESCO Convention, Rule 2 of the Annex

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; and is subject to the authorisation of the competent authorities.”

By virtue of this provision, where there has been appropriate state authorisation, the deposit of underwater cultural heritage with a custodian, including its sale to that party, is permitted as long as the scientific or cultural interest or integrity of the artefacts is not compromised, and that it is kept in a manner that is available for “professional and public access”<sup>75</sup>, whilst the project archives be managed according to international professional standards.<sup>76</sup>

Given that the salvage operations were authorised and the 1995 Agreement entered into by the Government of Rolga, the Claimant is permitted to sell its 40% share of the artefacts, as a collection, to museums or other similar institutions for a profit, so long as the remaining Rules in the Annex of the 2001 UNESCO Convention are complied with.

**B. In any event, the Claimant is entitled to a salvage reward fixed by this Tribunal under the 1989 Salvage Convention**

It is submitted that the Claimant is entitled to a salvage award even if the 1995 Agreement was unenforceable, and the Bilateral Treaty (together with the Guiding

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<sup>75</sup> *Ibid.*, Rule 33

<sup>76</sup> *Ibid.*, Rule 34

Principles) were applicable to the wreck of the Coeur de l' Ocean, and further the 2001 UNESCO Convention prohibited the sale of the artefacts recovered. Article 12 of the 1989 Salvage Convention provides that "salvage operations which have had a useful result give right to a reward". Article 13 states the criteria for fixing the award. They include, for instance, the salvaged value of the vessel and other property,<sup>77</sup> the nature and degree of the danger,<sup>78</sup> the skill and efforts of the salvors in salvaging the property,<sup>79</sup> the time used and expenses and losses incurred by the salvors,<sup>80</sup> and the risk of liability and other risks run by the salvors or their equipment.<sup>81</sup>

Should the Tribunal award compensation pursuant to article 12 of the 1989 Salvage Convention, it is submitted that the following factors are relevant: (1) the artefacts recovered were of extremely high value; (2) the discovery of the wreck site has made it vulnerable to unscrupulous treasure hunters; (3) the Claimant, as a salvor, has offered an archaeologically sound plan to recover the wreck and artefacts, which will bring nautical culture and history to an even wider audience; and (4) the Claimant

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<sup>77</sup> 1989 Salvage Convention, art 13(1)(a)

<sup>78</sup> *Ibid.*, art 13(1)(d)

<sup>79</sup> *Ibid.*, art 13(1)(e)

<sup>80</sup> *Ibid.*, art 13(1)(f)

<sup>81</sup> *Ibid.*, art 13(1)(g)

has undertaken all the expenses in salvaging the wreck and also the risk that no artefacts will be recovered.

The grant of salvage award also finds its support in common law contractual rules. In relation to interpreting legislation (here in the form of the Bilateral Treaty or the 2001 UNESCO Convention) which renders private contracts unenforceable, it is submitted that “the courts have... been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party to the contract who has not performed his part of the bargain but who has benefited from the performance by the other party.”<sup>82</sup> If the Tribunal chooses not to grant the Claimant any salvage award, this would be an unjust windfall befalling the Respondent. Given that the grant of a salvage reward is not dependent on the setting up of the allegedly illegal contract as an integral part of the claim against the Respondent, and does not involve a breach of the legal obligations imposed by the two treaties, the law regards the Claimant “innocent” so as to allow an independent cause of action based on the Respondent’s “collateral warranty or implied term”<sup>83</sup> that performance of the contract is free from

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<sup>82</sup> *Chitty on Contracts*, 30<sup>th</sup> edn (London: Sweet and Maxwell, 2008), Vol 1, p 1179, para 16-149

<sup>83</sup> *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525; *Chitty on Contracts*, *supra* n 82, pp 1183, 1193, paras 16-160, 176

the taint of illegality.<sup>84</sup> Accordingly, a salvage award should be granted to the Claimant.

#### **IV. THE CLAIMANT ENJOYS EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L' OCEAN**

##### **A. The Claimant is entitled to the asserted exclusive rights because they form part of the Claimant's trade secrets**

It is the Claimant's position that information relating to the exact location of the wreck site is considered a "trade secret" of the Claimant. The 1995 Agreement contains a confidentiality clause which governs the release of information concerning the salvage operations performed pursuant to the contract.<sup>85</sup>

There is case precedent in which the court recognised that the salvor, having expended substantial labour in rendering the salvage service, has a proprietary interest in essential information regarding the salvage operations, such as the location of the wreck site and the technology used by the salvors.<sup>86</sup> The precise location and nature of the wreck site – being confidential information central to the Claimant's business – would be exposed to the general public if a third party is allowed to enter into the wreck site and take photographs of the wreck. Such would be an infringement upon

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<sup>84</sup> *Ibid.*

<sup>85</sup> Partnering Agreement Memorandum, § 11

<sup>86</sup> *Columbus-America Discovery Group* 1989 AMC 1955 at 1959; see also D. J. Bederman, "In 'Titanic' Case, IP and Admiralty Laws Collide" (1998) 21 *National Law Journal* C18,col 1

the Claimant's rights. The consequence of such divulgence of information is that the Claimant's salvage operations would be jeopardised by attracting the already rampant illegal treasure hunters in Rolgan waters<sup>87</sup> to loot the wreck site.

