

INTERNATIONAL CENTER OF ARBITRATION

THE INTERNATIONAL FINALS

OF

THE 4<sup>TH</sup> LAWASIA MOOT COMPETITION 2009

BENEVOLENT HERITAGE, INC.

(CLAIMANT)

v.

THE GOVERNMENT OF ROLGA

(RESPONDENT)

**MEMORIAL FOR THE RESPONDENT**

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2009

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## STATEMENT OF JURISDICTION

Although the arbitral tribunal has the competence to decide on issues regarding its jurisdiction, it is confined to those disputes reasonable contemplated by the agreement of the parties, as expressed in the arbitration clause.<sup>1</sup> It is critical that the arbitral tribunal remain within the bounds of the arbitration agreement, else run the risk that the award will be refused recognition and enforcement.<sup>2</sup> In this light, the absence of a dispute precludes the exercise of jurisdiction by the arbitral tribunal,<sup>3</sup> for to act otherwise would evidently derogate from what was agreed upon by the parties.

Under the 1995 Partnering Agreement Memorandum, the parties have agreed to refer to arbitration any dispute and/or difference.<sup>4</sup> The absence of any difference and/or dispute necessarily bars the commencement of arbitration. In line with this, the Respondent respectfully requests that this arbitral tribunal refrain from exercising its jurisdiction for want of any existing dispute and/or difference.

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<sup>1</sup> A. REDFERN AND M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 159 (1999).

<sup>2</sup> *Id.*

<sup>3</sup> F.A. MANN, NOTES AND COMMENTS ON CASES IN INTERNATIONAL LAW, COMMERCIAL LAW, AND ARBITRATION, 19 (1992).

<sup>4</sup> *Partnering Agreement Memorandum (“Partnership Agreement”), Clause 10.*

## QUESTIONS PRESENTED

The following questions are respectfully submitted to the arbitration tribunal for resolution:

- 1) Whether or not the Arbitral Tribunal has jurisdiction given that there exists no dispute and/or difference;
  
- 2) Whether or not Respondent has interfered with the Claimant's rights and performance under the 1995 Partnering Agreement Memorandum when it ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, when it entered into an Agreement with the state of Astoria in 2003, and when it issued a permit to Aquatic View to organize wreck dives to the shipwreck Coeur de l' Ocean;
  
- 3) Whether or not the Claimant enjoys exclusive rights of photographing and documenting the shipwreck Coeur de l' Ocean; and
  
- 4) Whether or not the distribution of artefacts solely on the basis of salvage legal principles was envisaged by the 1995 Partnering Agreement Memorandum.

## **STATEMENT OF FACTS**

### **Coeur de l' Ocean**

Lying within 12 nautical miles off Rolga's coast, the Coeur de l' Ocean is an Astorian warship, laden with precious cargoes of commercial shipments and other war booty. In 1800, whilst enroute from Zamzala to another destination, the vessel sank due to the onslaught of a monsoon.

### **Rolga gains independence**

On 7<sup>th</sup> November 1959, Rolga, which now has territorial jurisdiction over Zamzala, gained independence from Astoria and has henceforth prospered on agriculture and tourism. In addition to several of its islands being listed under the 1972 World Natural and Cultural Heritage Convention for their rich biodiversity and ecosystem values, remnants of World War II scattered in its maritime waters make it an extremely popular destination among wreck divers. Such wrecks however are facing peril from rampant lootings and illicit treasure hunting activities, trawl-net fishing and natural elements.

### **Coeur de l' Ocean is Discovered**

In 1990, Mr. Bernard Bodd, an Astorian salvor and major shareholder of Benevolent Heritage, Inc. ('Heritage'), a Rolgan corporation with expertise in historic wrecks recovery, submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of certain wrecks belonging to the era of Astorian expansion. Said proposal included the highly coveted Coeur de l' Ocean, thus, it was well-received by the Rolgan Government.

### **Entry into the 1995 Partnering Agreement Memorandum**

On 27th September 1995, the Government of Rolga and Heritage, signed a “Partnering Agreement Memorandum,” which vested latter with certain rights in order to conduct its salvage operations. Though the Agreement contemplated a “joint marketing plan,” such plan never materialized.

### **Successful Retrieval of Coeur de l’ Ocean Artefacts**

Upon approval of salvage project plan and compliance with the requisites laid down in Clause 3 of the 1995 Agreement, Heritage commenced operations and succeeded in recovering thousands of artefacts, some of which have been auctioned off.. Part of the profits generated was distributed among the parties, while the rest were used to partly finance the project expenses. Many artefacts were showcased in a maritime exhibit in the National Museum of Rolga

### **New Law to Protect Historical and Cultural Wrecks**

In 2000, Rolga passed a new law to protect wrecks of historical and cultural significance to Rolga, on the basis of the developments leading to the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, which Rolga delayed in ratifying. This law authorizes the Minister of Rolga Cultural Heritage to designate a certain site as “restricted area”, should he found cause therefor. However, the wreck site of the Coeur de l’ Ocean has not yet been designated as a “restricted area”

### **Entry into a Bilateral Agreement with Astoria**

In 2001, the Rolga entered into an agreement on the “Protection of Astorian Wrecks”, without notifying Astoria about the 1995 Agreement. The Bilateral Agreement sought to protect historic wrecks. Pursuant to this Agreement, Astoria ceded all its right, title and interest in and to Astorian shipwrecks lying on or off Rolga’s coast, while Rolga recognized the former’s “continuing interest” in articles retrieved from the said shipwrecks. However, such recognition of Astoria’s interest is limited to historical and other cultural purposes. Also, the “Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks off the Coast of Rolga” was signed to guide the parties as to the proper manner of conserving the artefacts.

