

**INTERNATIONAL CENTRE OF ARBITRATION**

**2009**

**BENEVOLENT  
(APPLICANT)**

**v**

**THE GOVERNMENT OF ROLGA  
(RESPONDENT)**

**MEMORIAL FOR APPLICANT**

**TABLE OF CONTENTS**

**INDEX OF AUTHORITIES** .....5

**STATEMENT OF JURISDICTION** .....9

**QUESTIONS PRESENTED** .....10

**STATEMENT OF FACTS** .....10

**SUMMARY OF PLEADINGS** .....14

**PLEADINGS** .....16

**SUBMISSION A. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT’S SALVAGE RIGHTS WHEN IT ENTERED INTO THE 2001 AGREEMENT, RATIFIED THE UNESCO CONVENTION AND BY ALLOWING ANOTHER TOUR OPERATOR TO ORGANISE AND MAKE PROFITS FROM VISITING ACTIVITIES TO THE SITE INCLUDING THE TAKING OF PHOTOGRAPHS** .....16

**A.1 THE RESPONDENT INTERFERED WITH THE CLAIMANT’S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ENTERING INTO THE 2001 AGREEMENT.** .....17

**A.1.1. ASTORIA HAD IMPLIEDLY ABANDONED THE COEUR DE L’ OCEAN PRIOR TO THE COMMENCEMENT OF SALVAGE OPERATIONS** .....17

A) AN IMPLIED STANDARD OF ABANDONMENT APPLIES .....17

B) PRIOR TO 2001, ASTORIA IMPLIEDLY ABANDONED THE COEUR DE L’ OCEAN .....19

**A.1.2 IN THE ALTERNATIVE, IF ASTORIA DID NOT ABANDON THE COEUR DE L’ OCEAN THE COEUR DE L’ OCEAN DOES NOT ATTRACT SOVEREIGN IMMUNITY** .....20

A) THE COEUR DE L’ OCEAN IS NOT A ‘WARSHIP’ ATTRACTING SOVEREIGN IMMUNITY .....20

B) IN THE ALTERNATIVE, THE COEUR DE L’ OCEAN IS NOT A STATE VESSEL ON “GOVERNMENT NON-COMMERCIAL SERVICE” ATTRACTING SOVEREIGN IMMUNITY .....21

C) IN THE ALTERNATIVE, THE COEUR DE L’ OCEAN IS NO LONGER A STATE OWNED ‘SHIP’ OR ‘WARSHIP’ AND THEREFORE CANNOT ATTRACT SOVEREIGN IMMUNITY UNDER UNCLOS .....22

**A.1.3 AS THE COEUR DE L’ OCEAN IS EITHER ABANDONED OR NOT SUBJECT TO SOVEREIGN IMMUNITY, THE CLAIMANT HAS SALVAGE RIGHTS, RIGHTS UNDER THE SALVAGE CONVENTION AND RIGHTS UNDER THE 1995 AGREEMENT** .....22

A. THE CLAIMANT HAS COMMON LAW SALVAGE RIGHTS .....23

B. THE CLAIMANT HAS RIGHTS UNDER THE SALVAGE CONVENTION .....	24
C. THE CLAIMANT HAS RIGHTS UNDER THE 1995 AGREEMENT .....	24
A.1.4. GRANTING ASTORIA A ‘CONTINUING INTEREST’ IN THE DISPOSITION OF ARTEFACTS INTERFERES WITH THE APPLICANT’S RIGHTS UNDER THE 1995 AGREEMENT .....	25
<b>A.2 ROLGA HAS INTERFERED WITH THE CLAIMANT’S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY RATIFYING THE UNESCO CONVENTION .....</b>	<b>26</b>
A.2.1 ROLGA’S RATIFICATION OF THE UNESCO CONVENTION INTERFERES WITH THE CLAIMANT’S RIGHT TO CONTINUE SALVAGE OPERATIONS ON THE COEUR DE L’ OCEAN WITHOUT INTERFERENCE .....	26
A) THERE IS AN IMPLIED TERM OF THE 1995 AGREEMENT THAT THE CLAIMANT HAS THE RIGHT TO CONTINUE TO CONDUCT SALVAGE ON THE COEUR DE L’ OCEAN WITHOUT INTERFERENCE FOR THE PERIOD OF THE AGREEMENT.....	26
B) ARTICLE 4 OF THE UNESCO CONVENTION INFRINGES THE IMPLIED TERM THAT THE CLAIMANT HAS THE RIGHT TO CONTINUE SALVAGE.....	27
C) THE UNESCO CONVENTION APPLIES TO THE COEUR DE L’ OCEAN PROSPECTIVELY, AND NOT RETROACTIVELY .....	28
D) ARTICLES 7, 9 AND 10 OF THE UNESCO CONVENTION INTERFERE WITH THE CLAIMANT’S RIGHTS.....	28
A.2.2 THE RESPONDENT’S RATIFICATION OF THE UNESCO CONVENTION RESTRICTS THE CLAIMANT’S RIGHT TO OWN AND POSSESS ITS RELATIVE SHARE OF ARTEFACTS UNDER THE 1995 AGREEMENT .....	29
A) THE PROHIBITION ON COMMERCIAL EXPLOITATION OF UNDERWATER CULTURAL HERITAGE IN THE UNESCO CONVENTION REMOVES THE CLAIMANT’S POWER TO SELL ARTEFACTS .....	29
B) THE UNESCO CONVENTION INTERFERES WITH THE CLAIMANT’S OWNERSHIP RIGHTS BY REMOVING OR RESTRICTING THE CLAIMANT’S POWER TO SELL THE ARTEFACTS .....	30
<b>A.3 THE RESPONDENT HAS INTERFERED WITH THE 1995 AGREEMENT BY GRANTING AQUATIC VIEW A PERMIT TO VISIT THE WRECK AND ALLOWING IT TO PROFIT FROM THE TAKING OF PHOTOGRAPHS AND OTHER ACTIVITIES .....</b>	<b>31</b>
A) PERMITTING AQUATIC VIEW TO VISIT THE WRECK AND PROFIT FROM THE TAKING OF PHOTOGRAPHS AND OTHER ACTIVITIES BREACHES THE IMPLIED DUTY OF CO-OPERATION .	31

