

INTERNATIONAL CENTER OF ARBITRATION

THE 2009 LAWASIA

INTERNATIONAL MOOT COMPETITION

THE CASE CONCERNING THE COEUR DE L' OCEAN

BENEVOLENT HERITAGE INC

Claimant

v.

THE GOVERNMENT OF ROLGA

Respondent

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

Benevolent Heritage Inc (“**Heritage**”) and the Government of Rolga (“**Rolga**”) (each, a “**Party**”; collectively, “**the Parties**”) have agreed to submit the present dispute to the International Arbitration Centre (“**IAC**”) pursuant to clause 10 of the Partnering Agreement Memorandum (“**the Heritage-Rolga Agreement**”).

Clause 10 of the Heritage-Rolga Agreement provides that disputes between the Parties shall be decided by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration (“**the KLRCA**”). Rule 1(1) of the Rules for Arbitration of the KLRCA provides that where parties have agreed in writing that disputes shall be settled or resolved by arbitration in accordance with the Rules for Arbitration of the KLRCA, such disputes shall be settled or resolved by arbitration in accordance with the UNCITRAL Arbitration Rules of 1976. The IAC adopts UNCITRAL Arbitration Rules of 1976.

Accordingly, Heritage and Rolga accept this Tribunal’s jurisdiction.

QUESTIONS PRESENTED

Heritage respectfully submits the following questions for the Tribunal's determination:

1. Whether the terms of Rolga's unilateral agreement with Astoria in 2001 ("**the Astoria-Rolga Agreement**"), the *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage* (Paris, 2 November 2001) ("**the UNESCO Convention**"), and the licence granted to Aquatic View ("**Aquatic**") are inconsistent with Heritage's expectations given the international law background against which Heritage contracted with Rolga in the Heritage-Rolga Agreement in 1995, in that:
 - a. Heritage's title to the *Coeur de l' Ocean* ("**the Vessel**"), derived from the law of finds, is directly interfered by the terms of the Astoria-Rolga Agreement, or
 - b. Alternatively, Heritage's maritime lien over the Vessel, under the law of salvage, is directly interfered by the terms of the Astoria-Rolga Agreement and the *UNESCO Convention*, and
 - c. The licence granted to Aquatic infringes Heritage's right to exclude others from the vicinity of the Vessel
2. Whether Heritage is entitled to the exclusive rights of photographing and documenting the Vessel, given that:
 - a. These rights are consistent with the primary aim of salvage law, which is to incentivise commercial salvage operations, and

- b. The salvage operations qualify as confidential information under intellectual property principles, which Rolga should not have divulged to Aquatic
3. Whether the calculation of profits should be made solely on the basis of salvage principles, given that:
 - a. The sharing arrangement under the Heritage-Rolga Agreement is perfectly consistent with salvage principles, and
 - b. The distribution of artefacts should not be guided by the *UNESCO Convention*

STATEMENT OF FACTS

The loss and discovery of the Vessel

In 1800, the Vessel sank off the waters of Zamzala (now, Rolga), and, until now, remained undiscovered except for the efforts of Heritage. The Vessel had been used by the Astorian empire to transport spices, jewellery and other spoils from Zamzala, which Astoria had just conquered in order to finance other military adventures.

Two centuries later, in 1990, Heritage, a specialist in historic wreck salvage, began extensive research and study of maritime records to identify the location of the Vessel. It was only after arduous of survey that their efforts finally led to the discovery of the wreck in 1993.

The Heritage-Rolga Agreement

Heritage's salvage was conducted pursuant to a commercial agreement with Rolga in 1995. There was no exclusion, and hence an implied common acceptance that customary international law and common law would remain binding upon both parties. The Heritage-Rolga Agreement made clear that:

- Heritage alone would bear the expenses of the salvage, which was estimated by Rolga itself (as evidenced by the Astoria-Rolga Agreement) to be more than the intrinsic value of the artefacts.
- Moreover, Heritage would *pay* Rolga
 - a Licence Fee of USD\$30,000;
 - a Expense Deposit of USD\$1,250,000; and

- a Conservation Deposit of USD\$100,000.

This was a “no cure, no pay” agreement; and it was obviously contemplated that the only compensation, if any, would derive from:

- Heritage having the sole rights to use the name “*Coeur de l’ Ocean*” for sales and marketing merchandise related to the Vessel provided Heritage paid Rolga a fee equal to 3% of its gross sales of merchandise, and
- Heritage eventually owning and possessing its relative share of the artefacts, depending on the aggregate amount of the appraised values for the artefacts and/or selling prices of the artefacts.

Heritage made payment of the necessary deposits and fees, obtained approval to salvage, and has since carried out the salvage operations according to plan, and is close to salvaging all the artefacts. Salvage is, however, an expensive enterprise. Heritage has incurred crippling expenses, which forced it to sell a part of the artefacts in order to finance the completion of the salvage. As part of its commitment to expand the intellectual, historical and cultural heritage of mankind, Heritage had even undertaken efforts to document the salvage operations and the recovered artefacts with the International Broadcasting Company.

Unilateral conduct by Rolga to sign the Astoria-Rolga Agreement

All of this was afoot when Heritage discovered unilateral conduct on the part of Rolga that, we submit, clearly derogates from Rolga’s contractual obligations to Heritage.

First, in 2001, Rolga unilaterally signed the Astoria-Rolga Agreement. Under the Astoria-Rolga Agreement, legal titles to all Astorian ancient wrecks lying off the coast of Rolga was

purportedly transferred from Astoria to Rolga. Astoria, as the State of historical origin, was however, recognised as having a “continuing interest” in the articles recovered from the wrecks. Nowhere does the Astoria-Rolga Agreement acknowledge Heritage’s interest in the artefacts (by virtue of the law of finds or the law of salvage) or its salvage efforts.

Unilateral conduct by Rolga to ratify the UNESCO Convention

Second, and compounding matters, Rolga, under populist pressure, unilaterally ratified the *UNESCO Convention* on 9th January 2005, further undermining Heritage’s contractual rights.

Unilateral conduct by Rolga to grant the licence to Aquatic

Third, Rolga granted Aquatic a permit to organise exclusive underwater trips to view the wreck of the Vessel. Aquatic not only sold 25 tickets at USD\$20,000 each, but Aquatic also had their staff take photographs and make video clips of the wreck. These video clips have been posted as promotional material for the trip on their website. Aquatic has also engaged a songwriter to write a song entitled ‘Cour de l’ Ocean’, which has been used in conjunction with their merchandising.

SUMMARY OF PLEADINGS

Heritage has acquired title to the Vessel as of 1995, having satisfied the three legal elements under the law of finds, namely (1) that it has demonstrated its intent to acquire the vessel, (2) it has in fact acquired the Vessel, and (3) the Vessel has been impliedly abandoned by its original owner. The law of finds was the applicable law as of 1995, given its deep rooted origins in admiralty law, its codification in the *1982 UN Convention on the Law of the Sea* which both Rolga and Astoria are party to, and its support by principles of equity which constitute part of international law. The Heritage-Rolga Agreement has to be read against this backdrop.