### **Rolga Licenses Aquatic View’s Commercial Activities**

In 2001, Rolga granted Aquatic View, a specialized tour operator, to organize and profit from wreck divers to view the shipwreck to promote public awareness on the significance of underwater cultural heritage. Aquatic View, then, (1) took photographs and made video clips of the wrecks, (2) posted the images as promotional materials for the tours on their website, and (3) made and marketed CD souvenirs of “Cour de l’ Ocean”. Heritage Inc. complained to the Rolgan Historic Monument Executive Agency about Aquatic View’s activities. However, being understaffed, the Agency has not yet attended to this matter.

### **Submission to Arbitration**

By 2003, Heritage realized that further investment in efforts, time and money into other Astorian wrecks would only be harmful to the company. Though there was no compliance yet with the

condition precedent that the Parties to the 1995 Agreement attempt to reach mutual understanding and agreement, Heritage Inc. immediately referred the dispute to arbitration pursuant to Clause 10 of the 1995 Agreement.

## SUMMARY OF PLEADINGS

The Claimant cannot invoke the jurisdiction of the Arbitral Tribunal for failure to satisfy a condition precedent. This condition precedent is the failure to reach a mutual understanding and agreement between the parties as stipulated in the Arbitration Agreement. Moreover, the Claimant has not exhausted all efforts to satisfy this condition precedent.

Granting that the condition precedent has been met, the Arbitral Tribunal does not have jurisdiction because no dispute exists between the parties. The Respondent has not interfered with the Claimant's rights and performance under the 1995 Partnering Agreement. First, the ratification of the 2001 UNESCO Convention (UCPUCH) does not prevent the Claimant from conducting its salvage operations. It allows the Respondent to comply with pre-existing obligations and is not retroactive. Its provisions do not impair the Claimant's contractual rights under the 1995 Agreement. The mandate on *in situ* preservation and information sharing is not absolute and limited. In any case, the Respondent did not designate the wreck site as "restricted area". Second, The Respondent did not encroach on the Claimant's contractual rights when it entered into the Bilateral Agreement with Astoria. It honors its contractual obligations under the 1995 Agreement because it excluded the Coeur de l' Ocean from the Bilateral Agreement and its recognition of Astoria's interest is limited. As a treaty, the Bilateral Agreement operates prospectively. In case Astoria gets representative samples, the retrieved artefacts are sufficient to compensate the Claimant. Third, the Respondent's licensing of Aquatic View's commercial activities does not divest the Claimant of its right to conduct salvage operations. Aquatic View

has not obstructed Claimant's operations's activities do not obstruct Claimant's salvage operations.

Moreover, the Claimant does not enjoy exclusive rights of photographing and documenting the shipwreck. The Respondent did not grant exclusive rights of photographing and documenting under the 1995 Agreement. The Claimant's copyright over its original works is exclusive. The Claimant's original works in the exercise of its right to photograph and document is protected by the 1886 Berne Convention. Such protection is limited only to the Claimant's output. Consequently, the Respondent has the right to permit other parties to photograph and document the shipwreck Coeur de l' Ocean. In any case, assuming that Claimant has exclusive rights to photograph and document, these exclusive rights were lost when many of the artefacts were destroyed due to poor handling.

Lastly, the distribution of artefacts solely on the basis of salvage legal principles was not envisaged by the 1995 Partnering Agreement Memorandum. The 1995 Partnering Agreement did not contemplate a salvage service. The shipwreck was not subject to marine peril and the efforts were not successful. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is read into the 1995 Partnering Agreement. As a monist state, Respondent's ratification of the 1982 UNCLOS provides the treaty with the same force and effect as municipal law. The provisions of the 1995 Partnering Agreement Memorandum, particularly the Sharing Arrangement, is subject to and qualified by the 1982 UNCLOS.

## **PLEADINGS**

### **ARGUMENTS ON JURISDICTION**

#### **I. Claimant cannot invoke the jurisdiction of the arbitral tribunal for failure to satisfy a condition precedent.**

There are instances where an arbitration clause provides for procedural requirements to be complied with by the parties prior to the commencement of the arbitral process.<sup>5</sup> An example is that which requires prior negotiations to resolve differences.<sup>6</sup> Non-compliance with these procedural requirements of the arbitration agreement is considered a jurisdictional defect affecting the arbitral proceedings.<sup>7</sup> The Claimant has not complied with one such procedural requirement expressly stated in the arbitration clause under the 1995 Partnering Agreement.