B) THE VISITS BY AQUATIC VIEW INTERFERE WITH THE CLAIMANT’S RIGHT TO CONDUCT SALVAGE OPERATIONS .....	32
C) PERMITTING AQUATIC VIEW TO TAKE PHOTOGRAPHS INTERFERES WITH THE CLAIMANT’S SALVAGE RIGHTS .....	33
<b>B. THE CLAIMANT HAS EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE COEUR DE L’ OCEAN .....</b>	<b>33</b>
<b>B.1 THE RIGHT TO PHOTOGRAPH AND DOCUMENT A WRECK FORMS PART OF THE <i>JUS GENTIUM</i> OF THE LAW OF SALVAGE.....</b>	<b>33</b>
A) THE CLAIMANT IS ENTITLED TO ALL THE PRIVILEGES ACCRUING TO A SALVOR-IN-POSSESSION.....	33
B) THE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L’ OCEAN FORMS PART OF THE CLAIMANT’S EXCLUSIVE SALVAGE RIGHTS.....	34
C) THE RIGHT TO EXCLUDE OTHERS FROM PHOTOGRAPHING AND DOCUMENTING THE COEUR DE L’ OCEAN IS JUSTIFIED BY THE SAME CONSIDERATIONS UNDERPINNING A TRADITIONAL SALVAGE AWARD .....	34
D) THE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L’ OCEAN IS A <i>SUI GENERIS</i> RIGHT ACCRUING TO SALVORS-IN-POSSESSION .....	35
E) IT IS JUST AND EQUITABLE IN ALL THE CIRCUMSTANCES TO ENFORCE THE CLAIMANT’S EXCLUSIVE RIGHTS OF PHOTOGRAPHY AND DOCUMENTATION AS SALVOR-IN-POSSESSION	35
<b>B.2 THE LAW OF BREACH OF CONFIDENCE CONFERS AN EXCLUSIVE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L’ OCEAN UPON THE CLAIMANT .....</b>	<b>36</b>
A) EXCLUSIVE RIGHTS OF PHOTOGRAPHY AND DOCUMENTATION ARE NECESSARY TO PROTECT TRADE SECRETS AND OTHER CONFIDENTIAL INFORMATION OF THE CLAIMANT...	36
B) THE RESPONDENT IS UNDER AN EXPRESS OBLIGATION OF CONFIDENCE UNDER THE 1995 AGREEMENT TO PROTECT THE CONFIDENTIAL INFORMATION SUPPLIED TO IT BY THE CLAIMANT .....	37
C) IN THE ALTERNATIVE, IF THE RESPONDENT IS NOT UNDER AN EXPRESS OBLIGATION OF CONFIDENCE, THEY ARE UNDER AN IMPLIED OBLIGATION OF CONFIDENCE ARISING FROM THE CIRCUMSTANCES OF THE INSTANT CASE.....	38
<b>B.3 THE CLAIMANT HAS EXCLUSIVE RIGHTS OF PHOTOGRAPHY AND DOCUMENTATION ARISING FROM ITS BROADCAST ARRANGEMENTS.....</b>	<b>38</b>
A) THE CLAIMANT HAS RIGHTS OF AUTHORSHIP IN FOOTAGE PRODUCED UNDER THE ONGOING BROADCAST DEAL .....	38

