

**INTERNATIONAL CENTER OF ARBITRATION**

HO CHI MINH CITY, VIETNAM

**THE 2009 LAWASIA  
INTERNATIONAL MOOT COMPETITION**

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**THE CASE CONCERNING THE COEUR DE L' OCEAN**

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**BENEVOLENT HERITAGE INC**

**Applicant**

**v.**

**THE GOVERNMENT OF ROLGA**

**Respondent**

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**MEMORIAL FOR THE RESPONDENT**

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## **STATEMENT OF JURISDICTION**

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

Article 10 of the Heritage-Rolga Agreement provides that disputes between the Government and Heritage 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 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 the UNCITRAL Arbitration Rules of 1976.

Accordingly, Heritage and the Government accepts IAC’s jurisdiction.

**QUESTIONS PRESENTED**

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Rolga respectfully asks the Arbitral Tribunal:

1. Whether the purported recognition of Astoria's original ownership of or continuing interest in the *Coeur de l' Ocean* ("the Vessel") in the 2001 Agreement between Astoria and Rolga ("**Astoria-Rolga Agreement**") are inconsistent with the 1995 Agreement between Heritage and Rolga ("**Heritage-Rolga Agreement**") given that:
  - a. As between Heritage and Rolga, Rolga had always been considered the owner of the Vessel; and
  - b. Heritage's ownership rights, if any, were only to arise upon completion of the salvage.
  
2. Whether Rolga's actions in entering into the Astoria-Rolga Agreement and the UNESCO Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001) ("**UNESCO Convention**") subsequent to the Heritage-Rolga Agreement has prejudiced Heritage's salvage rights given that, consistent with the objective of the former two agreements to preserve and promote underwater cultural heritage:
  - a. The Heritage-Rolga Agreement never contemplated Heritage possessing any maritime lien over the Vessel;
  - b. The Heritage-Rolga Agreement had always contemplated that the freedom to distribute the artefacts would be circumscribed;

- c. The Heritage-Rolga Agreement had never guaranteed Heritage the ability to exclude reasonable tours to the Vessel; and
  - d. The Heritage-Rolga Agreement never granted Heritage the exclusive right to photograph or document the Vessel.
3. Whether the distribution of the artefacts in accordance with the principles articulated in the Astoria-Rolga Agreement and the UNESCO Convention are consistent with the Heritage-Rolga Agreement.

## **STATEMENT OF FACTS**

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### ***The loss and discovery of the Vessel***

The Vessel was led by Captain Van Cleef of the Astorian empire in 1800 to conquer the ancient trading city of Zamzala, now part of the territory of the State of Rolga. Astoria was victorious, and the Vessel took off with large shipment of treasures harvested as fruits of the war effort, which were to be used to finance Astoria's other military adventures. The Vessel sank *en route* to another destination in Rolgan waters. Rolga gained independence from Astoria on 7<sup>th</sup> November 1959.

In 1990, Heritage a commercial company with Bernard Bodd as a major shareholder, submitted, as required by law, a proposal to the Rolga Cultural Heritage for approval to begin research of the Vessel, with the aim of eventually recovering it. After some research and study of Astoria's maritime records, the Vessel was located in 1993.

### ***The Heritage-Rolga Agreement***

Heritage's discovery led to the signing of the Heritage-Rolga Agreement in 1995. This Agreement authorized Heritage to salvage the Vessel and its accompanying artefacts. It was a commercial agreement between two sophisticated parties and it contained no allusion whatsoever to any expectations other than those set forth in the document. The key aspects of the Agreement relevant to Heritage's unfounded criticisms of Rolga include:

- As between the contracting parties, Rolga would "at all times" be considered the owner of the Vessel.

- Heritage may enjoy the usage of the name “Coeur de l’ Ocean” for merchandise provided it pays Rolga a fee equal to 3% of its gross sales of merchandise. Nowhere does the contract say this was an exclusive right.
- Heritage will also be entitled to own and possess its relative share of the artefacts, depending on the aggregate amount of the appraised values for the artefacts and the net proceeds of any sales of artefacts. Such ownership rights would only arise after the salvage had been completed; and the rights of ownership were clearly circumscribed to the extent that any marketing or distribution of the artefacts had to be done in agreement with Rolga.
- No other rights to exclude Rolga’s ability to grant permits for underwater tours to the site are articulated in the Agreement.

Both parties had concluded this Agreement after arms’ length negotiations and there is no suggestion of any duress. Rolga had and has full intention to commit itself to the terms of the Agreement and only the terms Agreement.

***Rolga entered into an agreement with Astoria in 2001***

In 2001, Rolga signed the Astoria-Rolga Agreement. Under this Agreement, all legal titles to Astorian ancient wrecks lying off the coast of Rolga were transferred from Astoria to Rolga, which confirmed Rolga’s ownership of the Vessel. Astoria, however, retains a “continuing interest” in the artefacts as it was interested in the appropriate distribution of the salvaged artefacts for historical and other cultural purposes.

***Rolga ratified the UNESCO Convention***

Rolga ratified the UNESCO Convention on 9<sup>th</sup> January 2005. This was in line with Rolga's extant commitment to the protection of its cultural heritage that also saw the passing of a new law in 2000 to protect the wrecks of historical and cultural significance to Rolga, by empowering the Minister to designate an area as a restricted area if he was satisfied the relevant conditions were met.

***Rolga allowed Aquatic to organize and make profits from visiting activities to the site***

Rolga did grant Aquatic a permit to organize underwater trips in order to expand access to the Vessel.

## **SUMMARY OF PLEADINGS**

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Despite having signed a commercial, binding agreement with Rolga that carefully delineates parties' rights, Heritage now seeks more than its share by contending for rights that do not appear in the agreement; nor are they even universally agreed to be part of the *jus gentium* of international law so that they should be implied into the agreement.

First, the Astoria-Rolga Agreement affects nothing in the commercial arrangement between Heritage and Rolga. The purported transfer of title is irrelevant to Heritage since it never had title. As between Heritage and Rolga, Rolga was considered the owner of the Vessel "at all times." Even under the law of finds, Heritage cannot possibly show that the Vessel, which served a military purpose, had been expressly abandonment to establish title under law of finds. Moreover, the exception of sovereign immunity would apply to deny title to Heritage.

Even if Heritage asserts that they had, at minimum, acquired rights under the laws of salvage, such rights are not inconsistent with Astoria's or Rolga's ownership of the Vessel. Indeed, the law of salvage was not uniformly accepted as legitimate as of 1995, particularly as it related to historic or war wrecks. Even if it had been, sovereign immunity would again apply to negate its operation. Also, salvage principles have consistently not been applied to historic wrecks such as the Vessel.

