

**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 RESPONDENT**

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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 or not there is a valid contract between the Claimant and the Respondent;

### **II.**

Whether the distribution of artefacts is to be governed solely by contractual principles, and the clause in the 1995 Agreement governing the distribution is unenforceable;

### **III.**

Whether or not the Claimant enjoys exclusive rights of photographing and documenting of the Coeur de l' Ocean;

### **IV.**

If assuming arguendo that the 1995 Agreement is enforceable, whether or not there was unlawful interference with the Claimant's rights and performance under the contract when the Respondent (1) entered into the Agreement with Astoria ("Bilateral Treaty") in 2003; (2) ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage ("2001 UNESCO Convention") in 2005; and (3) allowed Aquatic View to organise and make profits from visiting activities to the site including the taking of photographs.

## **SUMMARY OF FACTS**

In 1800, an Astorian military vessel with the name “Coeur de l’ Ocean” was on a military expedition to conquer 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, including war booty. The wreck remained submerged in water for more than 200 years.

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 the terms of the excavation project.

In 2000, Rolga strengthened its cultural heritage appreciation as “symbol of nationhood”. In 2001, it entered into an agreement on “Protection of Astorian Wrecks” with the Government of Astoria with the main objective of providing better protection to historic wrecks where both countries share genuine “historical and cultural” interests. In the agreement Astoria transfers all its right, title and interest in

and to wrecked ancient vessels of Astoria in Rolgan waters to Rolga. On the other hand, Rolga promises to do its best to preserve any objects removed from its seabed for the benefit of mankind. Rolga also recognises that Astoria has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from such wrecked ancient vessels.

In the light of the developments in the international community regarding the commercial exploitation of underwater cultural heritage, there were calls from various quarters to quit activities directed at underwater cultural heritage motivated by commercial interests. It is also provided that during the recovery process of the Coeur de l' Ocean, many of the artefacts were destroyed due to poor handling by Benevolent Heritage personnel.

In or around 2001, 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. Aquatic View took photographs of the wreck and made video clips as promotional materials for the tours. They also sold souvenirs associated with the name "Coeur de l' Ocean".

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 with the aim to revamp the legal mechanism in order to fully protect cultural heritage from being looted and destroyed by illegal human activities.

The relevant artefacts are now in the custody of Rolga.

## SUMMARY OF PLEADINGS

- I. There is no valid contract between Benevolent Heritage and Rolga. The Partnering Agreement Memorandum was void for common mistake due to it being based on the fundamental mistaken assumption that Rolga had title to the Coeur de l' Ocean when the contract was entered into. Without such title, performance of the contract is impossible and the contract will be void *ab initio*.
  
- II. The distribution of artefacts recovered is to be based solely on contractual principles, and the clause governing the distribution is unenforceable since there is no valid contract. In the event this Tribunal finds otherwise, on the true construction of the Partnering Agreement Memorandum, it was intended that the contract be one of work and labour, and was not intended to be a salvage agreement. Since commercial exploitation of underwater cultural heritage is expressly prohibited by the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, the clause in the Partnering Agreement Memorandum regarding the distribution of proceeds of sale of the artefacts is rendered unenforceable. In addition, even if assuming that the parties intended that the distribution of artefacts be governed by salvage legal principles, salvage law is inapplicable because (1) the recovery activity cannot be seen as a salvage operation since there was no "marine peril" to the property recovered; (2) the

2001 UNESCO Convention expressly excludes the application of salvage law to underwater cultural heritage; and (3) the 1989 Salvage Convention does not apply to the Coeur de l' Ocean – an Astorian state-owned vessel – which enjoys sovereign immunity.

III. Benevolent Heritage does not enjoy exclusive rights of photographing and documenting of the Coeur de l' Ocean both as a matter of law and as a matter of public policy.

IV. In the event the Partnering Agreement Memorandum is found enforceable (due to there being no common mistake), there is still no unlawful interference with Benevolent Heritage's rights and performance under such contract. As regards the Agreement with Astoria and the 2001 UNESCO Convention, (A) there was no interference on the facts; and further, (B) (1) the Partnering Agreement Memorandum cannot prohibit Rolga from entering into treaties or international conventions since the Government of Rolga's contractual promises cannot fetters its discretion in exercising its executive functions; and (2) in the event Benevolent Heritage asserts an interference, the necessary implication is that performance of the Partnering Agreement Memorandum is prohibited/hindered by the two treaties; and since the two treaties automatically have the force of law in Rolga, they have rendered the performance of the Partnering Agreement

Memorandum illegal, and the contract is accordingly frustrated. As regards Aquatic View's activities, there is no unlawful interference since the Partnering Agreement Memorandum did not grant Benevolent Heritage the right to have exclusive control of the wreck site. There is also no intellectual property law basis upon which the Claimant can assert an unlawful interference with its rights.

## PLEADINGS

### I. THERE IS NO VALID CONTRACT BETWEEN THE CLAIMANT AND THE RESPONDENT

#### A. The Tribunal has power to rule on the existence or the validity of the contract of which the arbitration clause forms part

The UNCITRAL Arbitration Rules, which are adopted by the present Arbitral Tribunal (“Tribunal”),<sup>1</sup> specifically empower the Tribunal to rule on jurisdictional pleas. In particular, article 21(2) states that the Tribunal “shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part”. It is the Respondent’s case that the contract of which the arbitration clause forms part is neither valid nor enforceable; and consequently, no assertion of the contract being breached (or its specific enforcement) is possible.