B) THE CLAIMANT’S RIGHTS OF AUTHORSHIP EXTEND TO CONTROLLING THE PRODUCTION AND DISSEMINATION OF DERIVATIVE WORKS .....	39
<b>C. THE CALCULATION OF PROFITS AND/OR DISTRIBUTION OF ARTEFACTS BETWEEN THE PARTIES IS TO BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES .....</b>	<b>39</b>
A) IN THE ABSENCE OF AN EXPRESS TERM IN THE 1995 AGREEMENT DETAILING HOW ARTEFACTS ARE TO BE DISTRIBUTED BETWEEN THE PARTIES SALVAGE PRINCIPLES SHOULD GOVERN THE DISTRIBUTION .....	40
B) THE CLAIMANT IS ENTITLED TO OWNERSHIP OF ARTEFACTS <i>IN SPECIE</i> IN PROPORTION TO THE AGGREGATE VALUE OF ARTEFACTS TO WHICH IT IS ENTITLED UNDER THE 1995 AGREEMENT .....	40
C) IN THE ALTERNATIVE, THE CLAIMANT IS ENTITLED TO TERMINATE THE 1995 AGREEMENT AND RELY ON SALVAGE PRINCIPLES FOR THE DISTRIBUTION OF ARTEFACTS .	41
D) THE DISTRIBUTION OF ARTEFACTS SHOULD ALSO BE MODIFIED SO THE AWARD ALSO INCLUDES COMPENSATION FOR INTERFERENCES WITH THE CLAIMANT’S PERFORMANCE UNDER THE CONTRACT .....	42
<b>PRAYER FOR RELIEF .....</b>	<b>42</b>

## INDEX OF AUTHORITIES

### Cases

<i>Aircraft Recovery, L.L.C. v Abandoned Aircraft</i> 54 F.Supp.2d 1172 (1999) .....	22
<i>Baltimore, Crisfield &amp; Onancock Line Inc v United States</i> 140 F.2d 230 (1944).....	22, 26
<i>Bemis v. The R.M.S. LUSITANIA</i> , 884 F. Supp. 1042 (1995).....	27
<i>Butt v McDonald</i> (1896) 7 QLJ 68 .....	35
<i>Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel</i> 525 F. Supp. 186 (1981) .....	23, 44
<i>Coco v A.N. Clark (Engineers)</i> [1969] RPC 41 .....	40, 42
<i>Columbus-America Discovery Group v Atlantic Mutual Insurance Company</i> 974 F .2d 450 (1992) .....	22, 23, 24, 27, 44, 45
<i>Electro Cad Australia Pty Ltd v Mejati RCS SDN BHD</i> [1999] F.S.R. 291 .....	42

<i>General Trading Co(Holdings) Ltd v Richmond Corp Ltd</i> [2008] 2 Lloyd’s Rep. 475 .....	35
<i>Hatteras, Inc. v. The USS. Hatteras</i> 1984 AMC 1094 (1981).....	22
<i>Horgan v Macmillan Inc.</i> 789 F.2d 157.....	43
<i>Kaufman v McGillicuddy</i> (1914) 19 CLR 1.....	45
<i>Lansing Linde Ltd v Kerr</i> [1991] 1 WLR 251 .....	42
<i>Lindsay v Wrecked &amp; Abandoned Vessel R.M.S. Titanic</i> , 1998 Lexis US Dist. 13604.....	38, 42
<i>Mackay v Dick</i> (1881) App Cas 251 .....	35
<i>Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd</i> [1997] AC 749.....	34
<i>Marex International v The Unidentified, Wrecked &amp; Abandoned Vessel</i> , 952 F.Supp 825 ....	37
<i>MDM Salvage Inc. v The Unidentified, Wrecked and Abandoned Sailing Vessel</i> , 631 F.Supp 308.....	38
<i>Micro Star v Formgen Inc.</i> 154 F.3d 1107 .....	43
<i>Miller v Borner</i> [1900] 1 QB 691 .....	34
<i>Nordsjø Dykker Co. v. Høvding Skipsopphugging</i> 135 Norsk Retstidende 346 .....	23
<i>Platoro Ltd. v. Unidentified Remains of a Vessel</i> , 695 F.2d 893, (1983) .....	27
<i>R.M.S. Titanic Inc v The Wrecked and Abandoned Vessel believed to be the RMS Titanic 9</i> F.Supp 2d 624 (1998).....	27, 38
<i>R.M.S. Titanic Inc. v Haver</i> 1999 AMC 1330 .....	36
<i>Robinson v Western Australia</i> (1982) 153 CLR 168 .....	27
<i>Sea Hunt, Inc v. Unidentified Shipwrecked Vessel or Vessels</i> 2000 AMC 2113.....	23
<i>Seager v Copydex</i> [1967] 2 All ER 415.....	42
<i>Secured Income Real Estate (Aust) Ltd v St MArt.ins Investments Pty Ltd</i> (1979) 144 CLR 597.....	35
<i>Simon v Taylor</i> [1975] 2 Lloyd’s List L.R 338.....	23
<i>State by Ervin v. Massachusetts Co</i> 95 So. 2d 902 (1956). .....	22
<i>Stirling v Maitland</i> (1864) 5 B. & S. 840 .....	31
<i>The Charlotte</i> (1848) 3 W.Rob 68.....	38
<i>The Five Steel Barges</i> (1890) 15 P.D. 142.....	45