Second, to the extent that the Rolga-Astoria Agreement suggests a method of distribution that best showcases the artefacts consistent with the UNESCO Convention, the Rolga-Heritage Agreement already envisioned that Rolga could direct Heritage in the

disposal of their share of the remaining artefacts. Moreover, the shift towards the principles articulated by the UNESCO Convention was already in motion as of 1995. Rolga therefore rejects the contention that the method of distribution envisaged by the Astoria-Rolga Agreement is contrary to the letter and spirit of the Rolga-Heritage Agreement.

Third, Heritage cannot claim to have expected *exclusive* rights to photograph and document the Vessel, or to exploit it commercially. Nothing in the Rolga-Heritage Agreement says this. Even if the salvage principles did apply, such exclusive rights were not envisioned as part of general salvors' rights; and indeed, would be contrary to the recognition that the purpose of salvaging historic wrecks is to expand, not limit, access. Moreover, the means by which Heritage was to be compensated are clearly spelt out in the agreement and its attempt to seek greater "compensation" by hoarding rights of commercial exploitation is simply opportunistic and disproportionate to its efforts.

## PLEADINGS

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### I. **ROLGA HAS NOT INTERFERED WITH HERITAGE’S (LACK OF) TITLE WHEN IT ENTERED INTO THE ASTORIA-ROLGA AGREEMENT**

#### A. **AS BETWEEN HERITAGE AND ROLGA, ROLGA HAS ALWAYS BEEN CONSIDERED THE OWNER OF THE VESSEL**

To the extent that the Astoria-Rolga Agreement, which purports to transfer title to the Vessel to Rolga, may be said to be contrary to the terms of the Heritage-Rolga Agreement because it impliedly recognises that Astoria, not Rolga, owned the Vessel, this is simply untrue.

As between Heritage and Rolga, Rolga has always been considered the owner of the Vessel. This is evident from the Heritage-Rolga Agreement and is completely consonant with the customary international law of state succession and the legal consequences of cessions of territory.

The Heritage-Rolga Agreement, which governs the relationship between Heritage and Rolga, recognizes that Rolga is the owner of the Vessel. This is clearly evinced in Clause 5 of the Heritage-Rolga Agreement which states, “the Government shall at all time be considered the owner of the shipwreck”.

Clause 5 is completely consonant with the customary international law of state succession and the legal consequences of cession of territory. *Restatement (Third) of the Foreign Relations Law of the United States* (“**Restatement**”) provides that<sup>1</sup>:

- (1) Subject to the agreement between predecessor and successor states, title to state property passes as follows:

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<sup>1</sup> *Restatement (Third) of the Foreign Relations Law of the United States* § 209(a) (1987).

- a. Where part of the territory of a state becomes territory of another state, property of the predecessor state located in that territory passes to the successor state.

Furthermore, Article 14 of the *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*<sup>2</sup> (“**Vienna Convention**”) provides, that “[w]hen part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between them.”<sup>3</sup> But, “in the absence of such an agreement...immovable property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor States.”<sup>4</sup>

Hence, under customary international law (as codified by the *Vienna Convention and Restatement*), title to the Vessel would have passed from Astoria to Rolga when Rolga gained independence from Astoria on 7<sup>th</sup> November 1959. This occurred even before the Astoria-Rolga Agreement caused an explicit cession of the Vessel. Paragraph 5 of the agreement simply confirms that Rolga always had title to the Vessel, and that Heritage was cognizant of Rolga’s title. Accordingly, there is no basis on which Heritage could possibly claim ownership of the Vessel except as provided in paragraph 5.

**B. EVEN IF ASTORIA WAS CONSIDERED THE HISTORICAL OWNER OF THE VESSEL,  
HERITAGE WOULD NOT HAVE TITLE**

Even if it could be argued that the Heritage-Rolga Agreement was factually wrong, and Astoria should be considered the true, historical owner of the Vessel, this does not affect

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<sup>2</sup> *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331.

<sup>3</sup> *Ibid.* at Article 14(1).

<sup>4</sup> *Ibid.* at Article 14(2)(a).

any of the contractual rights that Heritage may claim under the Heritage-Rolga Agreement. If Heritage is claiming title to the Vessel under the law of finds, the rule of sovereign immunity under customary international law would apply to the Vessel to defeat Heritage's claim. Accordingly, the Astoria-Rolga Agreement, which purports to transfer legal title from Astoria to Rolga does not interfere with Heritage's (lack of) title.

1. The rule of immunity of sunken warships confirms that title remains with Astoria

Heritage does not have any rights apart from rights under the Heritage-Rolga Agreement. There is no consistent practice to imply into the Agreement rights that have not already been provided for in the Agreement. Therefore, Heritage does not have any legitimate expectations of additional rights apart from contract.

In determining the rights to sunken warships, several "building blocks"<sup>5</sup> are to be considered:<sup>6</sup>

- As warships, they deserve the immunities granted by general international law;
- As wrecks, they are governed by the general rules of underwater cultural heritage;
- As an object in territorial waters, the rights and obligations of flag and coastal states influence the rules to give effect to the basic premise of international law of equality of all sovereign states;<sup>7</sup>

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<sup>5</sup> Mariano J. Aznar-Gómez, "Legal Status of Sunken Warships "Revisited", (2003) 9 SYIL 61 at 65.

<sup>6</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. U.S.)*, [1984] I.C.J. Rep. 246 at 299 and *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] I.C.J. Rep. 73 at 76.

<sup>7</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States In Accordance with The Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8082 (1970).

The principle of sovereign immunity has been historically accepted both by tribunals<sup>8</sup> and doctrine.<sup>9</sup> Articles 32, 95 and 236 of the 1982 *UN Convention on the Law of the Sea* (“*LOSC 1982*”)<sup>10</sup> preserve the immunity of warships. Also, Article 16 of the 1991 ILC Draft Articles on Jurisdictional Immunities of States and Their Property,<sup>11</sup> confirms that warships, naval auxiliaries, and other ships owned or operated by a State, and used exclusively on government non-commercial service enjoy immunity. It is thus established law that warships enjoy immunity with regard to any action brought against them before the domestic courts of other nations.<sup>12</sup>

In the context of *sunken* warships, they do not lose their immunity by the mere fact of their sinking.<sup>13</sup> The application of the law of salvage and the law of finds to sunken war vessels has not only been criticized by doctrine,<sup>14</sup> but has also been rejected by State practice both domestically and internationally. In the United States, the law of salvage and the law of finds generally do not apply to those wrecks governed by the Abandoned Shipwreck Act

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<sup>8</sup> See Marshall CJ in the *Schooner Exchange v McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

<sup>9</sup> Moore, *Digest of International Law*, vol. 2 (1906), pp 571-82.