#### B. The Partnering Agreement Memorandum (“1995 Agreement”) between the Claimant and the Respondent was void for common mistake

1. The contract was based on a fundamental mistaken assumption that the Respondent had title to the Coeur de l’ Ocean at the time the 1995 Agreement was entered into

The 1995 Agreement is void *ab initio* for common mistake and thus there can be no cause of action. A fundamental mistaken assumption made by both parties nullifies the parties’ consent and renders the contract void *ab initio* when performance

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<sup>1</sup> Moot Problem, p. 8, ¶ 18

of the contract is made impossible.<sup>2</sup> A substantial part of the 1995 Agreement concerns the distribution of artefacts. Performance of the contract is impossible as the Respondent did not have ownership of the artefacts at the time the contract was entered into. The subject matter of the contract – Rolga’s artefacts to be distributed – was not in existence and thus the 1995 Agreement is void for common mistake.

The Respondent did not have title to the Coeur de l’ Ocean prior to the signing of the Bilateral Treaty with Astoria. The Coeur de l’ Ocean was used as an Astorian military ship prior to its sinking.<sup>3</sup> When the 1995 Agreement was entered into, Astoria retained ownership to the Coeur de l’ Ocean. Astoria had not, either expressly or by implication, abandoned its ownership rights in the Coeur de l’ Ocean.

An effective abandonment at law involves some form of positive intention (*animus derelinquendi*) on the original owner’s part to relinquish its ownership rights.<sup>4</sup> While previously the United States Government and courts have lent support to the notion that historic state-owned vessels sunk in the distant past may be

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<sup>2</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>3</sup> Further Clarifications, p 1, ¶ 5; Moot Problem, p 1, ¶ 1

<sup>4</sup> Dromgoole and Gaskell, “Interests in Wreck” in Palmer and McKendrick (eds), *Interests in Goods*, 2<sup>nd</sup> edn (LLP Limited, 1998), Chap 7, at p 162. See also *The Tubantia* [1924] P 78 at p 87 on intention

“determined by the more conventional interpretation of abandonment of that period”,<sup>5</sup> there now appears to be a clear development with regard to US practice. In recent times the United States have more than once advocated the express abandonment standard as the appropriate international practice, and recognising only express acts of abandonment by the Flag State to be effective relinquishment of ownership rights.<sup>6</sup> Many other states adopt a similar argument that ownership rights in state vessels can only be lost through an act of express abandonment.<sup>7</sup>

Recent American decisions also tend to adopt an express abandonment test (at least in relation to state-owned vessels), where the courts have held that no inference of abandonment shall be made as sovereign shipwrecks are always subject to an express abandonment standard.<sup>8</sup> Jurisprudence on this matter outside the United States, while not a common occurrence, also seems to endorse the express abandonment test. It has been suggested, though being *obiter dicta*, by the

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<sup>5</sup> Letter from US Department of State to Marine Administration, 30 Dec 1980, reprinted in (1980) 8 *Digest of United States Practice in International Law* 999 at p 1004; see also *Treasure Salvors v Unidentified, Wrecked and Abandoned Sailing Vessel* (1978) 569 F.2d 330 at 337

<sup>6</sup> See “Statement on United States Policy for the Protection of the Underwater Cultural Heritage” 19 Jan 2001, *Weekly Compilation of Presidential Documents*; and J A Roach, “Sunken Warships and Military Aircraft” (1996) 20 *Marine Policy* 351 at p 352 (quoting and reflecting the official US policy in 1996)

<sup>7</sup> Dromgoole, “UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: Implications for Commercial Treasure Salvors” [2003] *Lloyd’s Maritime and Commercial Law Quarterly* 317, at p 324

<sup>8</sup> See eg *United States v Steinmetz* (1992) 973 F.2d 212; *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels* (2000) 221 F.3d 634; *International Aircraft Recovery, LLC v Unidentified, Wrecked and Abandoned Aircraft* (2000) 218 F.3d 1255

Australian High Court that where a ship is sunk in deep water making salvage services commercially impracticable, coupled with the fact that the exact position of the wreck is not known, it would be difficult to accept that the owner evinced a positive intention to abandon its ownership rights – save for an express act of relinquishment.<sup>9</sup> In this case the vessel concerned – the Gilt Dragon – was wrecked in 1656.<sup>10</sup>

Even if this Tribunal were to accept an implied abandonment test (which was adopted in earlier American decisions), there need to be “clear and convincing evidence”<sup>11</sup> tantamount to express abandonment in order to infer abandonment.<sup>12</sup> There is no known evidence pointing to the likelihood that the Coeur de l’ Ocean was abandoned. Given that “there was nothing voluntary in the owners’ failure either to resume possession or even to discover the ship’s whereabouts”,<sup>13</sup> in the absence of any express declarations of abandonment, the “mere passage of so many years should not be treated as involving abandonment of title”.<sup>14</sup> It follows that Astoria retained