<i>The Hestia</i> , [1895] P.193 .....	45
<i>The Moorcock</i> (1889) 14 Ph.D 64.....	30
<i>The Sabine</i> (1879) 101 US 384.....	26
<i>The Tojo Maru</i> [1971] 1 Lloyd’s Rep 341 .....	31, 32, 35
<i>The Unique Mariner</i> [1979] 1 Lloyd’s Rep 37 .....	31, 32, 35
<i>Throcmerton v Tracey</i> (1585) 1 Plow. 145 .....	34
<i>Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel</i> 556 F. Supp. 1319 (1983).....	23, 40, 44
<i>Treasure Salvors, Inc v Unidentified, Wrecked and Abandoned Sailing Vessel</i> 569 F.2d 33027	
<i>United States v. Steinmetz</i> 973 F.2d 212 (1992) .....	22

## **Treaties**

Convention on the Protection of the Underwater Cultural Heritage, opened for signature on 2 November 2001 (entered into force 2 January 2009).....	14, 25, 32, 34
International Convention on Salvage, opened for signature on 28 April 1989 (entered into force 14 July 1996).....	19, 27, 28,31, 34, 38, 45, 46
Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967, opened for signature 24 July 1971 (entered into force 15 December 1972) .....	43
<i>United Nations Convention on the Law of the Sea</i> , opened for signature on 10 December 1982 (entered into force 16 November 1994)(.....	15, 25, 33, 37
Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980).....	25

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43 Halsbury’s Laws of England 928 (4 <sup>th</sup> ed. Reissue 1997).....	28
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Caflish, Lucius, “Submarine Antiquities and the International Law of the Sea” (1982)12 <i>Netherlands Year.Book of. International Law. 3</i> .....	26
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Odyssey Marine Exploration, <i>The HMS Sussex Shipwreck Project (Site E-82) Preliminary Report</i> .....	41
--	----

<i>Statement by the President of the United States on US Policy for the Protection of Sunken warships</i> (19 January 2001) .....	23
---	----

**Legislation**

<i>Copyright Act 1987</i> (Malaysia).....	43
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**STATEMENT OF JURISDICTION**

Benevolent Heritage Inc and the State of Rolga have agreed to submit disputes under the agreement to arbitration.<sup>1</sup> The Arbitrators have jurisdiction to decide the dispute pursuant to Clause 10 of the Partnering Agreement Memorandum (“1995 Agreement”).

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<sup>1</sup> Clause 10 of 1995 Agreement; Corrections [4]

## **QUESTIONS PRESENTED**

1. Whether Rolga interfered with Benevolent Heritage Inc's salvage rights and performance under the 1995 Agreement by entering into the 2001 Agreement with Astoria;
2. Whether Rolga interfered with Benevolent Heritage Inc's salvage rights and performance under the 1995 Agreement by ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage;<sup>2</sup>
3. Whether Rolga interfered with Benevolent Heritage Inc's salvage rights and performance under the 1995 Agreement by allowing a tour operator to organise and make profits from visiting activities to the site including the taking of photographs;
4. Whether Benevolent Heritage Inc has exclusive rights of photographing and documenting of the Coeur de l' Ocean;
5. Whether the calculation of profits and/or distribution of artefacts between the Parties is to be made solely on the basis of salvage legal principles.

## **STATEMENT OF FACTS**

In 1800 the Coeur de l' Ocean, a vessel of Astoria, sank off the coast of Rolga.<sup>3</sup> Prior to its sinking, Captain Van Cleef led the vessel on an expedition to conquer the city of Zamzala, now part of Rolga.<sup>4</sup> The Coeur de l' Ocean was used for military purposes prior to its

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<sup>2</sup> Convention on the Protection of the Underwater Cultural Heritage, opened for signature on 2 November 2001 (entered into force 2 January 2009)(hereinafter 'the UNESCO Convention')

<sup>3</sup> Official Moot Problem [1]

<sup>4</sup> Ibid.

sinking.<sup>5</sup> Astoria's army successfully conquered the city and robbed the palace.<sup>6</sup> Upon leaving the city the Coeur de l' Ocean sunk off the coast of Rolga. The cargo it contained included commercial shipments.<sup>7</sup>