##### **A. The arbitration agreement requires, as a condition precedent to the exercise of the arbitral tribunal's jurisdiction, the failure to reach mutual understanding and agreement by the parties.**

Under the arbitration agreement between the Claimant and Respondent, “[a]ny differences, discrepancies, and disputes” will only be “referred to and/or decided by the arbitration” “should

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<sup>5</sup> Jacobs, R., *Should Mediation Trigger Arbitration in A Multi-Step Alternative Dispute Resolution Clause?*, 15 AM. REV. INT’L ARB. 161, 179 n.77 (2004); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, AT 841 (2009).

<sup>6</sup> Figueres, D., *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, 14 ICC INT’L CT. ARB. BULL. 71 (2003); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, AT 841 (2009).

<sup>7</sup> Tibor Varady, *The Courtesy Trap Arbitration “If No Amicable Settlement Can Be Reached”*, 14 J. INT’L ARB. 5 (1997); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, AT 842 (2009).

the parties be unable to reach mutual understanding and agreement”.<sup>8</sup> It is clearly evident that a condition precedent to arbitration has been agreed to by the parties – i.e. failure to reach mutual understanding and agreement.

**B. The Claimant has not exhausted all efforts to satisfy this condition precedent.**

The non-compliance with procedural requirements for commencing or conducting arbitration will affect the ability of the Claimant to pursue any reference to arbitration.<sup>9</sup> The Claimant has pre-maturely sought relief under the arbitration agreement without exhausting all efforts to arrive at a mutual understanding and agreement, as required by the arbitration agreement. The Claimant has proceeded to commence arbitration without awaiting the resolution of its complaint filed with the Rolgan Historic Monument Executive Agency.<sup>10</sup> Moreover, the Claimant hastily seeks to refer the matter to arbitration even as the parties have already taken steps at finalizing the distribution of retrieved artefacts.<sup>11</sup>

**II. Granting that the condition precedent has been met, the Arbitral Tribunal does not have jurisdiction because there exists no dispute and/or difference between the parties.**

An arbitration agreement authorizes an arbitral tribunal to resolve disputes that fall within the confines of that agreement.<sup>12</sup> It is of essence that an arbitrator exercises his/her jurisdiction

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<sup>8</sup> *Partnering Agreement, Clause 10.*

<sup>9</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, AT 847 (2009).

<sup>10</sup> *Moot Problem (“Problem”), pPar.11.*

<sup>11</sup> *Problem, par.12.*

<sup>12</sup> A. REDFERN AND M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, AT 159 (1999).

strictly within the bounds of this agreement.<sup>13</sup> It should be noted, however, that the absence of a genuine dispute necessarily precludes the commencement of arbitration.<sup>14</sup>

The Claimant and Respondent, under the 1995 Partnering Agreement Memorandum, have mutually agreed to submit any difference, discrepancy, and dispute to arbitration.<sup>15</sup> However, the Arbitral Tribunal does not have jurisdiction for there is no dispute and/or difference between the parties arising under the 1995 Partnering Agreement Memorandum.

**A. The Respondent has not interfered with the Claimant's rights and performance under the 1995 Partnering Agreement Memorandum.**

The Respondent has not performed any acts which interfered with the contractual rights and performance of the Claimant. In fact, Respondent has complied with its obligations under the 1995 Partnering Agreement Memorandum.

**1. The ratification of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage does not prevent Claimant from conducting its salvage operations.**

Respondent pondered on the impact of the UCH provisions on its pre-existing contractual obligations towards the Claimant. Hence, it took a long time in ratifying the Convention as it made sure that such act will not infringe upon Claimant's salvage rights and hamper its operations.

**i. The Convention allows a sphere for the Respondent to comply with pre-existing obligations.**

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<sup>13</sup> *Id.*

<sup>14</sup> G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, AT 848 (2009); A. REDFERN AND M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, AT 159 (1999).

<sup>15</sup> *Partnering Agreement, Clause 10.*

UCH does not impose upon a State to perform what lies beyond its capabilities.<sup>16</sup> Considering that Respondent is bound to recognize Claimant's rights and performance under the 1995 Agreement, then Respondent only needs to comply with UCH mandates, insofar as they don't encroach upon Claimant's contractual rights. Respondent has placed primordial consideration on such rights that it has taken such a long time before it ratified the UCH.<sup>17</sup>

**ii. UCH is non-retroactive.**

Being a treaty, UCH cannot infringe Claimant's rights because it operates prospectively.<sup>18</sup> Furthermore, UCH itself has bound the Respondent to comply with its treaty obligations under the Convention long after the 1995 Agreement was signed.<sup>19</sup>

**iii. The UNESCO provisions do not impair the Claimant's contractual rights under the 1995 Agreement.**

The UCH provisions on *in situ* preservation and information sharing are not absolute. The circumstances surrounding the salvage operations of the Coeur de l' Ocean fall within the exceptions. Hence, the provisions do not impair any of the Claimant's contractual rights.

**a. The mandate on in situ preservation is not absolute.**

UCH prescribes *in situ* preservation of underwater cultural heritage (i.e. in its original location) as a first and preferred option before allowing activities directed at the heritage.<sup>20</sup>

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<sup>16</sup> UNESCO Convention on the Protection of the Underwater Cultural Heritage ("UNESCO CPUCH"), Art. 2 par.4; *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage – Frequently Asked Questions*, pp.6-7.

<sup>17</sup> *Problem*, par.16; *Further Clarifications to the Moot Problem ("Further Clarifications")*, par.14.