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

<sup>11</sup> *Yearbook of the International Law Commission 1991*, vol. 2, part 2 (New York: UN, 1989) (UNDOC. A/46/10).

<sup>12</sup> *Supra*, n 5 at 64.

<sup>13</sup> *Ibid.*

<sup>14</sup> As said by two specialists on the subject: "As the case-law now stands, the commercial orientation of salvage law produces some most undesirable results with respect to the underwater cultural heritage." Lyndel V. Prott & Patrick J. O'Keefe, *Law and the Cultural Heritage: Discovery and Excavation*, vol 1 (N.p.: Butterworths Law, 1984). See also Ricardo J. Elia, "US Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects" (2000) 29 *Int'l. J. Nautical Archaeology* 43.

(“ASA”).<sup>15</sup> This is because “admiralty principles are not well-suited to the preservation of historic and other shipwrecks to which this Act applies. The same could be said, for example, about the domestic legislation of States, such as Spain, Portugal, France, Australia, China, Italy, South Africa, Tunisia, Israel and the United Kingdom.<sup>16</sup> The Council of Europe's Parliamentary Assembly also recommended avoiding commercial recovery operations.<sup>17</sup>

The Vessel was used as a warship in wartime. Even if it is not a warship, it is a vessel of military character and hence, deserves immunity since it maintains the *jure imperii vocatio*.<sup>18</sup> The Vessel maintains its military character because weapons, including cannon balls, swords, and cannons were found in the Vessel.

The practice of States and the status of international conventions currently in force have confirmed the view that the rule of immunity still applies on sunken warships, even when located in territorial waters of another State.<sup>19</sup>

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<sup>15</sup> 43 U.S.C. §2101-06 (1994). The ASA expressly rejects the application of maritime laws of salvage and finds, if the shipwreck has been abandoned. See 43 U.S.C. §2106(a) (‘The law of salvage and the law of finds shall not apply to abandoned wrecks to which section 2105 of this title applies.’ See *Fairport International Exploration, Inc. v. Shipwrecked Vessel known as The Captain Lawrence*, 105 F.3d 1078 at 1084 (6<sup>th</sup> Cir. 1997), vacated and remanded in light of *Deep Sea Research*, 118 S. Ct. 1558 (1998), remanded in light of *Deep Sea Research*, 177 F.3d 491 (6<sup>th</sup> Cir. 1999).

<sup>16</sup> See, for a general survey, Sarah Dromgoole, ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (The Hague: Kluwer Law International., 1999).

<sup>17</sup> Council of Europe, P.A., *Recommendation 1486(2000) Maritime and fluvial cultural heritage*, paragraph 13(v),(vi).

<sup>18</sup> See, for example, the *U.S. Foreign Service Immunities Act*, 28 U.S.C. §1611(b)(2) (1976).

<sup>19</sup> *Supra* n 5 at 83.

2. In the alternative, the law of finds does not award title of the Vessel to Heritage

Even if sovereign immunity is found inapplicable, the law of finds does not award title of the Vessel to Heritage because Astoria had not abandoned the Vessel and hence retained title.

United States jurisprudence reflects the requirement for express abandonment. In *Sea Hunt, Inc v. Unidentified Shipwrecked Vessel or Vessels*,<sup>20</sup> the court was required to determine whether Spain had abandoned title to the wrecks of the *La Galga* and *Juno*.<sup>21</sup> The Fourth Circuit Federal Court of Appeals referred to the decision in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*<sup>22</sup> in which it was held that although abandonment could be inferred in the case of “long lost” shipwrecks, such an inference would not be sustained where a previous owner came forward and asserted a proprietary interest. The court endorsed that decision and the application of the express abandonment theory.

Significantly, the District Court in the *Sea Hunt* case had found that the 1763 Definitive Treaty of Peace expressly evinced an intention to transfer ownership of the *La Galga* to the United Kingdom.<sup>23</sup> The court endorsed *Sumimoto Shoji American, Inc. v Avagliano*,<sup>24</sup> in which the court had found that “when the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty

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<sup>20</sup> 221 F.3d 634 (4<sup>th</sup> Cir., 2000); 2000 AMC 2113.

<sup>21</sup> See Kyle Salvador Sclafani, “*Sea Hunt, Inc. v. Unidentified Shipwrecked Vessels*: Defining a Standard of “Abandonment” for the Shipwreck of a Sovereign” (2000-2001) 25 Tul. Mar. L.J. 559.

<sup>22</sup> 974 F.2d 450 (4<sup>th</sup> Cir. 1992).

<sup>23</sup> *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999).

<sup>24</sup> 475 U.S. 176 (1982).

language, we must *absent extraordinarily strong contrary evidence*, defer to that interpretation.”<sup>25</sup> Thus, the court found that Spain had not expressly abandoned title to the *La Galga*.

Astoria, the historical owner of the Vessel, had not expressly abandoned the vessel before 1993 when Heritage located the wreck. That Astoria asserted that it was the successor to the property and assets of the Astorian ancient wrecks in the Astoria-Rolga Agreement is further proof. Even if it had been abandoned, the mechanism of abandonment must be by a bilateral agreement between Astoria and Rolga. Yet this was not provided for in the Astoria-Rolga Agreement.

In the absence of the requisite express abandonment, Heritage does not obtain title to the Vessel.

**C. THE ASTORIA-ROLGA AGREEMENT DOES NOT INTERFERE WITH HERITAGE’S  
(LACK OF) TITLE**

The Astoria-Rolga Agreement (1) transfers legal title from the Vessel from Astoria to Rolga and (2) grants Astoria a “continuing interest” in the articles recovered from the Vessel.

Given that it has been established that Heritage did not, and could not have, obtained title, the transfer of legal title of the Vessel from Astoria to Rolga does not interfere with Heritage’s non-existent title.

With regard to the “continuing interest” that Astoria professes to have in the artefacts, the Astoria-Rolga Agreement is simply an inter-government understanding that the Vessel is of historical interest to Astoria, and does not necessarily give Astoria a legally enforceable right that would ultimately affect the rights of Heritage under the Heritage-Rolga Agreement. The continuing interest clause is similar to that found in *The Agreement between the*

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<sup>25</sup> *Ibid* at 185.