According to the 17th century historical practices of maritime powers, Heritage's claim to title is buttressed by the fact that it is a commercial ship, and not one for "military purposes".. Hence, the requirements of express abandonment and the principles of sovereign immunity do not apply to this Vessel.

The Astoria-Rolga Agreement directly interferes with Heritage's title to the Vessel. Firstly, the Agreement purports to transfer title from Astoria to Rolga (when Astoria had already abandoned the Vessel), and secondly, it recognises Astoria as having a "continuing interest" in the Vessel.

Even if the law of finds does not apply, the Heritage-Rolga Agreement must at minimum be read subject to the law of salvage. Salvage law as a sub-category of admiralty law, was in 1995, and still is, considered part of the law of all nations, and is codified in *UNCLOS* and the *IMO Convention*.

Under salvage principles, Heritage has satisfied the elements required to establish a maritime lien over the Vessel, and consequently is entitled to exclusive salvage rights and a

salvage award. However, Rolga has interfered with these rights by virtue of the the Astoria-Rolga Agreement, the ratification of the UNESCO Convention, and the license granted to Aquatic.

It is also submitted that Heritage is entitled to the exclusive rights of photographing and documenting the wreck. Granting Heritage such rights is entirely consistent with the primary aim of salvage law, which is to incentive commercial salvage operations. It is also in public interest to grant Heritage these rights, to ensure the safety of the wreck and swift, expedient, and uninterrupted recovery of the artefacts. Without these rights, Heritage will suffer irreparable harm. It is noteworthy that *R.M.S. Titanic v. Haver*, which is the only known case denying a salvor these rights, was wrongly decided.

The Government of Rolga has breached its obligation of confidence under intellectual property principles by divulging the location of the wreck to Aquatic. This obligation is imposed by virtue of clause 10 of the Heritage-Rolga Agreement and by the common law. Heritage has suffered detriment as a result of Rolga's breach.

Finally, the Government of Rolga has unfairly distributed the recovered artefacts *contrary* to the 1995 Heritage-Rolga Agreement, and it is submitted that the calculation of profits should be derived solely from the agreement between the two parties.

PLEADINGS

I. THE ASTORIA-ROLGA AGREEMENT IS INCONSISTENT WITH HERITAGE'S TITLE TO THE VESSEL

A. THE HERITAGE-ROLGA AGREEMENT MUST BE READ SUBJECT TO FINDS LAW

Allocation of commercial risk does not occur in a vacuum. It is established that a salvage agreement, like a commercial agreement, must be read against the backdrop of the prevailing law.¹ Therefore, in analysing Rolga's obligations to Heritage, it is necessary to ascertain the law in 1995.

1. Finds law was the applicable law in 1995

Finds law has its genesis in admiralty law, is codified in the *1982 UN Convention on the Law of the Sea* ("*UNCLOS*"),² and supported by principles of equity.

Under admiralty law, a party recovering abandoned property at sea is entitled to the property.³ Indeed, finds law "is most often applied in the context of long-lost shipwrecks".⁴

This doctrine is codified in *UNCLOS*, which Rolga is a State Party thereto. Article 303(3) specifically preserves admiralty laws, which include finds law.⁵

¹ Craig Forrest, "Historic Wreck Salvage" (2009) 33 Tul. Mar. L.J. 347 at 351.

² *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397.

³ Valentina Sara Vadi, "Investing in Culture" (2009) 42 Vand. J. Transnat'l L. 853 at 870.

⁴ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, et al.*, 323 F.Supp.2d 724 (E.D. Va., 2004) at 735.

Finds law is also consistent with the principles of equity, which constitute part of international law.⁶ A salvor expending time, costs and effort engaged in years of tireless survey, research and recovery efforts of a property that had been abandoned for two centuries should, in accordance with his expectations and the general principles of fairness and justice, be awarded title to the Vessel.

Since 1995, Heritage had a legitimate expectation that it would be entitled to the artefacts in the Vessel, so long as it had satisfied the legal elements mandated under finds law.⁷ Unfortunately, Rolga was keen to profit from Heritage's efforts at no cost to itself. That Heritage agreed to share part of the artefacts with Rolga does not undermine the fact that it was entitled to them *ab initio*; and it was certainly entitled to its share *after* the salvage operations.

Clause 5 of the Heritage-Rolga Agreement, which purports to acknowledge Rolga as the owner of the shipwreck "at all times", is clearly loose drafting, since the agreement also contemplates Heritage having ownership rights, at least after the salvage had been appraised.⁸ Moreover, it makes no sense for Rolga, if it was the true owner, to grant Heritage any ownership rights it could simply have promised payment of an equivalent amount. Crucially, as evidenced by its own agreement with Astoria in 2001, Rolga admitted that it *did not* possess title to the Vessel before the latter date!⁹ Accordingly, this provision was a legal fiction necessary for Rolga

⁵ Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters* (The Hague: T.M.C. Asser Press, 2002) at 63.

⁶ Marian Leigh Miller, "Underwater Cultural Heritage" (2006) 20 *Emory Int'l L. Rev.* 345 at 386. See especially article 59 of UNCLOS.

⁷ Pleadings, p 3.

⁸ Moot Problem, Appendix (1), ¶5.

⁹ Moot Problem, p 4, ¶3.

to impose its licensing and other requirements. It does not prejudice Heritage's submission that it was entitled to the artefacts under finds law.

Therefore, finds law applies in the contractual matrix.

2. Heritage satisfies the elements under finds law

Heritage has satisfied the three elements required to establish title under the law of finds:¹⁰

a. Heritage has demonstrated its intent to acquire the Vessel

Intent to acquire the property¹¹ is proven by three elements: (1) the salvor has to know the location of the wreck, (2) be capable of recovering it, and (3) is currently exercising that capability.¹² These are clearly satisfied. Heritage has knowledge of the actual location of the wreck. Their expertise in historic wrecks recovery shows that Heritage is capable of recovering the wreck. The subsequent recovery of silver coins, and other artefacts from the wreck proves that Heritage is currently exercising that capability.

b. Heritage has acquired possession

To have acquired possession, a salvor must take complete physical control of the shipwreck.¹³ This does not always require that one who discovers lost or abandoned property

¹⁰ Boesten, *supra* note 6.

¹¹ *Eads v. Brazelton* (1861), 22 Ark. 499.

¹² Boesten, *supra* note 6 at 113.

¹³ *The Tubantia* (1924), 18 Lloyd's L.R. 158.

must actually have it in hand before he is vested with a legally protected interest.¹⁴ For practical reasons, it often takes years to recover the vessel and it is unlikely that the every artefact can be salvaged due to deterioration and scattering. Instead, recovery of a part of the wreck, whether part of the ship, its apparel or cargo, suffices for the purposes of finding that the salvor has acquired possession.¹⁵ It is beyond doubt that Heritage has presently recovered almost all the artefacts, thus it has acquired possession of the Vessel.¹⁶

c. The Vessel has been abandoned

International law does not require affirmative acts of renunciation of title, but looks to conduct that is consistent with an intention to relinquish ownership. The lapse of time, where substantial is often determinative of abandonment unless the original owner has affirmatively asserted title prior to the finder's claim. As held by in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*,¹⁷ "should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment." Given that Heritage recovered the Vessel *two centuries* after it sank, abandonment can be implied.