<sup>18</sup> *Vienna Convention on the Law of Treaties*, Art. 2(a) and 28.

<sup>19</sup> UNESCO CPUCH, Art.27; *Problem*, par.16 and *Further Clarifications*, par.28.

<sup>20</sup> UNESCO CPUCH, Art.2, par.5; *Rules Concerning Activities Directed at Underwater Cultural Heritage*, Rules 1 and 4; *UNESCO Convention on the Protection of Underwater Cultural Heritage – Frequently Asked Questions*, p.

Nonetheless, the recovery of underwater cultural heritage may be authorized if it is necessary to ultimately protect the heritage.<sup>21</sup> In this case, since the retrieval of the Coeur de l' Ocean artifacts is imperative in order to protect the artifacts from rampant lootings and illicit treasure hunting activities,<sup>22</sup> trawl-net fishing<sup>23</sup> and the action of the elements,<sup>24</sup> then retrieval of the artefacts is warranted.

**b. The mandate on information sharing is limited.**

The UCH mandate to share information with other States is limited to training in underwater archaeology, transfer of technologies and technology transfer and raising public awareness concerning the significance of UCH, as well as to the protection and management of such heritage.<sup>25</sup> The need to report and coordinate with other States starts from sites located on the seabed seawards from the territorial sea.<sup>26</sup> UCH respects the coastal State's exclusive right to regulate activities in their internal and archipelagic waters and their territorial sea.<sup>27</sup> In this case,

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6; *UNESCO Convention on the Protection of Underwater Cultural Heritage – Information Brochure on the 2001 Convention*, p.13.

<sup>21</sup> *Rules Concerning Activities Directed at Underwater Cultural Heritage*, Rule 4.

<sup>22</sup> *Problem*, par.3

<sup>23</sup> *Problem*, par.3; Watling and Norse, "Disturbance of the Seabed by Mobile Fishing Gear: A Comparison to Forest Clearcutting", 1998: 1190-92, in *Conservation Biology* 12.6 (1998), 1180-97; and *Shipwreck, Too, Threatened by Trawlers*, Oceana (<http://community.oceana.org/blog/2009/02/shipwreck-too-threatened-trawlers>).

<sup>24</sup> *Treasure Salvors, Inc. vs. Unidentified Wrecked and Abandoned Sailing Vessel* (Treasure Salvors I), 569 F.2d 330, 337 (5<sup>th</sup> Cir.1978); *Platoro Ltd., Inc. vs. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 n. 9, 1984 AMC 2288 (5<sup>th</sup> Cir.1983); *Cobb Coin Co., Inc. vs. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F.Supp. 540, 557 (S.D.Fla.1982)

<sup>25</sup> UNESCO CPOCH, Art.19, pars. 1-2; *UNESCO Convention on the Protection of Underwater Cultural Heritage – Frequently Asked Questions*, p.6; *UNESCO Convention on the Protection of Underwater Cultural Heritage – Information Brochure on the 2001 Convention*, p.13.

<sup>26</sup> *UNESCO Convention on the Protection of Underwater Cultural Heritage – Information Brochure on the 2001 Convention*, p.15.

<sup>27</sup> UNESCO CPOCH, Art. 7, par.1.

the Coeur de l' Ocean lies within Respondent's territorial waters,<sup>28</sup> thus, information as regards this underwater cultural heritage still enjoys confidentiality.<sup>29</sup>

**iv. In any case, the Respondent did not designate the wreck site as “restricted area.”**

Granting *arguendo* that there are UCH provisions, which would ultimately interfere with the Claimant's contractual rights, Respondent has not yet done anything to impair such rights. In fact, Respondent did not even designate the site of the Coeur de l' Ocean as “restricted area.”<sup>30</sup>

**2. Respondent's entering into the Bilateral Agreement with Astoria does not encroach on the Claimant's contractual rights.**

Entry into the 2003 Bilateral Agreement causes no interference with Claimant's rights and performance, because the Coeur de l' Ocean is excluded from the scope of the Bilateral Agreement, which operates prospectively.

**i. Respondent honors its contractual obligations under the 1995 Agreement**

**a. Respondent excluded the Coeur de l' Ocean from the Bilateral Agreement.**

Respondent neither informed Astoria of the existing commercial exploitation of the Coeur de l' Ocean<sup>31</sup>, nor did it offer, lend or sold any artefact to Astoria.<sup>32</sup> Thus, the latter never got involved with the Coeur de l' Ocean.<sup>33</sup> This evidences Respondent's clear intent to honor the 1995 Agreement.

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<sup>28</sup> *Problem*, par. 16; *Further Clarifications*, par.1.

<sup>29</sup> *UNESCO Convention on the Protection of Underwater Cultural Heritage*, p.14.

<sup>30</sup> *Problem*, par.8 and 10.

<sup>31</sup> *Further Clarifications*, par.26.

<sup>32</sup> *Further Clarifications*, par.36.

<sup>33</sup> *Further Clarifications*, pars.4 and 37.