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<sup>9</sup> *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 318

<sup>10</sup> *Ibid.*

<sup>11</sup> See eg *Zych v Unidentified, Wrecked and Abandoned Vessel Believed to be the Lady Elgin* (1991) 755 F.Supp 213 at 214, ruling affirmed in (1992) 960 F.2d 665; *Columbus-America Discovery Group v Atlantic Mutual Insurance Co* (1992) 974 F.2d 450 at 464-465

<sup>12</sup> *Deep Sea Resources Inc v The Brother Jonathan* (1995) 102 F.3d 379 following *Columbus-America Discovery Group*, above

<sup>13</sup> *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 318

<sup>14</sup> *Ibid.*

title to the Coeur de l' Ocean prior to the signing of the Bilateral Treaty. It also follows, from the submissions above, that the subject-matter of the contract did not exist, thus rendering the performance of the contract impossible and void for common mistake.

**II. THE DISTRIBUTION OF ARTEFACTS IS TO BE BASED SOLELY ON CONTRACTUAL PRINCIPLES, AND THE CLAUSE GOVERNING THE DISTRIBUTION IS UNENFORCEABLE**

**A. Assuming arguendo that the 1995 Agreement was not void for common mistake, on the true construction of the 1995 Agreement, the recovery operations by the Claimant were to be governed solely by the 1995 Agreement as an ordinary contract for work and labour, and not as a salvage agreement**

The intention of the parties was that the 1995 Agreement is to be treated as an ordinary contract of work and labour, in which the Claimant was engaged as a contractor to raise the wreck of the Coeur de l' Ocean while upon performance they will receive remuneration as stipulated in the 1995 Agreement. It was not intended that salvage legal principles would be applicable at all. In nowhere did the 1995 Agreement mention the word "salvage". In fact, it is usual for owners of the wreck to grant permission to contractors for diving operations to take place to raise the shipwrecked cargoes and the two parties will agree as to the percentages (of the proceeds of sale to be distributed) in advance. For instance, immediately after the

World War II, it was common for states to agree with contractors that cargoes retrieved from wrecks would be split 20% for the contractor and 80% for the government.<sup>15</sup> It is therefore submitted that the application of salvage legal principles in respect of the issue of distribution of artefacts was not envisaged by either party as manifested by the 1995 Agreement.

**B. Commercial exploitation of underwater cultural heritage is expressly prohibited by the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, thus rendering the clause regarding distribution of artefacts unenforceable**

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage,<sup>16</sup> which was ratified by Rolga in 2005,<sup>17</sup> expressly prohibits the commercial exploitation of underwater cultural heritage. Given that the Government of Rolga's private contractual promises cannot fetter its discretion in exercising its executive functions,<sup>18</sup> the 1995 Agreement cannot be construed to the effect of precluding the application of the 2001 UNESCO Convention to the Coeur de l'Océan.

Rule 2 of the Annex of the 2001 UNESCO Convention reads:

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<sup>15</sup> Dromgoole and Gaskell, "Interests in Wreck" in Palmer and McKendrick (eds), *Interests in Goods*, 2<sup>nd</sup> edn (LLP Limited, 1998), Chap 7, at p 193

<sup>16</sup> Doc 31 C/24, Paris, 3 Aug 2001

<sup>17</sup> Moot Problem, p 7, ¶ 16

<sup>18</sup> See Section IV.B.1 below

“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.” (emphasis added)

One of the basic archaeological principles regarding underwater cultural heritage is that artefacts found together should be kept together as a collection for our future generation.<sup>19</sup> The consequence of allowing the commercial exploitation of the artefacts recovered is that it will lead to the splitting up of collections that should be kept together for further scientific study.

While the proviso of Rule 2 arguably opens the road for the sale of artefacts to be legitimised, such Rule should be read together with the “general principle” as embodied in art 2(7) of the Convention, which clearly and unequivocally states that historic wrecks “shall not be commercially exploited”. The sale of artefacts for profit, therefore, is in any event prohibited by the 2001 UNESCO Convention. Accordingly, clause 5 of the 1995 Agreement which sets out the sharing arrangements of the artefacts recovered is rendered unenforceable by the 2001 UNESCO Convention.

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<sup>19</sup> Dromgoole, *supra* n 7, at p 325

**C. Further, even if the parties intended that the distribution of artefacts be governed by salvage legal principles, the law of salvage is inapplicable in the instant case, and thus no salvage award should be granted**

1. The Claimant's activities were not salvage operations

a. *There was no marine peril*

One essential element for a claim of salvage award is “marine peril”.<sup>20</sup> The property rescued or recovered must be in danger before the alleged “salvage operations” took place.<sup>21</sup> In fact, the 1989 Salvage Convention defines a “salvage operation” as “any act or activity undertaken to assist a vessel or any property *in danger...*”<sup>22</sup> (emphasis added)

It is submitted that the danger requisite was not satisfied at the time the Claimant undertook and carried out the recovery activities of the Coeur de l' Ocean. The modern trend of international jurisprudence after the adoption of the 2001 UNESCO Convention is to treat sunken ancient wrecks as no longer being in a state of danger. The International Law Association (ILA) met in Buenos Aires in 1994 which led to a proposed draft convention to the UNESCO. The ILA Cultural Heritage Law Committee, by way of commentary, stated in its report that