Accordingly, the Claimant has exclusive rights of photography and documentation of the Coeur de l' Ocean since the location and nature of the wreck site are trades secrets of the Claimant.

**B. Further, as a matter of public policy, the claimed exclusive photography and documenting rights should be recognised as forming part of the possessory rights of the Claimant as a salvor**

It is submitted that on grounds of public policy and archaeological concerns, this Tribunal should consider an expansion of possessory rights of a salvor to include exclusive photography and documenting rights.

The costs and risks from the recovery operations were enormous. The Claimant bore the risk of finding no artefacts while being solely responsible for the expenditure incurred during the operations. As can be seen from the 1995 Agreement, the Claimant spent a large portion of the money invested in designing and adopting an archaeologically sound method to conserve and document the artefacts retrieved. It must be noted that the Claimant saved the artefacts from

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<sup>87</sup> Moot Problem, p 2, ¶ 3

being “lost through the actions of the elements”<sup>88</sup> or being plundered by unscrupulous illegal treasure hunters,<sup>89</sup> and helped bring nautical culture and history to a wider audience.<sup>90</sup> In order to allow the Claimant to recoup its substantial investment in salvaging the wreck, this Tribunal should allow such a claim so as to encourage future salvors to avoid unorganised, piecemeal salvaging of historic wrecks and to adopt scientific archaeological methods to preserve the wreck site to its greatest extent.

Accordingly, the recognition of such possessory rights of a salvor would bring in line traditional salvage law with the archaeological principle – to preserve underwater cultural heritage for the benefit of humanity – as enshrined in the 2001 UNESCO Convention.

**V. THE RESPONDENT HAS BREACHED AND INTERFERED WITH THE CLAIMANT’S RIGHTS AND PERFORMANCE UNDER THE PARTNERING AGREEMENT MEMORANDUM (“1995 AGREEMENT”)**

**A. Allowing Aquatic View to organise and profit from visiting activities to the wreck site and to take photographs interfered with the Claimant’s rights under the 1995 Agreement**

1. The visiting activities interfered with the Claimant’s possessory rights as a salvor

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<sup>88</sup> See Section I.B.1

<sup>89</sup> See Section I.B.3.b

<sup>90</sup> Moot Problem, pp 3-4, ¶ 6

The Claimant, as the first salvor over the wreck of the *Coeur de l' Ocean*, is entitled to protect its possessory rights against other parties (even including the owner)<sup>91</sup>. Courts have frequently held that interference with these rights entitles a party in the Claimant's position to injunctive relief and/or damages.<sup>92</sup> The aim of this protection is to ensure that the first salvor may continue its salvage operations in a responsible manner as against third parties appearing on the scene and seeking to interfere.<sup>93</sup>

The Claimant has satisfied the test for possession over the wreck as laid down in *The Association and The Romney*,<sup>94</sup> requiring the savior to show (1) "*animus possidendi*"<sup>95</sup> (intention to possess); and (2) "that they have exercised such use and occupation as is reasonably practicable having regard to the subject matter of the derelict, its location, and the practice of salvors."<sup>96</sup> This can be manifested from the fact that the Claimant invested such a huge amount in salvaging the wreck, and was successful in recovering over \$616 million worth of artefacts.<sup>97</sup> Even in cases where

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<sup>91</sup> *Cossmann v West* (1887) 13 App Cas 160 at 181

<sup>92</sup> *The Tubantia* [1924] P 78

<sup>93</sup> *Ibid.* See also *Hener v The United States* (1981) 525 F.Supp 350 for similar relief in the US

<sup>94</sup> [1970] 2 Lloyd's Rep 59

<sup>95</sup> *Ibid.*, at 61

<sup>96</sup> *Ibid.*

<sup>97</sup> Further Clarifications, p 2, ¶ 18

the wreck lies at the bottom of the ocean and can only be entered for short periods of time, the courts have still expressed reluctance<sup>98</sup> to find the first salvor not in possession as this would discourage enterprise which is costly and risky to the salvor and ultimately beneficial to the general public.<sup>99</sup>

It is submitted that the close proximity with the Coeur de l' Ocean when Aquatic View organised wreck divers to the wreck site including the taking of photographs disrupted the salvage operations conducted by the Claimant, and accordingly interfered with the Claimant's possessory rights.