*Netherlands and Australia concerning Old Dutch Shipwrecks* (“**Netherlands-Australia Agreement**”).<sup>26</sup> The Netherlands-Australia Agreement was signed by and entered into force between the governments of Australia and Netherlands on 6 November 1972. Under the Netherlands-Australia Agreement, the Netherlands, which is identified as the successor to the property and assets of the vessel in question, transfers all title to, and Australia accepts all title in, the wrecked vessels and articles. However, Australia also recognises that the Netherlands has a “*continuing interest*” in the articles recovered from the wrecks. A separate annexed document, the ‘Arrangement’, set out the principles for distributing recovered articles between the parties. Similar to the Guiding Principles,<sup>27</sup> these principles include an acknowledgment that the collective importance of an archaeological site far outweighs the value of the individual pieces and that a major part of the historical value of individual objects is their relationship within a site. Therefore, the “continuing interest” is not a contractual right *per se* but an understanding between the two governments as to the proper treatment of the artefacts. Even if the interest is legally enforceable, it is only enforceable as between the two governments. Heritage’s rights under the Heritage-Rolga Agreement are not affected by it. Furthermore, in agreeing to clause 5 of the Heritage-Rolga Agreement, Heritage was cognisant that it will not have title to the artefacts, which includes the Vessel, *except* when the aggregate amount of the appraised values for the artefacts and the net proceeds of any sales of artefacts exceed forty-five million dollars. Distribution of the artefacts was, in any event, circumscribed by the terms of the Heritage-Rolga Agreement.

Therefore, the Astoria-Rolga Agreement does not interfere with Heritage’s (lack of) rights.

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<sup>26</sup> *Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks*, Australia and Netherlands, 6 November 1972, A.T.S. 1972 No 18.

<sup>27</sup> Moot Problem, Appendix (2).

**II. IN THE ALTERNATIVE, ROLGA HAD NOT INTERFERRED WITH HERITAGE INC'S SALVAGE RIGHTS AND PERFORMANCE UNDER THE HERITAGE-ROLGA AGREEMENT**

**A. HERITAGE INC HAD NOT LAWFULLY ESTABLISHED A MARITIME LIEN UNDER THE PREVAILING LAW OF SALVAGE AS OF 1995**

1. The law of salvage was not the applicable law governing the recovery of the Vessel as of 1995

To the extent that the Astoria-Rolga Agreement and/or the UNESCO Convention call for a re-examination of the law of salvage, Heritage never had any recourse to salvage rights because its rights are restricted solely to the Heritage-Rolga Agreement. Even if the legal background existing at the time could be implied into the agreement, salvage law principles would not have been applicable to the recovery of the Vessel as of 1995.

Firstly, it is inaccurate to claim that the law of salvage attained any semblance of uniformity such that it could be assimilated into international maritime practice. The holding in *R.M.S. Titanic v Haver*<sup>28</sup> stating that salvage law is part of the *jus gentium* is factually incorrect as “there is little evidence that the law of salvage and finds has been accepted by more than a few common law systems”.<sup>29</sup> Even if broad principles of salvage law have been applied by various states for a substantial period, the specific rules as to how and when the rules apply differ across states.<sup>30</sup> The general principles have only been consistently applied

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<sup>28</sup> 171 F.3d 943 (4<sup>th</sup> Cir., March 24, 1999) at 960.

<sup>29</sup> James A.R. Nafziger, “The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck”, (2003) 44 Harv. Int'l L.J. 251 at 261.

<sup>30</sup> Craig Forrest, “Historic Wreck Salvage: An International Perspective” (2009) 33 Tulane Mar.L.J. 347 at 356.

by the United States.<sup>31</sup> Additionally, while salvage law is a singular institution in common law countries, in civil law regimes it consists of several different regimes.<sup>32</sup> If anything, such divergence points more clearly to the fact that the application of salvage law is a domestic concern, rather than a unified law of nations.<sup>33</sup>

Secondly, even if there is a uniform practice constituting *jus gentium* for the law of salvage with respect to wrecks in general, the fact that the Vessel is a state vessel or warship renders the law of salvage inapplicable, as the Vessel enjoys sovereign immunity, as discussed above.<sup>34</sup> It is also submitted that Article 4(1) of the 1989 International Convention on Salvage (“**1989 Convention**”), to which Rolga and Astoria are party to,<sup>35</sup> evinces the established rule within international practice. It states 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.”

The Vessel in the present case has been established to be a warship, and short of an express provision to the contrary, the 1989 Convention is inapplicable in the present context to give Heritage any rights.

Thirdly, even if the Vessel is not found to be a warship that enjoys sovereign immunity, and even if there was a *jus gentium* for the law of salvage in respect of wrecks of

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

<sup>32</sup> 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: Before and After the 2001 UNESCO Convention* (The Netherlands: Martinus Nijhoff Publishers, 2003) at 196.

<sup>33</sup> See John Reeder, ed., *Brice on Maritime Law on Salvage*, (London: Sweet & Maxwell, 2003) at paragraphs 1-100 to 1-101. The English authorities treat the English law of salvage as simply a matter of English domestic law.

<sup>34</sup> See above Section I(B)(1).

<sup>35</sup> Moot problem, ¶17.

general, it does not necessarily follow that such principles have been applied to the historic wrecks<sup>36</sup> or articles of underwater cultural heritage<sup>37</sup> (“UCH”). Treasure salvage is only a phenomenon of recent times, flourishing only with the development of modern technology in the late 1940s.<sup>38</sup> As such there is no customary practice, much less *jus gentium*, which could possibly have developed to deal with the recovery of historic wrecks. That specific rules in relation to recovery of historic wrecks vary widely across jurisdictions is further proof of this. For example, the High Court of Ireland in *In re La Lavia*<sup>39</sup> concluded that the wreck of three Spanish galleons which sunk in 1588 “had passed out of the realm of commercial maritime law and into archaeological law long before they were found ... in 1985.”<sup>40</sup> Thus, the courts declined to apply salvage law principles. Likewise, the Singapore High Court in *Simon v Taylor* denied the salvors’ claims by refusing to apply salvage law to recovery of historic wrecks where such operations are merely for commercial interests.<sup>41</sup>

While article 303(3) the *LOSC 1982* purports to retain the law of salvage in respect of archaeological and historical objects found at sea, it does not in any way recognize the law of salvage as a uniform body of law. In fact, article 303(3) goes only far as to establish that for articles of UCH within the territorial sea, the maritime rules of the coastal State prevails over that of the flag state, and hence the application or exclusion of salvage laws is solely

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<sup>36</sup> The definition of “historic wreck” varies widely. One definition defines it as “lost vessels and cargoes, objects which may have both considerable monetary and archaeological significance.” See 8 *Benedict on Admiralty* §13.07 (New York: Matthew Bender 7<sup>th</sup> ed., 2002).

<sup>37</sup> *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 2 November 2001, 41 I.L.M. 37. Defined in Article 1(1)(a) as articles reposed underwater for more than 100 years.