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<sup>20</sup> See eg *Halsbury's Laws of England*, 5<sup>th</sup> edn (London: Butterworths, 2008), Vol 94, ¶ 928; *Benedict on Admiralty*, 7<sup>th</sup> Edn (Revised) (New York: Matthew Bender, 2002), Chap XIII, § 13.03

<sup>21</sup> *Ibid.*

<sup>22</sup> 1989 Salvage Convention, art 1(a)

“[f]or underwater cultural heritage the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. Even if it lies in an area of turbulence, the remedy is to use the provisions of the Convention and Charter rather than rely on criteria drawn from salvage practices. The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items as fast as possible rather than undertaking the painful excavation and treatment of all aspects of the site that is necessary to preserve its historic value.”<sup>23</sup>

A number of US courts have deferred to scientific experts and evidence presented about the status of the wreck site, and held that historic shipwrecks are being preserved in situ and are not in marine peril.<sup>24</sup> This is echoed in Canadian courts, which recognise the potential risk posed to the wreck site by salvors. In *Her Majesty The Queen in Right of Ontario v Mar-Dive*,<sup>25</sup> the Ontario Court held that a wreck of a vessel sunk in Lake Erie was not in danger, save from unskilled recovery

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<sup>23</sup> Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, Commentary on Article 4.

<sup>24</sup> See eg *Klein v Unidentified Wrecked and Abandoned Sailing Vessel* (1985) 758 F.2d 1511 at 1515; *Chance v Certain Artifacts Found and Salvaged from The Nashville* (1985) 606 F.Supp 801 at 806-807

<sup>25</sup> 1997 AMC 1000

of artefacts,<sup>26</sup> and that underwater historic sites can be put at risk by such efforts. The Singaporean case of *Simon v Taylor*<sup>27</sup> also doubted that mercury recovered by divers from a German U-boat, which was submerged in water since 1944, was in any danger. The judge observed that there was no exposure of the mercury to any imminent or pending danger, and even if it was not retrieved “it would not have been entirely lost.”<sup>28</sup>

The Respondent’s position is that the peril causing the loss of the Coeur de l’ Ocean is no longer operative and the wreck is now lying on the seabed in a relatively secure and protective environment. This is particularly true in this present case since the Coeur de l’ Ocean is on the very deep seabed, and thus has become part of the natural underwater environment.<sup>29</sup> The rate of deterioration, accordingly, becomes very slow due to the lack of oxygen as the wreck is covered by the seabed.<sup>30</sup> The Coeur de l’ Ocean thus is now naturally preserved and is by no means in danger. Quite contrarily, any attempt to excavate the site at this stage will expose the artefacts to oxygen and threaten the stability of the site.<sup>31</sup>

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<sup>26</sup> *Ibid.*, at 1062 to 1063

<sup>27</sup> [1975] 2 Lloyd’s Rep 338

<sup>28</sup> *Ibid.*, at 344

<sup>29</sup> Dromgoole, *supra* n 7 at 325

<sup>30</sup> O Varmer, “The Case Against the ‘Salvage’ of the Cultural Heritage” (1999) 30 *Journal of Maritime Law and Commerce* 279, at pp 280-281

<sup>31</sup> *Ibid.*

In the absence of any “marine peril”, it is submitted that the activities of the Claimant cannot be deemed as of salvage nature. Accordingly, no salvage award can be fixed by this Tribunal.

2. Further, the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage expressly excludes the application of salvage law to underwater cultural heritage

Article 4 of the 2001 UNESCO Convention provides that “[a]ny activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: ... (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection”.

From an archaeological viewpoint, the application of salvage law to underwater cultural heritage must be stopped because salvage for commercial purposes destroys the underwater cultural heritage. The premises on which salvage law is based – that historic wrecks are in marine peril and need to be rescued – are in direct conflict with spirit of the 2001 UNESCO Convention which promotes in situ preservation. There is at least one common law jurisdiction which has ruled that ancient wrecks forms part of a different legal regime and is not subject to maritime salvage law. In the Irish

case of *King & Chapman v The Owners and All Persons Claiming an Interest in the 'La Lavia', 'Juliana' and 'Santa Maria de la Vision'*,<sup>32</sup> the High Court held that

“...when so much time has elapsed since the original loss of a vessel that the question of ownership and... indemnification, lose their practical significance and merge into history, then the wreck should be regarded as having passed from the commercial realm of maritime salvage law into the domain of archaeological law.”<sup>33</sup>

The judge explicated its ruling on the basis that a distinction is made between commercial maritime salvage operations and the “discovery and salvage from the sea of ancient historical remains and artefacts which are part of the national heritage of the nation”.<sup>34</sup> The latter should be governed by “its own expanding corpus of statute law” relating to archaeology and should not be subject to salvage law. Exploration of the historic wrecks, accordingly, is “a matter of archaeology and has no reality in terms of admiralty law which is essentially commercial in its nature and scope.”<sup>35</sup>

While the first instance judge granted the plaintiffs a generous reward for discovering the wreck, and was overruled by the Irish Supreme Court on this point, the ruling of

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<sup>32</sup> Unreported 26 July 1994 (High Court of Ireland); overruled on appeal for different reasons [1996] 1 ILRM 194 (Irish Supreme Court)

<sup>33</sup> Transcript, p 92

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

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

the High Court on the non-application of salvage law to historic wrecks was not rejected by the Supreme Court.