2. Aquatic View's making profits from photographs and songs infringed the Claimant's exclusive merchandising rights under the 1995 Agreement

The Claimant repeats the submission made at Section IV above, namely that the Claimant has exclusive photography and documentation rights in relation to the "Coeur de l' Ocean".

In addition, clause 6 of the 1995 Agreement granted the Claimant the right to use the name "Coeur de l' Ocean" in association with sales and marketing of merchandise (exclusive of artefacts) related to the wreck of the Coeur de l' Ocean. In return, the Claimant will pay the Respondent a fee equal to three percent of its gross sales of merchandise that utilises the name "Coeur de l' Ocean".

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<sup>98</sup> *The Tubantia* [1924] P 78; *The Association and The Romney* [1970] 2 Lloyd's Rep 59

<sup>99</sup> See Section II.A for danger posed to the wreck if it remains unrecovered

In order to fully perform this clause, it must be the parties' intentions that the exclusive merchandising rights relating to the "Coeur de l' Ocean" be granted to the Claimant. It would be impracticable (and hardly profitable) for the Claimant's merchandising business to use such name if such use was not exclusive to the Claimant. The value of the right to use the name "Coeur de l' Ocean" lies in the public's imagination and curiosity. If the right granted under clause 6 was not exclusive, that would be a huge devaluation in the marketability of the "Coeur de l' Ocean" name. Since the wording of the clause must be construed in such manner to give effect to the parties' intentions underlying the contractual provision,<sup>100</sup> it is submitted that the Claimant is to have the exclusive merchandising rights relating to the name "Coeur de l' Ocean".

Accordingly, Aquatic View has infringed the rights of the Claimant by making profit from photographs, songs and souvenirs using the name "Coeur de l' Ocean". The Respondent, by acquiescing them to the same, has breached its obligations towards the Claimant under salvage principles and/or the 1995 Agreement.

**B. Even if the Agreement with Astoria ("Bilateral Treaty") was applicable to the wreck of the Coeur de l' Ocean, the Respondent is liable for entering into the Bilateral Treaty since it interfered with the Claimant's rights**

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<sup>100</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912

If this Tribunal finds that that the Bilateral Treaty does apply to the wreck, it would have interfered with the Claimant's right to a salvage award under article 12 of the 1989 Salvage Convention. It is a principle of salvage law that the owner is bound by the salvage agreement as to the amount of the salvage reward.<sup>101</sup> Under the "Guiding Principles"<sup>102</sup> which are to be read together with the Bilateral Treaty, it is required that a "representative collection of [the material recovered] be made available to a museum of Astoria and a museum of Rolga".<sup>103</sup> It is also provided that the assemblage of the artefacts should avoid being split.<sup>104</sup> While the Claimant recognises the archaeological importance and the public benefit derived from such a practice, it would have breached the 1995 Agreement if the Respondent fails to compensate the Claimant according to the sharing arrangements as stipulated in the contract.

Further, while it is accepted that the Bilateral Treaty has the force of law in Rolga given that Rolga is a monist state, the Claimant pleads the same as in Section III.B that the rights and expectations of the Claimant may be enforced by way of an independent cause of action based on the Respondent's "collateral warranty or

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<sup>101</sup> *Halsbury's Laws of England*, supra n 22, Vol 94, ¶ 944

<sup>102</sup> Appendix 2

<sup>103</sup> *Ibid.*, § 6

<sup>104</sup> *Ibid.*, § 2

implied term” in the 1995 Agreement that the performance of the contract is free from taint of illegality.<sup>105</sup> Accordingly, such claim is not barred by the alleged illegality of the 1995 Agreement.

**C. Even if the 2001 UNESCO Convention rendered the law of salvage inapplicable, or that it prohibited the sale of artefacts, Rolga’s ratification of that Convention interfered with the Claimant’s rights**

Rolga’s ratification of the 2001 UNESCO Convention would have interfered with the Claimant’s right to own and possess its share in the artefacts recovered. The argument of a “collateral warranty or implied term” advanced in the foregoing section therefore applies *mutatis mutandis*.

**Conclusion and Prayer for Relief**

On the basis of the foregoing facts and points of law, the Claimant, Benevolent Heritage Inc, respectfully requests this Tribunal to adjudge and declare that all the declarations sought by the Claimant be granted.

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<sup>105</sup> *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525; *Chitty on Contracts*, *supra* n 82, Vol 1, pp 1183, 1193, paras 16-160, 176