Evidence of abandonment can also be implied if the original owner was aware of the location of the shipwreck but chose not to recover the shipwreck.¹⁸ Heritage predicted the

¹⁴ *Treasure Salvors, Inc. v. Wrecked and Abandoned Sailing Vessel*, 640 F.Supp.2d. 560 at 572 (5th Cir. 1981).

¹⁵ *Robinson v. Western Australian Museum* (1977), 138 C.L.R. 283 at 330 [*Robinson*].

¹⁶ Moot Problem, p 3, ¶2.

¹⁷ 974 F.2d 450 (4th Cir. 1992).

¹⁸ David J. Bederman, "Rethinking the Legal Status of Sunken Warships" (2000) 31 *Ocean Devel. & Int'l L.* 97 [Bederman, "Rethinking"] at 103. See also *Robinson*, *supra* note 16; *Martha's Vineyard Scuba Hq v. Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 at 1075 (1st Cir. 1987); and *Moyer v. Wrecked & Abandoned Vessel, Known as the Andrea Doria*, 836 F.Supp. 1099 at 1105 (D.N.J. 1993).

location of the Vessel through researching records at Astoria's maritime archives. Astoria was thus always possessed of the necessary information to reclaim the Vessel if it had wanted to. However, it chose not to do so for two centuries.

Of course, such an inference of abandonment may not be warranted if the original owner had been actively seeking the sunken vessel or has otherwise asserted title. This was the case in *Sea Hunt*, where at first instance¹⁹ and on appeal,²⁰ the courts were persuaded that there had been no abandonment by the Spanish government of two vessels that had sunk in 1750 and 1802, which was then discovered by Sea Hunt, a salvage company, in 1998. This was because the Spanish government tried to look for the vessels after they sank²¹ and appeared in the litigation to claim ownership.²² Other courts have upheld the proposition that abandonment can be implied from the passage of time unless affirmative action by the original owner proves otherwise.²³

Facts negating abandonment are not found in our case. Astoria, as historical owner of the Vessel, had not asserted ownership over the Vessel prior to 2001, six years after the Heritage-Rolga Agreement was signed. There is no evidence that Astoria was ever interested in recovering the Vessel until Heritage had already substantially succeeded in the salvage operation. Indeed, unlike the Spanish government in *Sea Hunt*, Astoria had not even sought to intervene in the present arbitration.

¹⁹ *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F.Supp.2d 678 (E.D. Va. 1999).

²⁰ *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000).

²¹ Kyle Salvador Sclafani, "*Sea Hunt, Inc. v. Unidentified Shipwrecked Vessels*" (2000-2001) 25 Tul. Mar. L.J. 559 at 559.

²² Craig Forrest, "An International Perspective on Sunken State Vessels as Underwater Cultural Heritage" (2003) 34 Ocean Devel. & Int'l L. 41 [Forrest, "UCH"] at 47.

²³ See e.g. *Simon v. Taylor and Others* (1975), [1975] 2 Lloyd's L.R. 338; *Nordsjø Dykker Co. v. Høvdning Skipsopphugging* (1970), 135 Norsk Retstidende 346.

In sum, the Vessel has been abandoned, given the substantial length of time between the Vessel's sinking and its recovery by Heritage, coupled with the absence of any positive actions on Astoria's part.

3. The Vessel is subject to finds law

a. *The Vessel's "military purpose" must be understood with the historical practices of maritime powers of the 17th century*

Our submission above that the Vessel had been impliedly abandoned is strengthened because the Vessel was, in fact, a commercial ship rather than a warship. Under the modern law of the sea, warships are defined as a subset of the larger class of vessel that might be characterised as "owned or operated by a State and used, for the time being, only on government non-commercial service".²⁴ Article 29 of *UNCLOS* defines "warship" as being:

[U]nder the command of an officer duly commissioned by...the State...and manned by a crew which is under regular armed forces discipline.

However, these modern definitions must be understood with the historical practices of maritime powers of the 17th century.

In those days, it was common to use vessels to transport treasure looted, mined and traded from the American and East Indian colonies, such as the Spanish and Portuguese treasure galleons, the Dutch spice fleets and the British East Indiamen. Even though these vessels were armed and captained by commissioned naval officers,²⁵ they were not considered warships

²⁴ Bederman, "Rethinking", *supra* note 19 at 99.

²⁵ *Ibid.*

because they were engaged in essentially trading or transport activity and any military function was purely incidental.²⁶ Similarly, although it was carrying Astoria's soldiers, the Vessel was primarily transporting cargoes of exotic goods and other riches.

Even if the Vessel was classified as a warship, the fact that it had sunk two centuries ago permits the Tribunal to adopt a more liberal test of abandonment. This is because the main policy reason why "finders, keepers" is not generally applied to warships, that state intelligence information and secrets might be discovered,²⁷ holds a lot less force when one is dealing with centuries-old state craft.

b. There is no standard of express abandonment

Suggestions that warships require a standard of express abandonment have been inconsistent. Authorities supporting a rule of express abandonment for sunken warships selectively rely on statements made by the United States concerning its policy never to factually abandon its public vessels.²⁸ However, the United States has, by its conduct, disavowed this position. In 1974, the United States raised a portion of a sunken Soviet submarine located in international waters, 750 miles northwest of Hawaii.²⁹ This action occurred only seven years after the submarine was lost by the Soviets. There had been no express act of abandonment by the Soviets, who quickly protested and attempted to assert their claim after the United States began to raise the sunken vessel. The United States' salvage of a Soviet submarine without

²⁶ *The Prins Frederik* (1820), 2 Dods. 451, 165 *Eng. Rep.* 1543 (Admlty).

²⁷ Forrest, "UCH", *supra* note 23 at 45.

²⁸ Bederman, "Rethinking", *supra* note 19 at 104-105.

²⁹ *Ibid.* at 100.

Soviet permission *believes* an assertion that the United States actually follows and respects a so-called rule of customary international law that allows salvage only of those warships that have been expressly abandoned. The theory of express abandonment is nothing more than maritime powers urging courts to adopt a standard of abandonment peculiarly favourable to a result in which they continue to retain ownership and does not reflect international practice.

c. The principle of sovereign immunity does not apply to the Vessel

The notion that sunken warships are accorded sovereign immunity is not founded in international law. While one might not disagree with the proposition that warships in the actual military service of a state are accorded immunities, this is not the same thing as proving that international law prescribes a rule of express abandonment for *sunken* warships. Privileges and immunities of a warship do not necessarily continue after the sinking of the vessel, its abandonment by officers and crew, and after it is no longer in the active military service of the state. The *1989 International Convention on Salvage (“IMO Convention”)*³⁰ supports this proposition that warships are not subject to sovereign immunity after sinking. Article 4 of the *IMO Convention* provides that “this Convention shall not apply to warships...entitled, *at the time of salvage operations*, to sovereign immunity under generally recognised principles of international law”. In qualifying with “at the time of salvage operations”, article 4 suggests that sovereign immunity may not be perpetual; drafters of the *IMO Convention* contemplated situations where the warships, at the time of salvage operations, are not entitled to sovereign immunity. Thus, a long-sunk warship, no longer in active military service may be abandoned in the same way as any other commercial ship.