The *Coeur de l' Ocean* has been submerged in water for more than 200 years,<sup>36</sup> and its wreck together with the artefacts on board provide a useful tool to probe into the historical and cultural significance of the Astorian Empire at the early modern era. The large amount of cargo she was carrying, including commercial shipments and other war booty,<sup>37</sup> many of which were looted from ancient Rolgan cities, is of great archaeological importance to both the people of Astoria and Rolga.

It must be noted that the public policy factor underlying salvage law is to encourage the recovery of maritime property in danger and to return it to the “stream of commerce”.<sup>38</sup> Very often sunken historic wrecks cannot be really said to be in any state of physical danger. English law treats a sunken vessel as being in danger as it is “immobilised”<sup>39</sup>, due to the fact that until it is found and recovered it has no commercial value.<sup>40</sup> It can be seen that the whole body of salvage law rests upon the notion of maximising commercial interests. However, it is this very idea that sunken

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<sup>36</sup> Moot Problem, p. 2, ¶ 1

<sup>37</sup> *Ibid.*

<sup>38</sup> Dromgoole, *supra* n 7 at 325

<sup>39</sup> See eg Brice, “Salvage and the Underwater Cultural Heritage” (1996) 20 *Marine Policy* 337 at p 339

<sup>40</sup> *Ibid.*, at p 339

wrecks be returned to the “stream of commerce” that is damaging to its archaeological value and runs counter to the spirit of the 2001 UNESCO Convention that underwater cultural heritage should never be a subject of ordinary commerce.<sup>41</sup> Indeed, as submitted above in Section II.B, commercial exploitation is deemed fundamentally incompatible with the 2001 UNESCO Convention.

Underwater cultural heritage should be seen as a time capsule that should be left undisturbed for present and future generations; and non-intrusive access and research of the wreck sites should be encouraged while intrusive actions such as salvage should be discouraged. It is submitted that artefacts are generally lost or damaged in salvage operations even when conducted pursuant to scientific guidelines. When excavated, the artefacts are placed into an unstable environment due to exposure to oxygen, water, and other atmospheric changes. This could be seen in the present case from the fact that many of the artefacts were destroyed during the recovery process,<sup>42</sup> despite a detailed project plan being prepared by the Claimant prior to the operations being commenced. In order to preserve the valuable contextual information accompanying the artefacts and the wreck site, which is an essential tool to allow our future generations to learn about our past history and culture, artefacts should be left where they are discovered so as to share the underwater cultural

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<sup>41</sup> Dromgoole, *supra* n 7 at 325

<sup>42</sup> Moot Problem, p 5, ¶ 10

heritage with interested individuals. It is also certain that as technology and science advance, future generations may be able to reveal and uncover many more of the stories of history and culture which may be hidden from present day archaeologists. *In situ* preservation will allow sustainable research of the wreck site without risking valuable information which underlies the artefacts being lost forever.

For the foregoing reasons, it is submitted that in the absence of compelling scientific evidence indicating a threat of destruction of the wreck site, the application of salvage law to the wreck of the *Coeur de l' Ocean* is contrary to the spirit of the 2001 UNESCO Convention – that is to “preserve underwater cultural heritage for the benefit of humanity”,<sup>43</sup> and to make certain that it be “deposited, conserved and managed in a manner that ensures its long-term preservation”.<sup>44</sup> Therefore, salvage law in this case is in contradiction to the Convention and does not ensure maximum protection given to the underwater cultural heritage. Accordingly, the exception provided in article 4 of the Convention is not satisfied and the application of salvage law is precluded as mandated by the 2001 UNESCO Convention. Thus no salvage award can be fixed by this Tribunal.

3. In addition, the 1989 Salvage Convention does not apply to state-owned vessels which are sovereign-immune

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<sup>43</sup> 2001 UNESCO Convention, art 2(3)

<sup>44</sup> *Ibid.*, art 2(6)

Article 4(1) of the 1989 Salvage Convention<sup>45</sup> provides that the Convention “shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law unless that State decides otherwise”. This means that any intrusive action with regard to a wreck of a warship must be taken with the express consent of the State owner.

Given that the *Coeur de l’ Ocean* was used as an Astorian military ship and was en route to another destination after having completed its military expedition to the ancient trading city of Zamzala prior to its sinking,<sup>46</sup> it is more likely than not that the *Coeur de l’ Ocean* was a state-owned Astorian vessel used for non-commercial purposes, and as a result it is subject to article 4(1) of the 1989 Salvage Convention.

No consent was given by Astoria or Rolga pursuant to article 4(1) before or after the signing of the Bilateral Treaty, which requires a notification to the Secretary-General of the International Maritime Organisation specifying the terms and conditions of such application (of salvage law to its state-owned vessels operating for non-commercial purposes).<sup>47</sup>

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<sup>45</sup> LEG/CONF.7/27, 2 May 1989

<sup>46</sup> Further Clarifications, p 1, ¶ 5; Moot Problem, p 1, ¶ 1

<sup>47</sup> 1989 Salvage Convention, art 4(2)

Accordingly, salvage law as codified into the 1989 Salvage Convention does not apply in this case, and no salvage award can be fixed by this Tribunal.