In 1990, a national of Astoria, Mr Bernard Bodd, a well known salvor and major shareholder in the Claimant submitted a proposal for the discovery and recovery of Astorian era ships, including the Coeur de l' Ocean.<sup>8</sup>

On 10<sup>th</sup> February 1993 Rolga ratified the 1982 United Nations Convention on the Law of the Sea<sup>9</sup> and established a 12 n.m. territorial waters and a 200 n.m Exclusive Economic Zone .<sup>10</sup> On 1<sup>st</sup> June 1993 the wreck was located by the Claimant exactly 12 n.m from Rolga's baseline, but beyond a 10 n.m limit.<sup>11</sup> The Claimant recovered some silver coins and gold bars from the wreck and took these to the relevant Rolgan authority to convince them to approve an extensive recovery project.<sup>12</sup>

On 27<sup>th</sup> September 1995 the Government approved the project and the 'Partnering Agreement Memorandum' was signed.<sup>13</sup> The agreement provides that the Claimant shall submit a project plan for approval.<sup>14</sup>

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<sup>5</sup> Further Clarifications [6]

<sup>6</sup> Official Moot Problem [1]

<sup>7</sup> Ibid.

<sup>8</sup> Official Moot Problem [4]

<sup>9</sup> *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982 (entered into force 16 November 1994)(hereinafter 'UNCLOS')

<sup>10</sup> Official Moot Problem [16]

<sup>11</sup> Official Moot Problem [5], Further Clarifications [1]

<sup>12</sup> Official Moot Problem [5]

<sup>13</sup> Ibid. (hereinafter 'the 1995 Agreement')

<sup>14</sup> Further Clarifications [21]

Many artefacts were recovered from the wreck and some have been auctioned off in overseas auction houses to partly finance the costs of the project.<sup>15</sup>

In 2000, influenced by its participations in UNESCO negotiations Rolga moved to strengthen its cultural heritage appreciation.<sup>16</sup> A Rolgan law passed in 2000 gives the Minister the power to designate any site in Rolgan waters that is of historical importance a restricted area.<sup>17</sup>

In 2001 the Government of Rolga entered into an agreement with the Government of Astoria. In this agreement “Astoria transfers all its right, title and interest in wrecked ancient vessels of Astoria lying on or off the coast of Rolga and to any articles thereof to Rolga which shall accept such right, title and interest”. In return Rolga “recognises that Astoria has a continuing interest... in articles recovered from any of the vessels referred to in the Agreement” which is to be read in conjunction with the Guiding Principles.<sup>18</sup> These Guiding Principles provide for maintenance of representative collections of artefacts in Rolgan and Astorian museums, the importance of non-division of artefacts and the possibility of reassembly of the entire collection.<sup>19</sup>

Also at this time, Aquatic View, a specialized tour operator was given a permit by the Government to organize exclusive underwater trips to view the wreck of the Coeur de l’ Ocean. So far the company has sold 25 tickets at the price of USD \$20,000 each. Aquatic View staff have also been taking photographs and making video clips of the wrecks and have

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<sup>15</sup> Official Moot Problem [6]

<sup>16</sup> Official Moot Problem [7]

<sup>17</sup> Official Moot Problem [8]

<sup>18</sup> Official Moot Problem [9]

<sup>19</sup> Official Moot Problem, Appendix 2

posted these materials on their website as promotional materials for the exclusive trips. Aquatic View has also engaged a songwriter to write a song entitled ‘Cour de l’ Ocean’, the CDs of which are commercially marketed as souvenirs. The Claimant claims the activities of the tour operator have jeopardized their ongoing television documentary deal with an International Broadcasting company.<sup>20</sup>

The Claimant brought these issues to the attention of the relevant Rolgan authority but the Agency ‘was unable at this time’ to deal with this complaint.<sup>21</sup> Clause 6 of the 1995 agreement between Rolga and the Claimant provides that the Claimant has the right to use the name “Coeur de l’ Ocean” in the sale and marketing of merchandise.

By 2003, the parties took steps to finalize the distribution of artefacts, pursuant to Clause 5 of the 1995 Agreement but the Claimant accused the Government of unfair distribution of artefacts contrary to the 1995 Agreement.<sup>22</sup>

All states are party to the 1989 Salvage Convention, 1886 Berne Convention, 1996 WIPO Copyright Treaty, 1969 Vienna Convention on the law of treaties.<sup>23</sup>

The dispute is now brought before the International Arbitration Center pursuant to article 10 of the 1995 Agreement.

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<sup>20</sup> Official Moot Problem [11]

<sup>21</sup> Ibid.