³⁰ *International Convention on Salvage*, 28 April 1989, 1953 U.N.T.S. 193.

B. HERITAGE’S TITLE TO THE VESSEL, DERIVED FROM FINDS LAW IS DIRECTLY INTERFERED WITH BY THE TERMS OF THE ASTORIA-ROLGA AGREEMENT

The Astoria-Rolga Agreement directly interferes with Heritage’s title to the Vessel for two reasons.

First, the Astoria-Rolga Agreement purports to transfer legal title to the Vessel from Astoria to Rolga,³¹ when in fact Heritage has title to the Vessel. Second, the Astoria-Rolga Agreement grants Astoria a “continuing interest” in the articles recovered from the Vessel.³² The “Guiding Principles for the Determination of the Disposition of Materials” makes clear that this “continuing interest” includes expectations regarding how the artefacts should be distributed. In particular, the artefacts are to be deposited in either Astoria’s or Rolga’s museums. This agreement affects Heritage to the extent that even though the agreement is between Astoria and Rolga, Rolga will be compelled to force Heritage to act consistent with the terms of the Astoria-Rolga Agreement in order to avoid falling foul of an international obligation. Having to deposit the artefacts in the museums of only two countries effectively creates a monopsony and limits Heritage’s ability to sell the artefacts at market prices when this was one of the primary means by which it was contemplated that Heritage could recover its expenses.

Accordingly, the Astoria-Rolga Agreement is inconsistent with Heritage’s title to the Vessel.

³¹ Moot Problem, p 4, ¶3.

³² *Ibid.*

II. IN THE ALTERNATIVE, ROLGA'S RECENT CONDUCT IS INCONSISTENT WITH THE HERITAGE-ROLGA AGREEMENT

A. AT MINIMUM, THE HERITAGE-ROLGA AGREEMENT MUST BE READ SUBJECT TO SALVAGE LAW

1. Salvage law was the applicable law in 1995

At minimum, even if finds law does not afford Heritage title to the Vessel, the Heritage-Rolga Agreement ought to be read subject to salvage law,³³ against which it was made and so too in the context of commercial salvage agreements.³⁴

Salvage law as a sub-category of admiralty law, was in 1995, and still is, considered part of the *jus gentium*; as evidenced by *opinio juris*. In *Lauritzen v. Larsen*,³⁵ the United States Supreme Court held that:³⁶

[Admiralty] courts...have generally deferred to a...international law of impressive maturity and universality. It has the force of law...from acceptance by common consent of civilised communities of rules designed to foster amicable and workable commercial relations.

Salvage law has its origins in the Rhodian Code, enacted nearly 300 years ago.³⁷ This body of maritime law has existed in England as far back as Saxon times, was codified in the

³³ Kim Lewison, *The Interpretation of Contracts*, 3d ed. (London: Sweet & Maxwell, 2004) at 101.

³⁴ *The Unique Mariner (No. 2)* (1979), [1979] 1 Lloyd's L.R. 37 at 50-51.

³⁵ 345 U.S. 571 (1953).

³⁶ *Ibid.* at 581-582.

Laws of Oleron as early as 1194 and has been affirmed in recorded cases since the reign of Henry III³⁸ and consistently codified in various codes spanning several jurisdictions.³⁹ Thus, salvage law, being “a universal law applicable to all nations, not the law of a single sovereign”⁴⁰ is applicable as part of Rolgan law, which governed the Heritage-Rolga Agreement. More specifically, the customary salvage law “governs the recovery of military and commercial vessels and the recovery of archaeological and historical shipwrecks.”⁴¹

Salvage law, as it then existed, was preserved by article 303(3) of *UNCLOS* and codified in the *IMO Convention*, both of which Rolga is a State Party. The *IMO Convention* consolidated existing customary salvage law and propelled salvage law to international status by requiring the application of uniform principles to all state parties.⁴²

Therefore, salvage law is the applicable law in 1995.

³⁷ Rob Regan, “Sovereign Immunity and the Lost Ships of Canada’s Historic Merchant Fleet” (2006) 64 U.T. Fac. L. Rev. 1 at 34.

³⁸ *Ibid.*

³⁹ *R.M.S. Titanic v. Haver*, 171 F.3d 943 at 960 (4th Cir. 1999) (“*Haver*”).

⁴⁰ Paul V. Niemeyer, “Applying Jus Gentium to the Salvage of the R.M.S. TITANIC in International Waters--The Nicholas J. Healy Lecture” (2005) 36 J. Mar. L. & Com. 431 at 439.

⁴¹ E. Barrowman, “The Recovery of Shipwrecks in International Waters” (1988) XIII Mich. Y.B. Int’l Legal Stud. 236.

⁴² Vadi, *supra* note 3 at 868-869.

2. Heritage established a maritime lien and hence, exclusive salvage rights and rights to an award under the prevailing salvage law

Under the salvage principles implied to the Heritage-Rolga Agreement, a salvor may establish a lien by performing salvage under a contract.⁴³ The Heritage-Rolga Agreement constitutes a salvage contract, which gives rise to Heritage's lien for the salvage services rendered pursuant to the Heritage-Rolga Agreement.⁴⁴

Heritage has satisfied the three elements under salvage law which entitles them to exclusive salvage rights and the right to an award:⁴⁵

a. The Vessel is under marine peril

The first element is satisfied. Under *jus gentium* salvage principles, marine peril includes the dangers that archaeological and historical shipwrecks face in terms of their deterioration and possible plunder.⁴⁶ There is evidence that the Vessel is continually subject to natural deterioration, and there is a real threat of illegal plundering and further damage to the wreck by the many treasure hunters trawling the surrounding waters.⁴⁷

b. Service is voluntarily rendered when not required as an existing duty

⁴³ *The Sabine*, 101 U.S. 384 (1879).

⁴⁴ *The Goulandris* (1927), P. 182 at 192.

⁴⁵ *Supra* note 43.

⁴⁶ *Treasure Salvors, Inc. v. Unidentified and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); *Cobb Coin Company, Inc. v. Unidentified and Abandoned Sailing Vessel*, 549 F.Supp. 540 (S.D. Fla. 1982).

⁴⁷ Moot Problem, p 2, ¶3.

The second element is satisfied. As contemplated by article 6 of the *IMO Convention*, services provided under a commercial agreement, which is the case here, do not constitute an existing duty. Any award in Heritage’s favour is simply a contractual entitlement in return for Heritage satisfying its contractual obligations to the stipulated standard.⁴⁸

c. Heritage has been successful in the salvage operation

The third element is also satisfied. Heritage has been successful in recovering a large collection of cultural artefacts.⁴⁹

Accordingly, Heritage is entitled to a maritime lien over the Vessel.