<sup>38</sup> Craig Forrest, “Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?”, (2003) 34 *J. Mar. L. & Com.* 309 .

<sup>39</sup> [1999] 3 I.R. 413 (H. Ct. 1995) (Ir.) (Lexis, Irish Reported and Unreported Cases).

<sup>40</sup> *Ibid*, at Headnote.

<sup>41</sup> [1975] 2 *Lloyd's Rep.* 338 at 344–345.

determined by national law.<sup>42</sup> Different states could apply or exclude the application of salvage law to UCH.

Notably, article 30(1)(d) of the 1989 Convention, which appears to have consolidated existing customary salvage law, expressly allows parties to the convention to reserve application of the 1989 Convention in relation to historic wrecks. This opt-out mechanism evinces a lack of consensus in the international arena that is fatal to any claim that a *jus gentium* exists.<sup>43</sup> Even as early as 1978, the Council of Europe had opted to exclude the law of salvage to protect UCH at a national level.<sup>44</sup>

Finally, policy reasons militate against the application of the law of salvage in relation to historic wrecks and/or articles of UCH.<sup>45</sup> At the core of salvage law lies the principle that a salvor must be compensated for rescuing marine property in marine peril. Preservation of UCH was never the objective of salvage law, and as such, there is little impetus for salvors to undertake operations in an archaeologically responsible manner. Although recently, the degree to which salvors strive to protect the archaeological and historical value of the wreck and items salvaged, has been added<sup>46</sup> to the list of *Blackwell* requirements<sup>47</sup> for determining

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<sup>42</sup> Anastasia Strati, *The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague: M. Nijhoff Publishers, 1995) at 125.

<sup>43</sup> 21 out of the 57 contracting states have, as of 31 Dec 2008, made a reservation on the application of art 30(1)(d). These nations include maritime powers such as the United Kingdom. See International Maritime Organization, *Status of Multilateral Conventions and Instruments In Respect Of Which The International Maritime Organization Or Its Secretary-General Performs Depository Or Other Functions*, retrieved from: [http://www.imo.org/includes/blastData.asp/doc\\_id=1006/Status%20-%202008.pdf](http://www.imo.org/includes/blastData.asp/doc_id=1006/Status%20-%202008.pdf).

<sup>44</sup> Council of Europe, P.A., 18<sup>th</sup> sess. *Recommendation 848 (1978) on the underwater cultural heritage*.

<sup>45</sup> *Supra*, n 42 at 45 – 47.

<sup>46</sup> *Supra*, n 22.

<sup>47</sup> *The Blackwell*, 77 U.S. 13 (1869) at 14. There are 6 criteria in determining the salvors award, in the absence of an agreement, namely (i) Labour expended by salvor, (ii) promptness, skill and energy of the salvor, (iii) value of property employed by salvors and the danger to which it was exposed, (iv) risk incurred by the salvor, (v) value of the property saved, (vi) degree of danger from which it was saved.

salvage award, its effectiveness is at best equivocal.<sup>48</sup> Salvage law also permits the dispersal of unique collections before proper documentation and study of the materials can be done. Once the salvor brings salvaged property within the admiralty court's jurisdiction to enforce its maritime lien, the court has wide latitude to execute the lien and "sell the property, or if the sale of the property would prove insufficient to compensate the salvor fairly, the court can award title...to the salvor."<sup>49</sup> Also, the profits derived from the sale of salvaged property are often channelled back to fund more salvage activity, thus perpetuating the depredation of UCH.<sup>50</sup> This is precisely the state of affairs in the present case, where some of the recovered artefacts were auctioned off to partly finance the costs of the project.<sup>51</sup> Far from safeguarding UCH, the law of salvage poses a greater threat to UCH and thus, should not govern the recovery of UCH.

2. Even if salvage principles did apply to historic wrecks, Heritage would still have failed to meet the requirements for a salvage award

Even under the assumption that salvage law could apply to the recovery of historic wrecks, Heritage would still have to establish the following to qualify for a salvage award:

- (i) a marine peril;
- (ii) service voluntarily rendered when not required as an existing duty; and

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<sup>48</sup> See Paul Fletcher-Tomenius et al., "Salvor in Possession: Friend or Foe to Marine Archaeology?", (2000) 9 Int'l J. Cultural Prop. 263 at 292. Even if the courts have the best interest to safeguard a wreck's archaeological value, the reality remains that in some instances this objective may be better served by leaving the wreck undisturbed instead. It is conceded that salvage activity tends to undermine "archaeological resource management". Attempts to gather and catalogue useful archaeological data have been disappointing, hence it is difficult at any rate for the court to establish any reliable benchmark for determining the salvage award.

<sup>49</sup> *Supra*, n 28 at 966.

<sup>50</sup> *Supra*, n 42 at 46.

<sup>51</sup> Moot problem, ¶6.

- (iii) success in whole or in part, or that the service rendered contributed to such success.<sup>52</sup>

Traditionally, the notion of marine peril was that of sinking. While it is conceded that it would be “extreme and unacceptable to set the irrefutable presumption that UCH is never in peril”, historic wrecks and UCH items immobilized on the seabed do not quite meet the threshold of marine peril. Notwithstanding the US court’s wide interpretation of marine peril which includes sunken ships, their cargoes, and even UCH,<sup>53</sup> other jurisdictions have decided otherwise. For example, the Canadian Court in *The Queen in Right of Ontario v Mar-Dive Corp*,<sup>54</sup> the court held that a wreck embedded on the riverbed was not at risk of marine peril by remaining there, and went so far as to say that unskilled salvage operations posed a greater threat. Also, an American court in *Subaqueous Exploration & Archaeology Ltd v The Unidentified, Wrecked and Abandoned Vessel*<sup>55</sup> held that “marine antiquities which have been undisturbed for centuries” are not under marine peril.

In the absence of any reservation made under article 30(1)(d), the 1989 Convention can apply to UCH, but that does not necessarily lead to the irrefutable presumption that UCH is, by default, in peril. That proof of the nature and degree of danger is a necessary requirement to determine the quantum of the salvors’ reward is also indicative that there is no presumption of marine peril, whether for contemporary sunken wrecks or UCH.

It is submitted that only in exceptional cases where UCH is subjected to human or natural external elements, such as when UCH was located under a heavily-used waterway in

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<sup>52</sup> *The Sabine*, 101 U.S. 384 (1879).

<sup>53</sup> See *Treasure Salvors I, Treasure Salvors, Inc. v The Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (5<sup>th</sup> Cir. 1978) at 337; *Cobb Coin II, Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982) at 557 and 561.

<sup>54</sup> 1997 AMC 1000 (Ont. Ct. 1997) at 1062-63.