**b. Respondent’s recognition of Astoria’s interest is limited.**

Respondent’s recognition of Astoria’s interest in articles recovered from any Astorian vessel is limited to historical and other cultural purposes.<sup>34</sup> Since Respondent did not designate the site of the Coeur de l’ Ocean as a “restricted area” only goes to show that the Minister of Rolga Cultural Heritage does not see any historical, archaeological or artistic importance in the vessel.<sup>35</sup> Respondent clearly considers that Astoria as to have no interest in the Coeur de l’ Ocean.<sup>36</sup>

**ii. As a treaty, the Bilateral Agreement operates prospectively.**

The Bilateral Agreement is a treaty.<sup>37</sup> As a general rule, a treaty operates prospectively, unless the text thereof expressly provides otherwise.<sup>38</sup> There is nothing in the Bilateral Agreement that says that it shall apply retroactively. Therefore, it cannot operate to encroach on the contractual rights that have arisen under the 1995 Agreement.

**iii. In case Astoria gets representatives samples, the retrieved artefacts are sufficient to compensate the Claimant.**

Claimant has retrieved hundreds of gold ingots, bullions and bars and thousands of Astorian silver coins.<sup>39</sup> Hence, even if Respondent decides to offer, lend or sell artefacts to Astoria, the retrieved artefacts would still be sufficient to compensate the Claimant.

**3. Respondent’s licensing of Aquatic View’s commercial activities does not divest Claimant of its right to conduct salvage operations.**

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<sup>34</sup> *Problem*, par.9.

<sup>35</sup> *Problem*, par.8; *Further Clarifications*, par.39.

<sup>36</sup> *Further Clarifications*, par.25.

<sup>37</sup> *Vienna Convention on the Law of Treaties*, Art.2(a) and 28.

<sup>38</sup> *Vienna Convention on the Law of Treaties*, Art.28.

<sup>39</sup> *Problem*, par.12; *Further Clarifications*, par.18.

Licensing of Aquatic View's wreck divers to the Coeur de l' Ocean and taking of photographs therein do not interfere with Claimant's rights, for three reasons: (1) Aquatic View's activities do not unduly prevent Claimant from conducting salvage operations; (2) Claimant has no exclusive to photograph and document the shipwreck; and (3) assuming that it has such exclusive rights, Claimant has forfeited them.

**i. Aquatic View's activities do not obstruct Claimant's salvage operations**

There is no showing that Aquatic View's commercial activities prevent, obstruct, or in any way hamper Claimant's salvage operations. Wreck divers and taking of photographs are not necessarily incompatible with the salvage operations of a salvor. Therefore, Claimant cannot assert a violation of its right when in fact none has occurred and where, most probably, none will ever occur.

**ii. Claimant does not have exclusive rights to photograph and document the shipwreck.**

The 1995 Agreement did grant the Claimant rights to photograph and document the artefacts.<sup>40</sup> However, nowhere in said Agreement can one infer that such rights are exclusive in character. When a contractual right is conferred exclusively, the contract stipulations expressly provide so.

In the "Partnering Agreement Memorandum Concerning the Shipwreck of *HMS Sussex*"<sup>41</sup>, a contract very much similar to the 1995 Agreement was entered into. In said Agreement, exclusive merchandising rights and intellectual property rights have been explicitly granted to the salvor. Such a provision is missing in the 1995 Agreement between the Claimant

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<sup>40</sup> *Partnering Agreement*, Clauses 2 and 3.

<sup>41</sup> *Partnering Agreement Memorandum Concerning the Shipwreck of HMS Sussex* (<http://www.shipwreck.net/pam/>).

and Respondent. Therefore, Claimant cannot assert an exclusive right where none has been granted it under the contract.

**iii. Granting *arguendo* that Claimant had exclusive rights, it has forfeited them when it mishandled the artefacts.**

A first salvor may be entitled to exclude others from participating in the salvage operations, so long as it appears ready, willing and able to complete the salvage project.<sup>42</sup> However, said salvor may forfeit its salvage rights, including the right to exclusive possession and a salvage award, once it reneges or breaches its “duties of good faith, honesty and diligence in protecting the property in its care.”<sup>43</sup> Hence, granting that as the first salvor, Claimant was entitled to exclude others from exploring and photographing the shipwreck, it lost this right when it mishandled the artefacts.<sup>44</sup>

**B. The acts of the Respondent, therefore, do not give rise to a dispute and/or difference that would otherwise vest jurisdiction on the arbitral tribunal.**

In the absence of a dispute to be decided through arbitration, the demand for arbitration is clearly an abuse of right.<sup>45</sup> In this particular dispute, the Respondent has not interfered with the rights and performance of the Claimant under the 1995 Partnering Agreement. As such, there is no dispute to be resolved by the arbitral tribunal. The Arbitral Tribunal, therefore, does not have jurisdiction and consequently must dismiss the claim.

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<sup>42</sup> *Treasure Salvors*, 640 F.2d at 567; *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, 1996 A.M.C. 2497.

<sup>43</sup> *R.M.S. Titanic vs. Wrecked and Abandoned Vessel*, 2006 435 F3d 521.

<sup>44</sup> *Further Clarifications*, par.34

<sup>45</sup> F.A. MANN, NOTES AND COMMENTS ON CASES IN INTERNATIONAL LAW, COMMERCIAL LAW, AND ARBITRATION, AT 19 (1992).