<sup>22</sup> Official Moot Problem [12]

<sup>23</sup> Official Moot Problem [16]

### **SUMMARY OF PLEADINGS**

**The Claimant (The Claimant) argues that;**

- A. The Respondent has interfered with the Claimant's salvage rights and performance under the 1995 Agreement by entering into the 2001 Agreement with Astoria, ratifying the 2001 UNESCO Convention and allowing Aquatic View to visit the wreck and profit from activities including the taking of photographs. The Claimant had rights under the

common law of salvage and the 1989 London Salvage Convention<sup>24</sup> because the Coeur de l' Ocean was either abandoned or not subject to sovereign immunity. Granting Astoria a continuing interest interferes with these rights by affecting the Claimant's ability to deal with artefacts. The UNESCO Convention interferes with the Claimant's right to continue salvage without interference and its right to own and possess as well as sell its relative share of artefacts. Permitting Aquatic View to photograph the wreck interferes with the exercise of the right of the Claimant to use the name "Coeur de l' Ocean" in selling and marketing merchandise by diminishing its value and breaching the Respondent's duty of co-operation. The visits also interfere with the Claimant's right to confidentiality under the 1995 Agreement. The visits also interfere with the Claimant's right to conduct salvage operations without interference and its exclusive rights of photography and documentation.

**B.** The Claimant has exclusive rights of photography and documentation of the Coeur de l' Ocean. These rights accrue under the law of salvage, which is applicable to the instant case. The right is one accruing to the Claimant as a salvor-in-possession as part of its right to exclusive possession, or as a *sui generis* right. The right is also within the scope of the confidentiality clause in the 1995 Agreement, or otherwise arises as part of an inferred obligation of confidence imposed by course of conduct. Finally, the Claimant submits that the right arises as part of its copyright in footage produced under the ongoing broadcasting deal.

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<sup>24</sup> International Convention on Salvage, opened for signature on 28 April 1989 (entered into force 14 July 1996) (hereinafter 'the Salvage Convention')

C. The Claimant submits that the distribution of artefacts should be on the basis of salvage legal principles and not the 1995 Agreement. In the absence of contractual provision for the distribution of artefacts, the only body of law providing for the distribution is that of the law of salvage. The Claimant is entitled to ownership of an *in specie* share of artefacts under the 1995 Agreement. Such disposition should take into account the need for compensation for the Respondent's interferences with the contract.

## **PLEADINGS**

**SUBMISSION A. THE RESPONDENT HAS INTERFERED WITH THE CLAIMANT'S SALVAGE RIGHTS WHEN IT ENTERED INTO THE 2001 AGREEMENT, RATIFIED THE UNESCO CONVENTION AND BY ALLOWING ANOTHER TOUR OPERATOR TO ORGANISE AND MAKE PROFITS FROM**

## VISITING ACTIVITIES TO THE SITE INCLUDING THE TAKING OF PHOTOGRAPHS

### **A.1 THE RESPONDENT INTERFERED WITH THE CLAIMANT'S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY ENTERING INTO THE 2001 AGREEMENT.**

Prior to the 2001 Agreement, the Claimant had rights arising from the following sources: common law salvage (hereinafter "salvage rights"), the Salvage Convention and the 1995 Agreement. This is because:

- 1.1 Astoria impliedly abandoned the Coeur de l' Ocean; or
- 1.2 The Coeur de l' Ocean was not sovereign immune.

The 2001 Agreement interferes with these rights by granting Astoria a "continuing interest" in the artefacts recovered from the Coeur de l' Ocean. Specifically, the 2001 Agreement prescribes that the disposition of artefacts recovered from the Coeur de l' Ocean must be in accordance with the Guiding Principles for the Determination of the Disposition of Materials from the Shipwrecks of Astoria off the Coast of Rolga 2001 ("the Guiding Principles").

#### A.1.1. ASTORIA HAD IMPLIEDLY ABANDONED THE COEUR DE L' OCEAN PRIOR TO THE COMMENCEMENT OF SALVAGE OPERATIONS

##### **a) An implied standard of abandonment applies**

The Coeur de l' Ocean is a state owned vessel of Astoria.<sup>25</sup> The Claimant submits that international law and state practice support the application of an implied abandonment standard to state vessels where a sovereign owner has not asserted ownership.<sup>26</sup> Abandonment can be inferred where there is “strong and convincing evidence” of an intention to abandon the vessel.<sup>27</sup> Relevant considerations include whether a substantial period of time has lapsed and whether an owner has asserted control or otherwise indicated a claim of possession over the vessel.<sup>28</sup> The Claimant submits that these considerations support the conclusion that Astoria impliedly abandoned the Coeur de l' Ocean.

There is no rule in customary international law that state vessels must be expressly or affirmatively abandoned by a sovereign owner.<sup>29</sup> The standard of abandonment to be applied to state vessels has therefore been the subject of inconsistent interpretation by domestic courts. Some US decisions have supported the application of an implied abandonment standard to U.S state vessels where they had been left undisturbed for a significant period of time.<sup>30</sup> Other U.S cases; however, have applied an express abandonment standard to U.S state vessels, holding that such vessels can only be abandoned by express acts or authorisation from Congress.<sup>31</sup> In contrast, domestic courts in other states have supported the application

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<sup>25</sup> Official Moot Problem, [1]

<sup>26</sup> *Columbus-America Discovery Group v Atlantic Mutual Insurance Company* 974 F.2d 450 (1992), 464-465.