<sup>55</sup> 577 F. Supp. 597 (D. Md. 1983) at 611.

shallow waters, should UCH be presumed to be under marine peril.<sup>56</sup> In the present case, the Vessel is not in such threatening conditions, notwithstanding that some pieces of artefacts may be in need of conservation.<sup>57</sup> Furthermore, its actual location was not made known to the public, and thus any threat of illegal looting resulting in damage to the wreck is minimal. It is noteworthy that the government of Rolga had passed a new law in 2000 to protect wrecks of historical and cultural significance which may be threatened by unauthorized interference.<sup>58</sup> That the Rolgan government had yet to invoke the law by designating the area around the Vessel as a restricted area reflects an implied acquiescence that the Vessel was not under threat.

Thus, the failure to satisfy the element of marine peril is fatal to Heritage's claim that a valid maritime lien and right to salvage award has been established.

**B. THE SIGNING OF THE ASTORIA-ROLGA AGREEMENT DOES NOT INTERFERE WITH HERITAGE INC'S RIGHTS**

The Heritage-Rolga Agreement in no way bars Rolga from entering Astoria-Rolga Agreement. Also, it has already been established that the Heritage-Rolga Agreement does not interfere with Heritage's lack of title. As Heritage could not have established a maritime lien over the Vessel, it did not even have a possessory interest over the vessel. Even if Heritage had a maritime lien, the Astoria-Rolga Agreement which vests title of the Vessel in Rolga is not inconsistent with Heritage's rights. The lien does not in any way give Heritage title over the Vessel.

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<sup>56</sup> *Supra*, n 32 at 201.

<sup>57</sup> Moot problem, Appendix (2), ¶3.

<sup>58</sup> Moot problem, ¶8.

While the Astoria-Rolga agreement vests rights in the artefacts in Rolga, and recognizes that Astoria has a continuing interest in the artefacts recovered from the vessel, it still does not interfere with Heritage's right to own and possess its relative share of the remaining artefacts. Paragraph 5 of the Heritage-Rolga Agreement describes the distribution of artefacts once the appraised values for the artefacts and the net proceeds of any sales of the artefacts exceed forty-five million dollars. Firstly, Heritage will be entitled to own and possess its relative share of the remaining artefacts, *and* both Heritage and Rolga must endeavour to formulate a joint marketing plan for the placement and sales of the remaining artefacts. Read together, this means that Heritage does not have unfettered autonomy to dispose of its share of the artefacts in any manner it so pleases. Heritage necessarily has to work with Rolga to determine the sale and placement of all remaining artefacts, even those that constitute their relative share. This clause evinces a common recognition by both parties that recovered artefacts should not be simply be disposed of in the open market, and that the integrity of cultural artefacts should be maintained for cultural purposes.

The Astoria-Rolga agreement thus does not in any way denigrate from the Heritage-Rolga Agreement. It contemplates that recovered artefacts should as far as possible be retained as a representative collection and deposited in the National Museums of Astoria and Rolga.<sup>59</sup> Rolga is thus entitled to be guided by these principles to formulate a joint marketing plan with Heritage, and direct Heritage to dispose of its share of the artefacts as contemplated in the Heritage-Rolga Agreement. Heritage's assertion that their rights have been infringed is an unjustified attempt to deny Rolga's legitimate exercise of its rights over the artefacts.

Additionally, it is submitted that the Astoria-Rolga agreement was contracted purely for the benefit of the two party states, and was binding on the two party states and no other. It was not intended to give Heritage any legally enforceable rights against either of the States.

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<sup>59</sup> Moot Problem, Appendix (2), ¶1 and ¶2.

**C. THE RATIFICATION OF THE UNESCO CONVENTION DOES NOT INFRINGE UPON  
HERITAGE RIGHTS**

Prior to the UNESCO Convention, articles 303 and 149 of the LOSC 1982 were the only international law provisions safeguarding objects of archaeological and historical nature found at sea.<sup>60</sup> Collectively, they imposed general duties on states to protect such articles and cooperate for such a purpose. Yet, the LOSC 1982 has been widely criticized as being ineffectual as it lacked a practical enforcement mechanism.<sup>61</sup> Aside from its internal inconsistencies,<sup>62</sup> article 303(4) of the LOSC 1982 encourages the emergence of new international agreements and to better define the rights and obligations of states in respect of articles of UCH.<sup>63</sup> In fact, as early as 1988, the International Law Association (“ILA”) began drafting a Convention for the protection of UCH, which provided the inspiration for the UNESCO Convention.<sup>64</sup> It was thus abundantly evident that the law was moving towards binding international agreements for the protection of UCH. Rolga’s ratification of the UNESCO Convention was thus consistent with the international community’s commitment to this common objective, which had been a domestic priority for Rolga since as early as 1990.<sup>65</sup>

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<sup>60</sup> Sarah Dromgoole, “UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: implications for commercial treasure salvors”, (2003) L.M.C.L.Q 317 at 320.

<sup>61</sup> Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters* (The Hague: T.M.C. Asser Press, 2002) at 64.

<sup>62</sup> Tullio Scovazzi, “A Contradictory and Counterproductive Regime”, in Robert Garabello & Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (The Netherlands: Martinus Nijhoff Publishers, 2003) at 9. These inconsistencies include, *inter alia*, how Article 149 advocates the protection of UCH “for the benefit of mankind as a whole” yet Article 303(3) preserves the law of salvage which arguably serves personal objectives for commercial gain.

<sup>63</sup> *Supra*, n 29 at 269.

<sup>64</sup> *Supra*, n 60.

<sup>65</sup> Moot Problem, ¶4. As early as 1990, Rolga already had a Cultural Heritage Committee to regulate and approve all survey or recovery or excavation projects involving historical objects or sites.

Given that Rolga may exercise its right under paragraph 5 of the Heritage-Rolga Agreement to direct Heritage as to its preferred method of disposal of the artefacts, Rolga's ratification of the UNESCO Convention simply requires it to be guided by the UNESCO Convention as it exercises that right.

Article 2 of the UNESCO Convention defines some of these legal boundaries, providing that "[u]nderwater cultural heritage shall not be commercially exploited". Rule 2 defines this prohibition:-

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

It is thus abundantly clear from the provisions that any sale of recovered UCH or any action that leads to the irretrievable dispersal of UCH will be an infringement of the Convention.<sup>66</sup> The only exceptions to this prohibition are the provision of professional archeological services and other disposal authorized by the authorities.<sup>67</sup>

Thus under Rule 2, the only permissible disposal of UCH is the sale of an entire collection of recovered artefacts, to museums or other "competent authorities" where the artefacts would be professionally treated to safeguard its cultural integrity and be "available for professional and public access".<sup>68</sup> It thus appears that the UNESCO Convention is entirely consistent with the Astoria-Rolga Agreement, in which the primary objectives are to ensure the preservation of the artefacts as a collection as far as possible in museums or similar

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<sup>66</sup> *Supra*, n 60 at 332.