## **ARGUMENTS ON THE MERITS**

### **I. ASSUMING BUT NOT CONCEDING, THAT THE TRIBUNAL HAS JURISDICTION, RESPONDENT BEARS NO LIABILITY FOR EXERCISING ITS SOVEREIGN PERSPECTIVE.**

Assuming that the Arbitral Tribunal has jurisdiction, adopts its previous arguments with respect to the absence of interference, as discussed in the arguments in jurisdiction.

Furthermore, the obligation to protect underwater cultural heritage has long been established as a public policy.<sup>46</sup> However, state jurisdiction is very limited, thereby necessitating the creation of an international legal instrument to regulate and coordinate the protection of underwater cultural heritage and to encourage cooperation among States.<sup>47</sup> This is where the UCH comes in – it seeks to establish a specific international cooperation regime, covering reporting, consultations and coordination in the implementation of protective measures for heritage within the exclusive economic zone, the continental shelf and the Area.<sup>48</sup> Nonetheless, UCH itself recognizes that States alone can regulate activities in their internal and archipelagic waters and their territorial seas.<sup>49</sup>

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<sup>46</sup> *1982 United Nations Convention on the Law of the Sea*, Arts.149 and 303.

<sup>47</sup> *UNESCO Convention on the Protection of Underwater Cultural Heritage – Information Brochure on the 2001 Convention*, p. 10; *UNESCO Convention on the Protection of Underwater Cultural Heritage – FAQs*, p.4.

<sup>48</sup> UNESCO CPUCH, Art.1 par.5 and Arts.9-11.

<sup>49</sup> UNESCO CPUCH Art.7, par.1.

Coeur de l' Ocean enshrines cultural heritage.<sup>50</sup> Thus, it must be protected, and Respondent's ratification of the UCH is imperative if it were to protect not only the Coeur de l' Ocean but all its cultural and natural resources.<sup>51</sup>

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

Claimant has the right to photograph and document under the 1995 Partnering Agreement Memorandum.<sup>52</sup> Its right to photograph and document is not exclusive.<sup>53</sup> What is exclusive is the Claimant's right over the original works<sup>54</sup> that may have been created through the right of photographing and documenting extended by the Respondent.<sup>55</sup>

### **A. Respondent did not grant exclusive rights of photographing and documenting under the 1995 Agreement.**

International law recognizes contracts as a source of obligations.<sup>56</sup> The 1995 Partnering Agreement, as the contract between the Claimant and the Respondent, governs their relationship. In accordance with the principle of *pacta sunt servanda*,<sup>57</sup> the Partnering Agreement is equally binding between the State Respondent and the Private Claimant. Nothing in the Agreement grants to the Claimant the exclusive right to photograph and document the shipwreck Coeur de l' Ocean.<sup>58</sup> Under Principles of International Commercial Contracts,<sup>59</sup> such Agreement can only be

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<sup>50</sup> 1972 World Natural and Cultural Heritage Convention, Arts. 1-2, 11 par. 2; *Problem*, par. 2; *Further Clarifications*, p. 10; UNESCO CPUCH, Art. 1(a)

<sup>51</sup> *Problem*, par. 2

<sup>52</sup> *Problem*, page 8, Clause 2.

<sup>53</sup> *Partnering Agreement*, p.8.

<sup>54</sup> 1886 Berne Convention for the Protection of Artistic and Literary Works, Art. 2, par.1.

<sup>55</sup> *Partnering Agreement*, p.8.

<sup>56</sup> UNIDROIT Principles of International Commercial Contracts, Art.1.3.

<sup>57</sup> Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1993); Vienna Convention on the Law of Treaties, Art.26.

<sup>58</sup> *Problem*,p.8.

modified in accordance with its terms or by agreement between the parties.<sup>60</sup> No such modification has been agreed upon by the parties. Thus, the Claimant cannot assert exclusivity to photograph and document, a right that was never contemplated in the Partnering Agreement.

## **B. The Claimant's copyright over its original works is exclusive.**

The Respondent has granted to the Claimant the rights to photograph and document Coeur de l' Ocean through the Partnering Agreement.<sup>61</sup> The original works produced under these rights are exclusive to the Claimant.<sup>62</sup> Such exclusivity is limited only to its original works and does not include the right to exclude others from photographing the shipwreck.<sup>63</sup>

### **1. The Claimant's original works in the exercise of its right to photograph and document is protected by the 1886 Berne Convention.**

Under Article 2, paragraph 1 of the 1886 Berne Convention, protected work includes every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.<sup>64</sup> Such production includes books, photographic works, maps, plans, illustrations, sketches, and three dimensional works.<sup>65</sup> Under the Partnering Agreement, the Claimant was vested with the rights to photograph and document the shipwreck Coeur de l' Ocean.<sup>66</sup> The Respondent is a signatory to the 1886 Berne Convention.<sup>67</sup> As part of its State

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<sup>59</sup> UNIDROIT Principles of International Commercial Contracts with Commentary <http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/1.3.html>

<sup>60</sup> UNIDROIT Principles of International Commercial Contracts, Article 1.3.

<sup>61</sup> *Problem*, p.8.