**III. THE CLAIMANT DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING OF THE COEUR DE L' OCEAN**

**A. Even if the 1995 Agreement was enforceable, it did not grant the Claimant exclusive rights of photographing and documenting of the Coeur de l' Ocean**

There was no provision in the 1995 Agreement which granted the Claimant the asserted exclusive rights. While clause 6 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 Coeur de l' Ocean, such right was not exclusive in the sense that the Respondent is not prohibited to grant a similar licence to a third party. This merchandising right, accordingly, does not extend to granting the Claimant exclusive photography and documentation rights

**B. Even if the Claimant is a salvor, the exclusive rights asserted are not part of the possessory rights given to a salvor**

1. As a matter of law, exclusive rights of photographing and documenting of the Coeur de l' Ocean are not part of the bundle of rights given to a salvor-in-possession

The United State Court of Appeals for the Fourth Circuit in *RMS Titanic v Haver*<sup>48</sup> overturned the District Court’s ruling which expanded the possessory rights of a salvor and granted the salvor the exclusive right to photograph the wreck. The Appeal Court reasoned that the District Court’s decision was inconsistent with the principle underpinning salvage law – that is to “encourage the voluntary assistance to ships and their cargo in distress”.<sup>49</sup> It is also an essential policy of salvage law to encourage the rescue and return to owners of specific property at risk.<sup>50</sup> It is submitted that photographs of the wreck of the Coeur de l’ Ocean were neither at risk nor could they be returned to the owner. Therefore, any exclusive right of photography of the wreck is not within the ambit of traditional salvage law.

The court stated that salvage law did not “include the notion that the salvor can use the property salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value.”<sup>51</sup>

Since the court viewed the whole body of salvage law as forming part of the *jus gentium*, a novel expansion of the traditional rights of a salvor should not be embarked on lightly, for any such decision would “so alter the law of salvage so to

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<sup>48</sup> (1999) 171 F.3d 943

<sup>49</sup> *Ibid.*, at 969

<sup>50</sup> *Benedict on Admiralty*, *supra* n 20, Chap XIII, § 13.01

<sup>51</sup> *Ibid.*

risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently applied body of law.”<sup>52</sup>

The decision of the Appeal Court in *RMS Titanic v Haver* would therefore be evidence of the *jus gentium* of the law of salvage. As stated by the US Supreme Court in *Lauritzen v Larsen*,<sup>53</sup>

“[Admiralty] courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilised communities of rules designed to foster amicable and workable commercial relations.”<sup>54</sup>

Accordingly, the ruling in *Haver* should be followed by this Tribunal.

2. As a matter of public policy, there is no legitimate reason to extend the law in order to grant the Claimant such novel yet lucrative right

Salvage operations are done on behalf of and for the benefit of the owners of the vessels in peril.<sup>55</sup> The inclusion of the lucrative exclusive imagery rights as part of

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<sup>52</sup> (1999) 171 F.3d 943, at 970

<sup>53</sup> (1953) 345 US 571

<sup>54</sup> *Ibid.*, at 582

<sup>55</sup> *Ibid.*, at 969-970

the rights of a salvor would shift the nature of maritime salvage from an operation to save property on behalf of an owner to a profit-making venture for the salvor.<sup>56</sup> Not only would the salvor's incentive to recover the ship be lowered, but the salvor would also likely abandon its efforts to recover the ship if the salvor could gain greater profit by selling images of the wreck while it was still submerged. As a result, a salvor might jeopardise the return of a vessel to the owner in order to secure his/her economic interest.

Possessory rights are given to a salvor only to ensure that the salvor can continue its salvage operations free from interference. This ultimately is for the benefit of the owner. However the same cannot be said in the present case. It is the Respondent's position that exclusive imagery and documentation rights are not compatible with salvage law and the rationale behind it. If this Tribunal finds otherwise, this would not only confer upon the Claimant a right just as powerful and lucrative as ownership of the wreck itself, but will also allow the Claimant to obtain an enormous windfall which vastly surpasses its expenses in salvaging the wreck.<sup>57</sup>

Accordingly, the Claimant does not enjoy the asserted rights.

**IV. EVEN IF THE PARTNERING AGREEMENT MEMORANDUM (“1995 AGREEMENT”) WAS ENFORCEABLE, THERE WAS NO**

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<sup>56</sup> *Ibid.*, at 970

<sup>57</sup> *Ibid.*

## **UNLAWFUL INTERFERENCE WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER SUCH CONTRACT**

**A. There was no interference on the facts when the Respondent (1) entered into the Agreement with Astoria ("Bilateral Treaty") in 2003; and (2) ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage ("2001 UNESCO Convention") in 2005**

It is submitted that the ratification of the two treaties did not, on the facts, interfere with the Claimant's rights under the 1995 Agreement. The Respondent's position on the effect of the two treaties is that (1) the 2001 Convention prohibits the commercialisation of underwater cultural heritage, including the sale of artefacts; and (2) the Bilateral Treaty (read together with the "Guiding Principles"<sup>58</sup>) aim to ensure that representative series of statistical samples and sufficient examples of rarer objects be deposited in the museums of Astoria and Rolga,<sup>59</sup> thus in practical effect precludes the option of an open auction of most of the artefacts.