<sup>67</sup> *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 2 November 2001, 41 I.L.M. 37, Rule 2(a)-(b).

<sup>68</sup> *Ibid.* Annex to the UNESCO Convention, Rule 33.

institutions,<sup>69</sup> where members of the public and scholars may access the material.<sup>70</sup> Taken together with the earlier conclusion that the Astoria-Rolga agreement is consistent with the Heritage-Rolga Agreement, it is thus submitted that the ratification of the UNESCO Convention does not interfere with Heritage's rights, but provides the backdrop as to how Rolga may exercise its right to direct Heritage on the disposal of its share of the recovered UCH.

**D. THE TERMS OF THE PERMIT THAT ROLGA HAD GRANTED AQUATIC VIEW DO NOT INTERFERE WITH HERITAGE'S RIGHTS UNDER THE HERITAGE-ROLGA AGREEMENT**

Given that Heritage's rights are limited to that of the Heritage-Rolga Agreement, the permit granted by Rolga to Aquatic View in no way interferes with Heritage's rights. Firstly, under the Heritage-Rolga Agreement, there is no clause prohibiting Rolga from entering into a separate agreement over the wreck. Such a clause may not be implied in, as it fails the business efficacy test.<sup>71</sup> Neither can such a term be said to be "so obvious that it goes without saying". Hence it cannot be implied into the Agreement via the officious bystander test.<sup>72</sup>

Secondly, paragraph 6 of the Heritage-Rolga Agreement only grants Heritage the right to use the name of the wreck. The permit granted by Rolga to Aquatic View only pertains to the organisation of "underwater trips" to the wreck, and therefore in no way infringes on Heritage's rights. Furthermore, paragraph 6 does not grant Heritage *exclusive* rights to use the name of the wreck, and hence Aquatic View's composition of the song

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<sup>69</sup> *Supra*, n 59.

<sup>70</sup> Moot Problem, Appendix (2), ¶5.

<sup>71</sup> *The Moorcock* (1889) 14 P.D. 64 at 68.

<sup>72</sup> *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 K.B. 206 at 227.

entitled 'Coeur de l' Ocean' is not inconsistent with Heritage's rights. Heritage is still free to exploit the name of the wreck and compose a song that will enjoy copyright protection in states who are party to the Berne and WIPO Conventions.

### **III. HERITAGE DOES NOT ENJOY EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE VESSEL**

#### **A. THE HERITAGE-ROLGA AGREEMENT DOES NOT GRANT HERITAGE THESE RIGHTS**

As submitted above, any rights that Heritage may have with regard to the wreck are to be derived solely from the Heritage-Rolga Agreement. Under the Agreement, there is nothing to suggest that Heritage has been granted any rights to photographing and documenting the wreck. There is no such term in the Agreement, and this term may not be implied in, given that it is not necessary for the contract to be performed and hence fails the business efficacy test. If such rights were envisaged by both parties, there would most definitely have been an express clause to that effect, given that both parties are experienced commercial entities.

From the Heritage-Rolga Agreement, the intentions of both parties are clear: Heritage is to recoup their costs from the division of artefacts pursuant to paragraph 5, and from exploiting the name of the wreck in association with sales and marketing of merchandise pursuant to paragraph 6. If both parties had envisaged additional methods of recouping Heritage's costs, an express term would in all likelihood have been included to that effect.

#### **B. EVEN UNDER SALVAGE LAW PRINCIPLES, HERITAGE WILL NOT BE ENTITLED TO THE EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE VESSEL**

Even if Heritage was found to have established rights under salvage law principles, a salvor is not entitled to these exclusive rights of photography and documentation of the wreck. To date, only the case of *R.M.S. Titanic v Haver*<sup>73</sup> supported the proposition that such

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<sup>73</sup> *Supra*, n 28.

rights are within salvors' rights, but this decision was subsequently overturned on appeal to the Fourth Circuit court.

On appeal, the learned judge criticised the district court's expansion of salvage rights to include these exclusive rights, and highlighted that the court was not aware of any case in the United States or in the body of *jus gentium* that supported this unjustified expansion.<sup>74</sup> Furthermore, the judge offered four additional reasons for not awarding a salvor such rights even if the property being saved is of an inadequate value to compensate the salvor.

Firstly, such rights are not within the scope of the court's award of compensation and reward.<sup>75</sup> Secondly, awarding these rights would convert what was designed as a salvage operation on behalf of the owners, into a self seeking operation serving the salvors. Thirdly, these rights would run counter to the purpose of salvage, as salvors would be less inclined to save the property because they might obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to view it. Fourthly, even if the court was prepared to assume that the salvors had full title to the wreck (as would be the case if the law of finds were applied), this title would not include the right to exclude others from viewing and photographing it, given that the wreck was located in a public area.<sup>76</sup>

These reasons are fully applicable to the present facts. To award these rights to Heritage would entitle them to a windfall, especially given the extremely broad copyright protection conferred upon photographs and images of the Vessel by the Berne and WIPO Conventions. These Conventions will allow Heritage to enjoy the same copyright protection

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<sup>74</sup> *Ibid* at 969.

<sup>75</sup> *Ibid* at 970.

<sup>76</sup> *Ibid*.

as in its country of origin<sup>77</sup> in at least 164 countries.<sup>78</sup> This protection arises automatically without the need for any formalities.<sup>79</sup>

Also, Heritage had a five-year head-start to obtain the first mover advantage in the sales and marketing of merchandise, photographs and videos associated with the wreck. This they have chosen not to do. Even if Aquatic View were to take the first step in marketing of the merchandise, Heritage still has a very substantial untapped market, as Aquatic View's customer base stands at a mere 25 customers, which is unlikely to pose a serious challenge to Heritage's market share worldwide.

Finally, it bears emphasis that Heritage is an experienced salvor, and awarding them these rights which are not stipulated in the contract would be to allow an unjustified departure from the Heritage-Rolga Agreement.

Additionally, it is submitted that even if the lower court's decision in *R.M.S. Titanic v Haver* remained good law, it does not apply to the present facts. Firstly, in that case, the salvor RMST had to capitalise on a "weather window" from June to August.<sup>80</sup> They could not embark on salvage operations after this "weather window" period, thus this factor persuaded the court to grant them exclusive rights. However in the present case, there is no such indication of a "weather window" limiting Heritage's ability to salvage the Vessel. Consequently, there is a much weaker case for Heritage to obtain exclusive entry to the Vessel. A proper scheduling can be worked out between the parties who have been granted a licence to enter the site, resulting in a win-win situation for all parties.