B. HERITAGE’S MARITIME LIEN OVER THE VESSEL, UNDER SALVAGE LAW, IS DIRECTLY INTERFERED BY THE TERMS OF THE ASTORIA-ROLGA AGREEMENT

Having established a maritime lien in its favour, Heritage is entitled to “exclusive possession, not only of the artefacts removed from the wreck...but also of the wreck itself, so that no other person is entitled lawfully to intrude as long as salvage operations continue”.⁵⁰ This possessory lien may be enforced in a court vested with *in rem* jurisdiction to secure for Heritage compensation and reward for its services rendered.

The Astoria-Rolga Agreement infringes upon Heritage’s rights, primarily because the Astoria-Rolga Agreement purports to recognise that Astoria has a “continuing interest” in the

⁴⁸ Boesten, *supra* note 6 at 104.

⁴⁹ Moot Problem, p 3, ¶2 and p 6, ¶1.

⁵⁰ *Supra* note 41 at 966, citing with approval *supra* note 15.

articles recovered from the Vessel,⁵¹ which is radically incompatible with Heritage's lien in the following ways.

First, Astoria's "continuing interest" consists in being able to dictate where the artefacts are distributed (namely, the museums of Astoria and Rolga).⁵² Indeed, both countries (without Heritage's involvement) are to set up a joint committee to decide on the distribution of artefacts.⁵³ This erodes Heritage's entitlement under the Heritage-Rolga Agreement, to *own* its share of the artefacts.

Second, Astoria's continuing interest in the distribution of the artefacts prejudices Heritage's contractual right to dispose of its share of the artefacts at market value.⁵⁴ Since the sharing arrangement reflects what Heritage deserves under the *Blackwall* principles⁵⁵ governing compensation,⁵⁶ it follows that Heritage may not even be able to recover its costs if it is compelled to give up the artefacts at below market value or for free.

Third, if Astoria is asserting "continuing interest" in the artefacts, it is to be liable for a portion of the compensation owed to Heritage. However, there is no hint of compensation in the Astoria-Rolga Agreement.

⁵¹ Moot Problem, p 4, ¶3.

⁵² Moot Problem, Appendix (2), ¶1.

⁵³ Moot Problem, Appendix (2), ¶4 and ¶5.

⁵⁴ Moot Problem, Appendix (2), ¶1.

⁵⁵ *The Blackwall*, 77 U.S. 13 (1869).

⁵⁶ See also *infra* note 96 and accompanying text.

Although the Astoria-Rolga Agreement does not technically bind Heritage, there is no reason to suppose that Rolga will not seek to impose such demands on Heritage, consistent with its present obligations to Astoria. Although it is true that Heritage was always suppose to formulate a joint marketing plan with Rolga, it is expected that there will be no room for genuine negotiation if Rolga seeks to avoid international liability under its agreement with Astoria.

C. HERITAGE’S MARITIME LIEN OVER THE VESSEL, UNDER SALVAGE LAW, IS DIRECTLY INTEREFERED BY THE *UNESCO CONVENTION*

Heritage submits that the ratification of the *UNESCO Convention*⁵⁷ directly interferes with their salvage rights by limiting and even excluding the operation of salvage law. The principles and objectives embodied in the *UNESCO Convention* are a marked departure from conventional salvage principles.

First, *in situ* preservation is favoured in the *UNESCO Convention* as the first choice of preservation, as opposed to salvage. Salvage will be authorised only where recovery of the heritage wreck better serves the objective of protection or knowledge enhancement of underwater cultural heritage.⁵⁸ It is abundantly clear that the artefacts of the Vessel are in need of treatment and conservation.⁵⁹ Hence, they ought to be recovered through salvage operations instead of being preserved *in situ*. Yet, salvage activities are authorised only where the following conditions in article 4 of the *UNESCO Convention* are met: (1) the activity must be authorised by the competent authorities, and (2) the activity is in *full conformity* with the *UNESCO*

⁵⁷ *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 2 November 2001, 41 I.L.M. 37.

⁵⁸ Moot Problem, Annex, Rule 1.

⁵⁹ Moot Problem, Appendix (2), ¶3.

Convention, and (3) the activity ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Such manifestly stringent requirements are not embodied in traditional salvage law. This preservationist approach adopted by the *UNESCO Convention* restricting salvage is not an accurate codification of the prevailing sentiments in the international arena. The *UNESCO Convention* has only 26 State Parties presently. This low adoption rate has been attributed to the attenuation of salvage principles.⁶⁰ In fact, the resultant article 4 of the *UNESCO Convention* was a crucial compromise from the earlier drafts of the *UNESCO Convention*, which completely excluded the application of salvage law. This earlier draft was abandoned in favour of the current position as it became apparent that a complete exclusion would be a deal-breaker for the whole negotiations on the final text.⁶¹

While the attenuation of salvage laws was intended to better safeguard and protect underwater cultural heritage, the principle of *in situ* preservation actually contradicts this very objective. *In situ* preservation does nothing to protect the wreck from (1) the inevitable natural decay process, and (2) looting of illegal treasure hunters. On the contrary, salvage law is capable of obviating both threats. Under salvage law, the maritime lien incentivises salvors to report a find to the State with an interest in the underwater cultural heritage object, to obtain an injunction on other treasure hunters. Furthermore, under general admiralty principles,⁶² and article 13 of the *IMO Convention*, the salvor's promptness, skill and care in salvage efforts

⁶⁰ Vadi, *supra* note 3 at 866.

⁶¹ See Guido Carducci, "The Crucial Compromise on Salvage Law and the Law of Finds" in Robert Garabello & Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage* (The Netherlands: Martinus Nijhoff Publishers, 2003) 193 at 195.

⁶² *Supra* note 57.

determine their award. This provides an incentive for salvors to preserve the archaeological integrity of the wreck and artefacts in their operation to recover items of underwater cultural heritage from the threat of natural elements.⁶³

It must be pointed out that Rolga was under absolutely no obligation to ratify the *UNESCO Convention* in 2001, as it was (1) not representative of a global consensus in the protection of underwater cultural heritage, and (2) in its attenuation of salvage law, potentially threatens rather than protects underwater cultural heritage. By ratifying the *UNESCO Convention*, Rolga had wilfully breached their obligations to Heritage under the Heritage-Rolga Agreement.

D. THE LICENCE GRANTED TO AQUATIC INFRINGES HERITAGE'S RIGHTS TO EXCLUDE OTHERS FROM THE VICINITY OF THE VESSEL

Heritage, as the first salvor, having established an enforceable maritime lien under the applicable salvage principles as at 1995, has the right to enjoy possession of the Vessel free from the interference of other tour operators as long as salvage operations continue. Rolga's permit to the other tour operator, namely, Aquatic, infringes upon this freedom from interference. By granting Aquatic the right to organise exclusive underwater trips,⁶⁴ Aquatic could jeopardise Heritage's salvage activities, thus affecting Heritage's obligations (and their rights) under the Heritage-Rolga Agreement.

Granting the permit has immediate repercussions on Heritage's salvage operations, especially if Aquatic's expeditions contemplate photo or video taking. As emphasised in *R.M.S.*

⁶³ Moot Problem, Appendix (2), ¶5.

⁶⁴ Moot Problem, p 5, ¶2.