<sup>27</sup> *Ibid.*

<sup>28</sup> David J. Bederman, “Rethinking the Legal Status of Sunken Warships” (2000) 31 *Ocean Development & International Law*, 97 104.

<sup>29</sup> Craig Forrest, “An International Perspective on Sunken State Vessels as Underwater Cultural Heritage” (2003) 34 *Ocean Development & International Law* 41, 48; see further Bederman, above n 25, 99-102; Jerry E. Walker, “A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations” (1999-2000) 12 *University of San Francisco Maritime Law Journal* 311, 336.

<sup>30</sup> *Baltimore, Crisfield & Onancock Line Inc v United States* 140 F.2d 230 (1944); *State by Ervin v. Massachusetts Co* 95 So. 2d 902 (1956).

<sup>31</sup> *Aircraft Recovery, L.L.C. v Abandoned Aircraft* 54 F.Supp.2d 1172 (1999); *United States v. Steinmetz* 973 F.2d 212 (1992); *Hatteras, Inc. v. The USS. Hatteras* 1984 AMC 1094 (1981); for U.S Government approach see *Statement by the President of the United States on US Policy for the Protection of Sunken warships* (19 January 2001)

of an implied standard of abandonment for state vessels.<sup>32</sup> The most recent case held that an express standard applies where a sovereign owner appears to assert ownership over a state vessel, whilst affirming an earlier decision that abandonment may be inferred where the ship is lost and undiscovered for some time, and where the sovereign owner does not appear to assert ownership.<sup>33</sup>

### **b) Prior to 2001, Astoria impliedly abandoned the Coeur de l' Ocean**

Astoria has not to date asserted any control or otherwise exercised possession over the Coeur de l' Ocean or the artefacts recovered therein. Astoria's inaction, combined with the passage of 193 years since the Coeur de l' Ocean sunk, supports a finding that Astoria had relinquished ownership and abandoned the Coeur de l' Ocean prior to the commencement of salvage operations.

The 2001 Agreement was not an assertion of title over the Coeur de l' Ocean by Astoria. The 2001 Agreement mirrors the terms of the Agreement Concerning Old Dutch Shipwrecks, Netherlands-Australia, (1972). The Netherlands-Australia Agreement does not state the nature or extent of the Netherlands' title (if any) being transferred and therefore does not acknowledge or assert that the Netherlands had title to the wrecks.<sup>34</sup> By analogy, the 2001

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<sup>32</sup> *Simon v Taylor* [1975] 2 Lloyd's List L.R 338, 342; *Nordsjø Dykker Co. v. Høvdning Skipsopphugging* 135 Norsk Retstidende 346, 349 (Norwegian Sup. Ct. March 21, 1970).

<sup>33</sup> *Sea Hunt, Inc v. Unidentified Shipwrecked Vessel or Vessels* 2000 AMC 2113, affirming *Columbus-America Discovery Group v Atlantic Mutual Insurance Company* 974 F.2d 450 (1992), 464-465.. See also *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel* 556 F. Supp. 1319 (1983); *Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel* 525 F. Supp. 186 (1981).

<sup>34</sup> *Ibid.* 226; O'Keefe and Prott, *Australian Protection of Historic Shipwrecks* (1974) 6 *Aust Year Book of International Law*. 119, 124; Constance Johnson, *Agreement between Australia and the Netherlands concerning old Dutch Shipwrecks* in Camarda and Scovazzi, *The Protection of the Underwater Cultural Heritage*, (2002), 23.

Agreement is not an assertion of title by Astoria and does not recognise that Astoria held any right, title or interest in the Coeur de l' Ocean in 2001.

Furthermore, if a vessel is abandoned it cannot be reclaimed by a reassertion of title.<sup>35</sup> As Astoria abandoned the Coeur de l' Ocean prior to the commencement of salvage operations it cannot reclaim the Coeur de l' Ocean by reasserting title in the 2001 Agreement.

A.1.2 IN THE ALTERNATIVE, IF ASTORIA DID NOT ABANDON THE COEUR DE L' OCEAN THE COEUR DE L' OCEAN DOES NOT ATTRACT SOVEREIGN IMMUNITY

The Claimant submits that the Coeur de l' Ocean did not attract sovereign immunity at the commencement of salvage operations. The Claimant therefore obtained salvage rights, rights under the Salvage Convention and rights under the 1995 Agreement.