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<sup>77</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221, Article 5(1).

<sup>78</sup> To date, there are 164 member states of the Berne Convention, and 184 member states of the WIPO Convention.  
[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](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)

<sup>79</sup> *Supra*, n 77, Article 5(2).

<sup>80</sup> *R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624 (E.D. Va. 1998) at 627.

Secondly, RMST had entered into an agreement with the governments of France and Britain not to sell the items found. The court stated that as RMST was not “selling artefacts like traditional salvors, it must be given the rights to other means of obtaining income.”<sup>81</sup> This crucial factor is absent in the present case, as Heritage had agreed to enter into a joint marketing plan for the placement and sales of the artefacts. Furthermore, Heritage also has the right, pursuant to the Heritage-Rolga Agreement, to exploit the name of the wreck in association with the sales and marketing of merchandise. Hence, it cannot be said that Heritage has no other means of obtaining income and was disadvantaged by the Heritage-Rolga Agreement.

Finally, RMST took extensive steps in preserving the artefacts and exhibiting them to the public, and the courts noted that RMST’s efforts “benefit[ed] the public more than the requisite on-site archaeological preservation would do.”<sup>82</sup> In the present case, Heritage clearly falls short of this standard. First, “many of the artefacts (e.g. Chinese porcelains) were destroyed” due to Heritage’s poor handling.<sup>83</sup> Second, Heritage had unilaterally sold some of the artefacts, causing a loss of archaeological interest in these artefacts once they are removed from their context.<sup>84</sup> This is in violation of a basic archaeological principle that artefacts found together should be kept together for posterity, instead of allowing private individuals to acquire private rights to the material.<sup>85</sup> In the present case, on-site archaeological preservation would be more beneficial to the public.

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<sup>81</sup> *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel Believed to be the R.M.S. Titanic*, 1996 A.M.C 2497 (E.D. Va. 1996).

<sup>82</sup> *Ibid.*

<sup>83</sup> Moot Problem, ¶10, read with ¶34 of the Further Clarifications.

<sup>84</sup> *Supra*, n 42 at 46.

<sup>85</sup> *Supra*, n 60 at 325. .

**IV. THE DISTRIBUTION OF ARTEFACTS ACCORDING TO THE PRINCIPLES ARTICULATED IN THE ROLGA-ASTORIA AGREEMENT AND THE UNESCO CONVENTION ARE CONSISTENT WITH THE HERITAGE-ROLGA AGREEMENT**

Following the above conclusion that the law of salvage does not govern the Heritage-Rolga Agreement, Heritage does not qualify for a salvage award, and hence neither the *Blackwall* principles<sup>86</sup> nor Article 12 to 13 of the 1989 Convention will apply to determine Heritage's share of the artefacts. The distribution should instead be strictly governed by the Heritage-Rolga Agreement and the agreement alone.

As submitted above, the Heritage-Rolga Agreement is not in any way frustrated by the Astoria-Rolga agreement, given that the Heritage-Rolga Agreement already contemplates that Rolga is entitled to have certain priorities in mind in the distribution and sale of the artefacts. It was the common intention of parties that recovered artefacts should not be simply be disposed of in the open market, and that the integrity of cultural artefacts should be maintained for cultural purposes. Given the equal sophistication of both Rolga and Heritage as contracting parties, it is highly conceivable that both parties were perfectly cognizant of their rights and obligations at the time of contracting. Thus, any attempt by Heritage to deviate from the Heritage-Rolga Agreement should not be entertained.

Similarly, the Astoria-Rolga Agreement is consistent with the States' obligations under the UNESCO Convention, and the ratification of the UNESCO Convention does vary any parties' rights and obligations both under the Astoria-Rolga Agreement and the Heritage-Rolga Agreement.

It is submitted that there is nothing inherently inequitable in adhering strictly to the sharing arrangement as envisaged in the Heritage-Rolga Agreement. In the case of the HMS

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<sup>86</sup> *Supra*, n 47.

*Sussex*,<sup>87</sup> where a partnering agreement was signed between the salvors, Odyssey, and the UK government, authorizing Odyssey to salvage The *Sussex*, a historic British warship that sank off Gilbatar in 1694. The sharing arrangement in that case mirrors that in the present case, and was found to be an equitable arrangement contracted for commercial reasons between parties of equal bargaining power. Short of any other suggestion of inequity, the contracted agreement should be adhered to.

Accordingly, Rolga submits that the remaining artefacts should be divided in the proportion of 40/60 in Heritage's favour, as envisaged under paragraph 5 of the Heritage-Rolga Agreement, given that the appraised value of the artefacts is in excess of US\$500 million.<sup>88</sup> Rolga submits that "remaining artefacts" refers to the artefacts left:

- (i) after allocation of numerically scarce artefacts that ought to be preserved together as a collection to the museums of Astoria and Rolga, and
- (ii) after the sale of any of the artefacts.

As mentioned, given that it was within both parties' contemplation that Rolga would prioritize the overarching objective of conservation of UCH, Rolga submits that Heritage should only claim its 60% share of the artefacts only in relation of those artefacts which are in numerical abundance. Items which are numerically scarce should be, in accordance with the Astoria-Rolga Agreement and the UNESCO Convention, be allocated to the museums instead.

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<sup>87</sup> See generally Odyssey Marine Exploration--Deep Ocean Shipwreck Experts Web Site, <http://www.shipwreck.net.sussex.html>.

<sup>88</sup> Moot Problem, Further Clarifications, ¶10.

**V. PRAYER FOR RELIEF**

For the foregoing reasons, the Respondent, the State of Rolga, respectfully requests this Honourable Arbitration Tribunal to:

1. **DECLARE** that the Astoria-Rolga Agreement is not inconsistent with the Claimant's rights under the Heritage-Rolga Agreement;
2. **DECLARE** that the ratification of the UNESCO Convention does not infringe upon the Claimant's rights under the Heritage-Rolga Agreement;
3. **DECLARE** that the terms of the permit that Rolga had granted Aquatic View do not interfere with Heritage's rights under the Heritage-Rolga Agreement;
4. **DECLARE** that the Claimant does not have exclusive rights of photographing and documenting of the *Coeur de l' Ocean*;
5. **DECLARE** that the calculation of profits and/or distribution of artefacts between the Parties is not to be made solely on the basis of salvage legal principles, but only on the basis of the Heritage-Rolga Agreement.

Respectfully submitted,

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Agent for the Respondent, F2070