Titanic Inc. v. Wrecked and Abandoned Vessel,⁶⁵ given the depths at which wrecks are usually located, photography and filming is only possible by working close to the wreck with powerful lighting. There is thus “a significant risk of interference with or injury to the wreck itself”.⁶⁶ Even if Aquatic’s underwater trips did not envisage photo or video taking, it is not inconceivable that the introduction of non-qualified salvors in the vicinity of the Vessel runs the risks of such damages occurring.

Even prior to the decision of *Haver*,⁶⁷ the applicable salvage law as at 1995 when the Heritage-Rolga Agreement was signed recognised that a first salvor’s rights include “the right to exclude others from participating in the salvage operations, as long as the original salvor appears ready, willing and able to complete the salvage project, and the right to possession of the salvaged property”.⁶⁸ Heritage has gone over and beyond demonstrating its readiness, willingness and ability to complete the salvage project; they had diligently applied themselves to the task of salvage by recovering a valuable collection of twenty-one items.⁶⁹ That Rolga has collected a licence fee of USD\$30,000 from Heritage should entail Heritage having the right to carry out their salvage operations uninterrupted as well.

As Heritage has possessory lien, amply demonstrated its ability and commitment to salvage the Vessel, and has paid Rolga a licence fee, their rights as salvors should be upheld.

⁶⁵ 9 F.Supp.2d 624 (E.D. Va. 1998).

⁶⁶ *Ibid.* at 636.

⁶⁷ *Supra* note 41.

⁶⁸ *Supra* note 15 at 572.

⁶⁹ Addendum, ¶18.

Rolga should not have granted Aquatic the licence, which effectively permits Aquatic to infringe upon these salvage rights.

Under contractual principles, Rolga is bound by the Heritage-Rolga Agreement “to do all such things as are necessary on [their] part to enable the other party to have the benefit of the contract”.⁷⁰ Given that Heritage cannot effectively complete its obligations in the Heritage-Rolga Agreement without the cooperation of Rolga to prevent external parties from interfering with their performance, it can be said that the salvage of the Vessel required the joint effort of both parties, hence, “in the absence of an express contract to the contrary, each [party] will use his best endeavours to forward the accomplishment of the common object”.⁷¹ Granting Aquatic the permit hinders the accomplishment of the salvage operations contemplated by both parties.

III. HERITAGE IS ENTITLED TO THE EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE WRECK

A. THESE RIGHTS ARE CONSISTENT WITH THE PRIMARY AIM OF SALVAGE LAW, WHICH IS TO INCENTIVISE COMMERCIAL SALVAGE OPERATIONS

It is trite salvage law that the salvor-in-possession of a wreck has an exclusive right to complete their job unhindered by others.⁷² This entails having control over the wreck site,⁷³ and

⁷⁰ *Fitzgerald v. FJ Leonhardt Pty Ltd* (1997), 189 C.L.R. 215 at 219.

⁷¹ *Ford v. Cotesworth* (1868), L.R. 4 Q.B. 127.

⁷² See G. Gilmore & C. Black, *The Law of Admiralty*, 2d ed. (N.p.: West Publishing Company, 1975) at §8-1. See also, *Hener v. U.S.*, 525 F.Supp. 350 (S.D.N.Y. 1981); *The “American Farmer”* (1947), [1947] 80 Lloyd’s Rep. 672; *The Henry Ewbank*, 11 F.Cas. 1166 (CA. Mass. 1833).

⁷³ *Supra* note 67 at 627.

jurisdiction to determine who can enter the site for any purpose, and who can photograph the ship and the locale.⁷⁴

Notwithstanding the exclusive right to complete its job unhindered by others, Heritage seeks a declaration that it has the exclusive rights of photographing and document the wreck under salvage principles (“**Rights**”) on four grounds:

1. Granting Heritage these Rights is consistent with the primary aim of salvage law, which is to incentivise salvage operations

The law of marine salvage developed in response to important social policies, to “encourage efforts to save property”.⁷⁵ The rights granted to Heritage, as salvor-in-possession must adequately encourage Heritage’s efforts to save the Vessel; the extent of the rights granted must commensurate with the efforts and costs incurred in the salvage operation.

The efforts incurred in the salvage operation are extraordinary. Heritage was only able to discover the Vessel after “extensive research and study of records at the maritime archives of Astoria” and “endless survey”.

In addition to these efforts, the costs incurred in the salvage operation were exorbitant. Heritage had to make an upfront payment of no less than USD\$1,380,000 to Rolga. Enormous amounts of capital would also have been spent on locating, recovering and documenting the artefacts from the wreck. It has been observed that locating and recovering wrecks is a “multi-

⁷⁴ *Ibid.*

⁷⁵ Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2d ed. (St. Paul, Minn.: West Publishing Company, 1994) at §16-1.

billion dollar activity”.⁷⁶ The value of the artefacts recovered is insufficient to recover such high costs of recovery.⁷⁷ Had Heritage not been successful in its salvage, it would have incurred these expenses without any compensation since its agreement with Rolga was on a “no cure, no pay” basis. Because of the inherent disincentives to salvaging sunken ships, the Rights must be afforded to encourage their salvage efforts.

It is noteworthy that in the *Titanic* case, the courts, in granting the RMST as salvors the exclusive right to photograph the shipwreck, held that to “take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take art[e]facts themselves... [s]ince the photographs can be marketed like any other physical artefact.”⁷⁸ The photographing and documenting of the wreck by another party will significantly diminish and erode Heritage’s potential market. This is further exacerbated by the extensive copyright protection conferred by virtue of the *Berne Convention*⁷⁹ and *WIPO Convention*,⁸⁰ which allow the other party to enjoy the same copyright protection as its country of origin in at least 164 countries.⁸¹ This protection arises automatically without the need for any formalities.⁸²

⁷⁶ David J. Bederman, “Historic Salvage and the Law of the Sea” (1998) 30 U. Miami Inter-Am. L. Rev. 99 at 102.

⁷⁷ Moot Problem, Appendix (2), ¶1.

⁷⁸ *Supra* note 67 at 627.

⁷⁹ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221 (“**Berne Convention**”).

⁸⁰ *Convention Establishing the World Intellectual Property Organization*, 14 July 1967, 828 U.N.T.S. 3 (“**WIPO Convention**”).

⁸¹ To date, there are 164 member states of the Berne Convention, and 184 member states of the WIPO Convention. See WIPO, “Contracting Parties”, online: World Intellectual Property Organization <http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=1&treaty_id=15&treaty_id=20>.

⁸² *Berne Convention*, *supra* note 81, article 5(2).

Should these rights not be conferred upon Heritage, it is submitted that they will be forced to sell or auction off the recovered artefacts.

2. It is in the public's best interest to grant Heritage these Rights

It is in the public's best interest to grant Heritage these Rights. Firstly, it is in the public's best interest to ensure the safety of the wreck. Allowing third parties to photograph and document the wreck will invariably result in a disclosure of the location of the wreck. This will severely jeopardise the safety of the wreck. As a result, the Vessel will tragically join the rest of the wrecks in Rolgan waters which "have been the targets of illegal treasure hunting activities", subject to "rampant lootings". Rolga and Heritage were acutely aware of the need to maintain the secrecy of the wreck's location, for "security reasons". Thus, Heritage should have the Rights, to ensure the security of the wreck.