A careful reading of the 1995 Agreement, however, shows that there is no obligation placed upon the parties to actually sell the artefacts. Clause 5 of the 1995 Agreement merely states that if the aggregate amount of the appraised values for the artefacts exceeds 45 million dollars, the parties will endeavour to formulate a joint marketing plan for the placement and sales of the remaining artefacts. The 1995 Agreement merely stipulates the sharing arrangements in the event both parties decide

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<sup>58</sup> Appendix 2

<sup>59</sup> *Ibid.*, art 5

to formulate the joint marketing plan and actually proceed with the plan. Since no reasons were given for the joint marketing plan not being finalised,<sup>60</sup> it is not seen that the Respondent was at fault in not arriving at a joint marketing plan with the Claimant prior to the 2001 UNESCO Convention coming into effect.

Accordingly, while subsequent legal changes rendered the sale of artefacts no longer a possibility, there is no interference with the Claimant's rights under 1995 Agreement, which include, for instance, the merchandising rights granted in clause 6.

**B. In any event, there can be no unlawful interference with the 1995 Agreement with regard to the ratification of the Bilateral Treaty and the 2001 UNESCO Convention**

1. The 1995 Agreement cannot prohibit the Respondent from entering into the Bilateral Treaty and the 2001 UNESCO Convention since the Government of Rolga's contractual promises cannot fetter its discretion in exercising its executive functions

A contract entered into by the government may be invalid when it results in an unlawful fettering of the government's discretion.<sup>61</sup> In the case the fetter is found unlawful, the contract will be rendered *ultra vires* (that is, unenforceable),<sup>62</sup> since it is

“not competent for the Government to fetter its future executive action, which

must necessarily be determined by the needs of the community when the

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<sup>60</sup> Further Clarifications, p 3, ¶ 20

<sup>61</sup> *JC Denman & Co Ltd v Westminster Corporation* [1906] 1 Ch 464 at 476

<sup>62</sup> *Chitty on Contracts*, 30<sup>th</sup> edn (London: Sweet and Maxwell, 2008), Vol 1, p 761

question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.”<sup>63</sup>

It is submitted that treaty-making is within the executive competence of the Government of Rolga,<sup>64</sup> and individual parties have no standing to prevent or interfere with the executive’s exercise of this power, as it would undermine the overall control of foreign policy.<sup>65</sup> The entering into of the Bilateral Treaty and the 2001 UNESCO Convention both concern with the duties and obligations of Rolga at an international level. The two treaties aim to preserve underwater cultural heritage, in particular the wreck of the Coeur de l’ Ocean and artefacts thereof, in order to promote awareness, appreciation and protection of that heritage. Using the words of Devlin LJ (as he then was) in *Commissioners of Crown Lands v Page*,<sup>66</sup> the treaties entered into were “measures affecting the nation as a whole which the [government] takes for the public good.”<sup>67</sup> Given that the Respondent was exercising its powers in pursuance of public interest, the usual practice of tribunals is to avoid interpreting the government’s contractual promises in a way that would fetter

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<sup>63</sup> *R v Rederiaktiebolaget Amphitrite* [1921] 3 KB 500 at 503

<sup>64</sup> *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 347, per Lord Atkin

<sup>65</sup> C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993), p 124

<sup>66</sup> [1960] 2 QB 274

<sup>67</sup> *Ibid.*, at 292

its performance of executive functions.<sup>68</sup> Therefore, this Tribunal should not construe the contract to the effect of, by implication, precluding the Respondent to enter into the Bilateral Treaty or the 2001 UNESCO Convention; for otherwise the 1995 Agreement will then unduly and unlawfully fetter the discretion of the Respondent as a government, and the contract will risk being rendered a nullity.

2. The Bilateral Treaty and the 2001 UNESCO Convention, which automatically have the force of law in Rolga, have rendered the performance of the 1995 Agreement illegal, and thus the contract is frustrated

Given that Rolga is a monist state,<sup>69</sup> international treaties have the force of domestic law once they are ratified.<sup>70</sup> In the event that the Claimant asserts that the Bilateral Treaty and the 2001 UNESCO Convention have interfered with their rights and performance under the 1995 Agreement, the necessary connotation is that the performance of the 1995 Agreement was disrupted by the passage of new law. The effect of this change in law is that the existing 1995 Agreement would be frustrated due to subsequent legal changes.<sup>71</sup> While the frustrating event (that is, the ratification of the two treaties) emanated from the Respondent, the fact that the

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<sup>68</sup> *Chitty on Contracts*, supra n 62, Vol 1, p 761

<sup>69</sup> Further Clarifications, p 1, ¶ 7

<sup>70</sup> G J Wiarda, in A Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1992), p 17

<sup>71</sup> *Reilly v The King* [1934] AC 176. See also E. Peel, *Treitel on The Law of Contract*, 12<sup>th</sup> edn (London: Sweet and Maxwell, 2007), p 483

Respondent voluntarily entered into the two treaties is considered irrelevant<sup>72</sup> and the disruption should not be seen as a case of the Respondent's self-disablement to perform its contractual obligations.<sup>73</sup> Therefore, the Respondent's act of ratification is not a breach of contract but is an event which frustrates the contract.