<sup>62</sup> *1886 Berne Convention for the Protection of Artistic and Literary Works*, Article 2, paragraph 1; B.2

<sup>63</sup> *Problem*, B.3.

<sup>64</sup> *1886 Berne Convention for the Protection of Artistic and Literary Works*, Art.2, par.1.

<sup>65</sup> *Id.*

<sup>66</sup> *Problem* p.8.

<sup>67</sup> *Problem*, p.6, par.17.

Responsibility,<sup>68</sup> the Respondent must therefore extend protection to the original works created by the Claimant in the exercise of its rights to photograph and document.

## **2. Such protection is limited only to the Claimant's output.**

The Respondent is also a signatory of the 1996 WIPO Copyright Treaty.<sup>69</sup> The 1996 WIPO Copyright Treaty gives authors of literary and artistic works the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.<sup>70</sup> Since the copyright protects the form of expression and not the subject matter,<sup>71</sup> the Claimant's exclusive rights vis-à-vis the WIPO Treaty are limited only to the original works it produced in the exercise of its rights to photograph and document.<sup>72</sup> Its exclusive rights over its original works therefore do not prevent other parties from creating their own expression of the shipwreck nor does it prevent the State from allowing other parties to take photographs and to document the shipwreck.

## **3. Consequently, the Respondent has the right to permit other parties to photograph and document the shipwreck Coeur de l' Ocean.**

The Claimant's exclusive rights are limited only to its original works produced from its right to photograph and document,<sup>73</sup> and the Respondent has the right to allow other parties to photograph and document Coeur de l' Ocean. Moreover, the Respondent has rights over the shipwreck both as its owner<sup>74</sup> and as a sovereign exercising territorial jurisdiction over the

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<sup>68</sup> Brownlie, *State Responsibility* (1983); D.J. Harris, *Cases and Materials in International Law* (2004); Eagleton, *The Responsibility of States in International Law* (1928)

<sup>69</sup> *Problem*, p.6, Clause 17.

<sup>70</sup> *1996 WIPO Copyright Treaty*, Art.6.

<sup>71</sup> Cornish, *Cases and Materials on Intellectual Property*, (2003); Goldstein, *Patent, Trademark, and Copyright Law* (1959).

<sup>72</sup> *1886 Berne Convention for the Protection of Artistic and Literary Works*, Article 2, par1.

<sup>73</sup> *1996 WIPO Copyright Treaty*, Article 6; *1886 Berne Convention for the Protection of Artistic and Literary Works*, Art.2, par.1.

<sup>74</sup> *Problem*, p.4, par.9.

shipwreck.<sup>75</sup> As the owner of Coeur de l' Ocean,<sup>76</sup> the Respondent vests the Claimant with the rights to photograph and document through the Partnering Agreement.<sup>77</sup> As a sovereign exercising territorial jurisdiction,<sup>78</sup> the Respondent has the right to grant permits to other parties as an exercise of its State Jurisdiction.<sup>79</sup> It is therefore within the Respondent's power to allow third parties to make original works such as photographs over the shipwreck.

**C. In any case, assuming that Claimant has exclusive rights to photograph and document, these exclusive rights were lost when many of the artefacts were destroyed due to poor handling.**

Assuming without conceding, that the Claimant has exclusive rights to photograph and document the shipwreck Coeur de l' Ocean, the Claimant's mishandling of the artefacts<sup>80</sup> disqualified it from enjoying these exclusive rights. The 1989 Salvage Law imposes in the salvor the duty to carry out the salvage operations with due care.<sup>81</sup> The law imposes on salvors the duties of good faith, honesty, and diligence in protecting the property in its care.<sup>82</sup> Under salvage legal principles, the handling of the property is heavily considered when exclusive salvage rights are sought.<sup>83</sup> In fact, admiralty courts sanction salvaging methods which fail to safeguard items and the invaluable archeological information associated with the artefacts salvaged.<sup>84</sup> Because a salvor acts on behalf of a true owner, even when that owner has not been identified, it serves as a trustee of the owner's property and is therefore not permitted to use that property for its own

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<sup>75</sup> *Problem*, p.2, par.5.

<sup>76</sup> *Problem*, p.4, par.9.

<sup>77</sup> *Partnering Agreement*, p.8.

<sup>78</sup> *Problem*, p.2 par.5.

<sup>79</sup> D.J. Harris, *Cases and Materials on International Law*, (2004) p. 265.

<sup>80</sup> *Problem*, p.4, par.10.

<sup>81</sup> 1989 *International Convention on Salvage*, Art.8, par.1(a).

<sup>82</sup> *R.M.S. Titanic v. Wrecked and Abandoned Vessel*, 171 F.3d at 964.

<sup>83</sup> *In MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F.Supp. 308 (S.D.Fla.1986).

<sup>84</sup> *Cobb Coin Co., Inc. vs. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F.Supp. 540, 557 (S.D.Fla.1982).

purposes. Consistent with trust-law principles, when the salvor violates that trust, it may forfeit its salvage rights, including the right to exclusive possession and a salvage award.<sup>85</sup> The Claimant is therefore divested of its exclusive rights.