Secondly, it is in the public interest for the artefacts to be recovered swiftly and expediently, and thus for the salvage operations to be carried out without any interference. One has to be close to the wreck and with powerful lights in order to take photographs as a result of the darkness caused by the depth and location of a wreck.⁸³ A safety hazard arises when more than one expedition conducts dive operations at the site.⁸⁴ The chances of collisions and accidents happening will be greatly increased should other parties attempt to enter the wreck site to take photographs. Thus, Heritage, as salvor, should be granted this exclusive right to photograph and document the Vessel.

⁸³ *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel Believed to be the R.M.S. Titanic*, 1996 A.M.C 2497 at 2498 and 2499 (E.D. Va. 1996).

⁸⁴ *R.M.S Titanic, Inc. v. Wrecked and Abandoned Vessel Believed to be the R.M.S. Titanic*, 1998 A.M.C. 2421 at 2444 (E.D. Va. 1998).

3. Without such Rights, Heritage will suffer irreparable harm

Heritage will suffer irreparable harm if it is denied the Rights. Heritage has an ongoing television documentary deal with the International Broadcasting Company. The proceeds generated from this deal will go a long way in helping Heritage recoup its losses as salvor, and in reducing the need to sell physical artefacts as a means of financing the salvage operation.

However, the presence and activities of one tour operator Aquatic have “jeopardised their ongoing television documentary deal”.⁸⁵ By conducting exclusive underwater trips to the wreck, publishing photographs and videos on the Internet, and by commercially marketing souvenirs in the name of the wreck, Aquatic will be robbing Heritage of its exclusive association with the wreck as the salvor-in-possession. While Heritage has been working furiously to recover the Vessel, Aquatic has stepped in and stolen from Heritage the first mover advantage.

Should Heritage be denied the Rights, Aquatic will continue to build up its reputation and goodwill to the extent that images and merchandise connected to the wreck becomes associated in the mind of the public to be exclusive of Aquatic’s business. Heritage will suffer severe difficulties in future licensing, and may be liable for a host of intellectual property infringements at this stage, from the common law action of passing off, to trademark and copyright infringement. This will be an ironic – and unjust – outcome for Heritage as salvor-in-possession.

⁸⁵ Moot Problem, p 5, ¶2.

4. The only known case that denied a salvor-in-possession such Rights was wrongly decided

To the extent that the Court denied such rights to RMST in *Haver*, it is respectfully submitted that the court had erred in principle.

The court had three main considerations in their objection to granting RMST such rights, each of which were misconceived:

First, the lack of case precedents is not surprising, given that the salvage of historical wrecks, as opposed to the salvage of commercial ships, is itself a young industry. A notable academic astutely pointed out that it was only in the last 25 years that historic salvage has established itself as a regular practice.⁸⁶ Prior to Jacques Cousteau's invention of the self-contained underwater breathing apparatus (SCUBA) in 1942, it was impossible for an underwater salvage operation to be carried out. It was only with the advancements in sonar and remote submersible technology 25 years ago that historic salvage became a regular practice.⁸⁷

It is not surprising that few cases in the past have focused on the exclusive rights of photography and videoing. It was only until 1999 that the courts observed in a case that “[t]oday, as we stand on the threshold of a new millennium, technology advances permit levels of video and photographic documentation of wreck sites *unprecedented* in maritime history.”⁸⁸

⁸⁶ Justin S. Stern, “Smart Salvage” (1999-2000) 68 Fordham L. Rev. 2489 at 2493.

⁸⁷ *Ibid.* at 2494.

⁸⁸ *Alexander Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 1999 A.M.C. 69 at 73 (S.D.N.Y. 1998). Emphasis added.

For this reason, the traditional salvage law must not be slavishly applied in the context of historic salvage. Traditional salvage rights must be expanded for those who properly take on the responsibility of historic preservation.⁸⁹ Additionally, there is case precedence recognising that:⁹⁰

In the emerging deep ocean industry, information is considered valuable and proprietary. Important information includes knowledge about: (1) the location of a particular object; (2) the characteristics of a particular site; (3) technology used, including technology for location and recovery of objects.

Granting Heritage the Rights is the only way to protect this valuable and proprietary information. Allowing another party to photograph and document the Vessel will invariably cause a disclosure and leakage of this information.

Second, a distinction must be drawn between traditional commercial salvage and historic salvage. The object of commercial salvage is to save the cargo and return the ship for further use in trade.⁹¹ In historic salvage, even if the vessel was completely recovered, these ships can never be returned to the service of the sea, and their cargo is valuable only because of their antiquity and historical insight that they provide. It can be readily observed that the emphasis of traditional commercial salvage lies in its usefulness to the owner of the vessel but in historic salvage cases, the emphasis lies in the historical and archaeological value to the public.

⁸⁹ *Supra* note 67 at 636.

⁹⁰ *Columbus-America Discovery Group v. Wrecked and Abandoned Sailing Vessel S.S. Central America*, 1989 A.M.C. 1955 (E.D. Va. 1989).

⁹¹ Martin J. Norris, *Benedict on Admiralty*, 7th ed. (New York: Lexis Publishing, 1989) at §11-15 to §11-18.

The court in *Haver* was not cognisant of this crucial difference in balancing the compensation received by the salvors against the benefit obtained by the owners of the vessel wrongly. The larger and overarching public interest was overlooked in their analysis, and this proved to be fatal to the RMST's claim.

Third, the court's concern that a salvor would be less inclined to save the wreck should he be awarded these exclusive rights is unfounded, as lack of diligence will be fatal to any subsequent challenge to its rights. This was precisely the case in *Bemis v. The RMS Lusitania*.⁹² In the present case however, this issue does not even surface as there is no suggestion that Heritage has been tardy in carrying out its duties as salvor. In fact, due to Heritage's diligence in recovering and documenting the artefacts, the number of tourist visits to the National Museums of Rolga has doubled.

It is submitted that the failure to adapt traditional salvage principles to the context of historic salvage will be detrimental to this industry, and consequently be a disincentive for any future historic salvage operations. The end result can only be a decline in the salvage of these historically invaluable vessels. This will be wholly detrimental to the interest of the public. As advocated by notable academics, traditional salvage principles must be expanded to include the Rights, as this strikes the best balance between the protection of the wrecks and the protection of the rights of salvors.⁹³

⁹² *Bemis v. The RMS Lusitania*, 884 F.Supp. 1042 (E.D. Va. 1995).

⁹³ *Supra* note 90 at 2541.

B. THE SALVAGE OPERATIONS QUALIFY AS CONFIDENTIAL INFORMATION UNDER INTELLECTUAL PROPERTY PRINCIPLES, WHICH ROLGA SHOULD NOT HAVE DIVULGED TO AQUATIC

Rolga is liable for a contractual breach of confidence and a common law breach of confidence. Apart from Heritage, only Rolga knew the location of the wreck.