Accordingly, with the contract discharged by frustration, no damages may be awarded for a claim of breach of contract in relation to the ratification of the two treaties.<sup>74</sup>

**C. Allowing Aquatic View to organise and make profits from visiting activities to the site including the taking of photographs was not an unlawful interference with the Claimant's rights**

1. The 1995 Agreement did not grant the Claimant the right to have exclusive control of the wreck site

The 1995 Agreement made no mention that the Claimant was to have exclusive control of the wreck site, nor did it restrain the Respondent from authorising other parties to organise and make profits from visiting activities to the site including the taking of photographs. The Respondent pleads the same as in Sections II.A and II.C that the 1995 Agreement was merely an ordinary contract for work and labour

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<sup>72</sup> *William Cory & Son Ltd v London Corp* [1951] 2 KB 476 at 487, per Harman LJ

<sup>73</sup> *Chitty on Contracts, supra* n 62, Vol 1, p 761

<sup>74</sup> *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700

and that salvage law is inapplicable in the present case respectively. Accordingly, the Claimant cannot claim possessory rights as a salvor.

In addition, while clause 6 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 Coeur de l’ Ocean, such right was not exclusive in the sense that the Respondent is not prohibited to grant a similar licence to a third party.

Therefore no unlawful interference can be found in relation to allowing Aquatic View to organise and make profits from visiting activities to the site including the taking of photographs.

2. There is no basis in intellectual property law upon which to assert interference with the Claimant’s merchandising rights

Apart from the submission in the foregoing section that the merchandising right granted under clause 6 of the 1995 Agreement was not exclusive, it is further submitted that there is no basis in intellectual property law upon which the Claimant can assert interference with its merchandising rights.

The Claimant cannot claim copyright protection of the name “Coeur de l’ Ocean”, since no copyright exists in a name, whether of a person, company, or as in this case, a wrecked vessel.<sup>75</sup>

Nor does the name “Coeur de l’ Ocean” qualify as a trademark of the Claimant. Clause 9 of the 1995 Agreement stated that the contract shall be governed by Rolgan law, which is *in pari materia* with Malaysian law.<sup>76</sup> The Malaysian legislation governing trademarks is the Trade Mark Act 1976.

For a trademark to be registrable under the Trade Mark Act 1976 in order for it to receive protection as a proprietary right, it shall contain “a word having no direct reference to the character or quality of the goods or services not being, according to its ordinary meaning, a geographical name or surname”.<sup>77</sup> However, the words “Coeur de l’ Ocean” are merely used in a descriptive manner, to the effect of only showing that the merchandise is related to the wreck of the Coeur de l’ Ocean. It does not have a distinctive character which serves to distinguish the trade origin of the merchandise.<sup>78</sup> Consequently, the name is not a registrable trademark and is not accorded trademark protection by statute.

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<sup>75</sup> *Exxon Corporation v Exxon Insurance Consultants* [1982] Ch 119

<sup>76</sup> Further Clarifications, p 1, ¶ 8

<sup>77</sup> Malaysian Trade Marks Act 1976, s 10(1)(d)

<sup>78</sup> *In the Matter of Application No. 2313504 in the Name of Linkin Park LLC*, decision by Richard Arnold QC, available at <http://www.patent.gov.uk/tm/legal/decisions/2005/o03505.pdf>

In addition, Claimant does not have the right to exclusively exploit the goodwill in the name “Coeur de l’Ocean”, as the name does not distinguish merchandise produced by Claimant from merchandise produced by other traders. As misrepresentation is an essential element to succeed in an action for passing-off,<sup>79</sup> the Claimant must prove that there was deception or confusion as to trade origin. As seen from case law, the name of a pop group<sup>80</sup> or the name of a fictional television character<sup>81</sup> is not distinctive *per se* and its use cannot be deemed as deception to trade origin.

As the name “Coeur de l’ Ocean” does not indicate the trade origin of any merchandise produced, this non-distinctive character of the name could not support any claim of misrepresentation to trade origin. As a result, there is no link between the name “Coeur de l’ Ocean” and the Claimant’s goodwill.

Accordingly, Aquatic View’s use of the name “Coeur de l’ Ocean” is not an unlawful interference with the Claimant’s merchandising rights under the 1995 Agreement

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<sup>79</sup> *Reckitt & Coleman Products Limited v Borden Inc & Others* [1990] RPC 341

<sup>80</sup> *Lyngstad v Anabas* [1977] FSR 62

<sup>81</sup> *Wombles Ltd v Wombles Skips Ltd* [1977] RPC 99

## **Conclusion and Prayer for Relief**

For the foregoing reasons, the Respondent, the Government of Rolga, respectfully requests this Tribunal to adjudge and declare that the Claimant has not proven their case, and all the declarations sought by the Respondent be granted.