### **III. The distribution of artefacts solely on the basis of salvage legal principles was not envisaged by the 1995 Partnering Agreement Memorandum.**

The applicability of salvage legal principles in the distribution of artefacts recovered from the shipwreck would depend on whether or not the artefacts are subject of salvage service. If no salvage service has been contemplated, then there would be no basis to apply salvage legal principles.

#### **A. The 1995 Partnering Agreement did not contemplate a salvage service.**

The law of salvage requires three elements for establishing the existence of a valid salvage service: (1) peril or danger from which the vessel is salvaged, (2) some degree of success, and (3) a voluntary effort. The first two elements are not present in the case of the recovery of the shipwreck *Coeur de l' Ocean*, thus taking it out of the definition of a valid salvage service.

##### **a. The shipwreck was not subject to marine peril.**

The law of salvage relates solely to the recovery of items endangered by the sea.<sup>86</sup> In the case of a sunken shipwreck, the danger has already passed.<sup>87</sup> In actuality, the subject property

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<sup>85</sup> *Rms Titanic Incorporated v. The Wrecked and Abandoned Vessel* 435 F3d 521.

may be in a greater danger from salvage operations, than remaining where it is.<sup>88</sup> Located at the bottom of the sea, the Coeur de l' Ocean was under no peril of destruction or loss.

**b. The efforts were not successful.**

A salvage effort may be deemed unsuccessful when the removal of the artifacts did more to create a marine peril than to prevent one,<sup>89</sup> as when the salvor utilizes damaging methods of recovery.<sup>90</sup> When salvage operations must be carried out to preserve the shipwreck's archeological provenience, the measures taken carrying it out are considered in determining success.<sup>91</sup> As confirmed by a government underwater archaeologist stationed on site of the Coeur de l' Ocean, many of the artefacts were destroyed due to poor handling of objects by Claimant's personnel.<sup>92</sup> As such, the salvage service performed by the Claimant is deemed to be unsuccessful.

**B. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is read into 1995 Partnering Agreement Memorandum.**

As a general principle of law, no matter what law the parties to a contract choose as the proper law of the contract, the overriding governing law superimposes their choice and applies

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<sup>86</sup> Martin Norris, **The Law of Salvage** §2.

<sup>87</sup> *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511.

<sup>88</sup> Buenos Aires Draft Convention on Protection of Underwater Cultural Heritage. Art.4.

<sup>89</sup> *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511.

<sup>90</sup> Bownman L., *Ocean's Apart Over Sunken Ships: is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?* Osgood Hall Law Journal Vol. 42 No.1 (2003).

<sup>91</sup> *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1514.

<sup>92</sup> *Problem*, par.10; *Further Clarifications* par.34.

automatically.<sup>93</sup> Pertinent provisions of the 1982 of the UNCLOS provide international law principles that deal with maritime property such as the Coeur de l' Ocean. Such provisions are deemed read into the 1995 Partnering Agreement.

**a. As a monist state, Respondent's ratification of the 1982 UNCLOS provides the treaty with the same force and effect as municipal law.**

In a monist state such as the Respondent,<sup>94</sup> international law is considered part of the law of the land, and enforced as such. As signatories to the 1982 UNCLOS<sup>95</sup>, the Respondent is bound to comply with its provisions.

**b. The provisions of the 1995 Partnering Agreement Memorandum, particularly the Sharing Agreement, is subject to and qualified by the 1982 UNCLOS.**

The substantive international law applicable to historic wrecks,<sup>96</sup> like the Coeur de l' Ocean, may be found under pertinent provisions of the 1982 UNCLOS. The treaty provides that states have a duty to protect historic wrecks in various maritime zones, and that this duty is undertaken for the benefit of humankind as whole, with preferential rights given to the State or country of origin, or the State of cultural origin, or the State of historical and archaeological

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<sup>93</sup> A.F.M. Maniruzzaman, State Contracts in Contemporary International Law: Monist versus Dualist Controversies (European Journal of International Law 2001)

<sup>94</sup> *Further Clarifications*, par. 7

<sup>95</sup> *Problem*, par. 17,

<sup>96</sup> P. 367, Craig Forrest, Historic Wreck Salvage: An International Perspective. Tulane Maritime Journal (Summer 2009).

origin.<sup>97</sup> As an agreement for the recovery of a historic wreck, the 1995 Partnering Agreement Memorandum is qualified by the provisions of UNCLOS, particularly those preserving the preferential rights of states from which the artefacts may originate, or the states of cultural, historical and archeological origin.

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<sup>97</sup> UNCLOS Art.149, 303, (1982).

## **CONCLUSION AND PRAYER FOR RELIEF**

Upon the foregoing facts and points of law, the Respondent respectfully requests this Arbitral Tribunal to declare and adjudge that:

- 1) The Arbitral Tribunal does not have jurisdiction because there is no dispute and/or difference;
- 2) The Claimant cannot invoke the jurisdiction of the arbitral tribunal for failure to satisfy a condition precedent;
- 3) The Respondent did not interfere with the Claimant's rights and performance under the 1995 Partnering Agreement Memorandum;
- 4) The Claimant does not enjoy exclusive rights of photographing and documenting the shipwreck Coeur de l' Ocean;
- 5) The distribution of artefacts solely on the basis of salvage legal principles was not envisaged by the 1995 Partnering Agreement Memorandum.