Rolga then granted Aquatic the permit to conduct exclusive underwater tours to the wreck, and revealed the location of the wreck to Aquatic. This disclosure was performed in breach of confidence.

1. Clause 10 of the Heritage-Rolga Agreement imposes on Rolga a contractual obligation of confidence

Clause 10 stipulates that all information “*relating*” to the Heritage-Rolga Agreement, and “all documents *relating to its execution*” are to be confidential. This includes information relating to the location of the wreck. Rolga has breached this contractual obligation of confidence by disclosing the location to Aquatic.

2. The common law action for breach of confidence also applies

The common law for breach of confidence will also apply in this situation as the three elements required are satisfied:⁹⁴

a. The information has the necessary quality of confidence

⁹⁴ *Coco v. AN Clark (Engineers) Ltd* (1968), [1969] R.P.C. 41 at 45.

The location of the wreck was unknown to any other party apart from Heritage and Rolga, prior to the breach of confidence by Rolga. This information was secret in all senses of the word. It was also of commercial value to Heritage, given that a leakage would jeopardise the safety of the wreck due to the rampant lootings of historic wrecks in Rolgan waters. These two factors would render the information as having the necessary quality of confidence.

b. The information was imparted in circumstances importing an obligation of confidence

The test to be applied is that of the reasonable man test,⁹⁵ and a reasonable man in Rolga's shoes would clearly know that the location of the wreck conveyed in confidence. This stems from the efforts of extensive search and high costs that Heritage had to incur to locate the wreck, and also that Heritage kept the location of the wreck a secret from the public due to "security reasons".

c. The unauthorised use of the information is to Heritage's detriment

No license or approval was given to Rolga by Heritage. Hence, Rolga's disclosure of the location of the wreck to Aquatic was unauthorised. This has caused clear detriment to Heritage, as the wreck will may now be susceptible to the looting. Further, the disclosure of the location has allowed Aquatic to erode into Heritage's rights to photographing and documenting the wreck.

⁹⁵ *Ibid.*

IV. THE CALCULATION OF PROFITS SHOULD BE MADE SOLELY ON THE BASIS OF SALVAGE PRINCIPLES

The Government of Rolga has unfairly distributed the recovered artefacts *contrary* to the Heritage-Rolga Agreement,⁹⁶ and it is submitted that the calculation of profits should be derived solely from the agreement between the two parties.

A. HERITAGE ASSERTS THAT THE DISTRIBUTION OF ARTEFACTS SHOULD NOT BE GUIDED BY THE *UNESCO CONVENTION*

Article 2(7) and Rule 2 of the *UNESCO Convention* limits the salvor's ability to enforce its maritime lien. "Commercial exploitation" is expressly prohibited. This affects the ability of Heritage to enforce their lien and recover their salvage award, *despite* having expended large amounts of resources and bore all expenses in discovering and recovering items from the Vessel on faith of the Heritage-Rolga Agreement. Inequity results. Heritage thus submits, that Rolga was under no obligation to ratify the *UNESCO Convention*, and in so doing, had wilfully infringed upon their salvage rights, under which Heritage is entitled to a salvage reward under the terms of the Heritage-Rolga Agreement. Even if Rolga was wholly justified in ratifying the *UNESCO Convention* and include it as part of the binding law of Rolga, article 28 of the *Vienna Convention on the Law of Treaties*⁹⁷ makes clear that short of a contrary intention expressed within *the UNESCO Convention*, the *UNESCO Convention* does not have retrospective effect on the rights of Heritage to a salvage reward, when such rights were established in 1995 either under the Heritage-Rolga Agreement or by salvage principles.

⁹⁶ Moot Problem, p 6, ¶1.

⁹⁷ *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331.

B. UNDER SALVAGE PRINCIPLES, HERITAGE IS ENTITLED TO THE PROPORTION OF ARTEFACTS AS STIPULATED IN THE HERITAGE-ROLGA AGREEMENT

Articles 6 and 7 of the *IMO Convention* recognise that salvage contracts will remain enforceable as any other contractual agreement. In the salvage of the HMS *Sussex*,⁹⁸ a partnering agreement was signed between the salvors, Odyssey and the government of the United Kingdom, authorising Odyssey to salvage the HMS *Sussex*, a historic British warship that sank off Gilbatar in 1694. In that case, the agreement similarly allocated to Odyssey 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. This agreement was upheld. The HMS *Sussex* case demonstrates therefore that such partnering agreements are in the commercial interests of both contracting parties. Thus, in the absence of any evidence establishing an inequitable agreement, Rolga is bound to honour the terms of the Heritage-Rolga Agreement.

Also, it appears from the face of the contract that Heritage would not be additionally remunerated for its salvage efforts, despite having to bear the burden of most the costs⁹⁹ and the hefty deposits it had to place with Rolga.¹⁰⁰ It thus follows that the incentive of having to share in the remaining artefacts was the primary reason why Heritage would even accede to such an agreement in the first place. The apportionment of artefacts was contemplated by both parties to be a fair exchange for Heritage's salvage efforts. Hence, Rolga should be held to the Heritage-Rolga Agreement and should distribute to Heritage its respective share of the artefacts.

⁹⁸ See Odyssey Marine Exploration, *HMS Sussex Project Overview*, online: Odyssey Marine Exploration website <<http://shipwreck.net/hmssussex.php>>.

⁹⁹ Moot Problem, Appendix (1), ¶7.

¹⁰⁰ Moot Problem, Appendix (1), ¶3.

Specifically, Heritage submits that they should receive their respective share of 60% of the artefacts as envisaged under the Heritage-Rolga Agreement, given that the appraised value of the artefacts is in excess of USD\$500 million.¹⁰¹ Heritage recognises, in the interest of the protection of underwater cultural heritage, that Astoria and Rolga do have, as part of the Astoria-Rolga Agreement, an interest in preserving a representative sample of the artefacts in their museums.¹⁰² It is submitted that Heritage is claiming its 60% share of the artefacts, in respect of artefacts, which are available in numerically larger quantities, leaving artefacts in numerically small quantities for preservation purposes in museums. Such an arrangement enables rights under the Heritage-Rolga Agreement and Astoria-Rolga Agreement to be upheld in the most equitable manner possible, without compromise on the over-arching principle of protection of underwater cultural heritage.

¹⁰¹ Addendum, ¶10.

¹⁰² Moot Problem, Appendix (2), ¶2, ¶5 and ¶6.

PRAYER FOR RELIEF

For the foregoing reasons, the Claimant, Heritage Inc, respectfully requests this Honourable Arbitral Tribunal to:

1. **DECLARE** that the Astoria-Rolga Agreement, the ratification of the *UNESCO Convention*, and allowing Aquatic to organise and make profits from visiting activities to the site is inconsistent with the Claimant's rights under the Heritage-Rolga Agreement executed in 1995;
2. **DECLARE** that the Claimant has exclusive rights of photographing and documenting of the *Coeur de l' Ocean*; and
3. **DECLARE** that the calculation of profits and/or distribution of artefacts between the Parties is to be made solely on the basis of salvage legal principles, as reflected in the Heritage-Rolga Agreement.

Respectfully submitted,

Agent for the Claimant, F2070