Sovereign immunity of warships and state vessels on government non-commercial service is governed by Articles 95 and 96 of UNCLOS. These articles reflect the position at customary international law which provides that these vessels are entitled to immunity from coastal state enforcement authorities within waters of national jurisdiction.<sup>36</sup>

**a) The Coeur de l' Ocean is not a 'warship' attracting sovereign immunity**

The definition of a warship is contained in UNCLOS and has three criteria: the vessel must bear external marks showing its nationality; the commanding officer must be duly commissioned with his or her name appearing in the appropriate service list; and the vessel must be manned by a crew under regular armed forces discipline.<sup>37</sup>

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<sup>35</sup> *Columbus*, above n.35 Widener J (in dissent), 476.

<sup>36</sup> Churchill and Lowe, *The Law of the Sea* (1999), 99.

<sup>37</sup> UNCLOS Art. 29

This definition of a “warship” is problematic when applied to vessels from the 18<sup>th</sup> century such as the *Coeur de l’ Ocean*.<sup>38</sup> It is unclear whether Captain Van Cleef would qualify as an officer duly commissioned by Astoria appearing on a service/naval list. Additionally, whilst the *Coeur de l’ Ocean* was used for military purposes and carried soldiers from Astoria’s army, further findings of fact would be necessary in order to determine what constituted “regular armed forces discipline” during the period in which the *Coeur de l’ Ocean* operated.

In light of these ambiguities, the Claimant submits that Article 29 should be interpreted in accordance with its ordinary meaning so as to exclude vessels that do not meet the definitional requirements.<sup>39</sup> The *Coeur de l’ Ocean* therefore does not fall within the definition of a “warship” for the purpose of attracting sovereign immunity at international law.

**b) In the alternative, the *Coeur de l’ Ocean* is not a state vessel on “government non-commercial service” attracting sovereign immunity**

Sovereign immunity at international law only attaches to state owned vessels used on “government non-commercial service”.<sup>40</sup> In determining the nature of the activities performed by the *Coeur de l’ Ocean*, a distinction must be drawn between vessels on “government non-commercial service” carrying official cargo and government vessels servicing private interests by transporting commercial cargo. Only the former will attract sovereign immunity. State practice has confirmed this distinction.<sup>41</sup>

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<sup>38</sup> Bederman, above n 28, 98.

<sup>39</sup> Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980), Art. 31. (hereinafter ‘the Vienna Convention’)

<sup>40</sup> UNCLOS Art. 96; Salvage Convention Art. 4; UNESCO Convention Art. 1(8).

<sup>41</sup> Letter from James H. Michel, Deputy Legal Advisor, U.S. Department of State – A July 13 1989 memorandum of the Office of the Legal Adviser of the U.S. Department of State analysed the immunities of the Uruguayan state vessel the *Presidente Riviera*: Digest of U.S. Practice in International Law (1980-90) cited in ‘Plaintiff Odyssey Marine Exploration Inc.’s Objections to the Magistrate Judge’s June 3, 2009, Report and

Whilst the Coeur de l' Ocean was used for military purposes prior to sinking, the Claimant submits that the Coeur de l' Ocean was performing a commercial function on its final voyage. The Coeur de l' Ocean contained a large amount of cargo that constituted commercial shipments.<sup>42</sup> The Coeur de l' Ocean is therefore properly classified as a state owned vessel on *commercial* service.

**c) In the alternative, the Coeur de l' Ocean is no longer a state owned 'ship' or 'warship' and therefore cannot attract sovereign immunity under UNCLOS**

The Claimant submits that upon sinking, the Coeur de l' Ocean ceased to be a state owned 'ship' or 'warship' capable of attracting sovereign immunity under Articles 95 and 96 of UNCLOS.<sup>43</sup> In *Baltimore, Crisfield & Onancock Line, Inc v. United States* the Fourth Circuit stated that the battleship in question was "wholly destroyed as a navigable and usable vessel... It cannot be shown that this wreck retained any characteristics of a vessel."<sup>44</sup> Upon sinking, the Coeur de l' Ocean lost the characteristics necessary to fulfil the definition of a ship or warship.<sup>45</sup>

**A.1.3 AS THE COEUR DE L' OCEAN IS EITHER ABANDONED OR NOT SUBJECT TO SOVEREIGN IMMUNITY, THE CLAIMANT HAS SALVAGE RIGHTS, RIGHTS UNDER THE SALVAGE CONVENTION AND RIGHTS UNDER THE 1995 AGREEMENT**

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Recommendation' in *Odyssey Marine Exploration Inc. v The Unidentified Shipwrecked Vessel and the Kingdom of Spain*.

<sup>42</sup> Official Moot Problem [1]

<sup>43</sup> Strati A, *The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995) 221.

<sup>44</sup> *Baltimore, Crisfield & Onancock Line Inc v United States* 140 F.2d 230 (1944), 234.

<sup>45</sup> Lucius Caflish, "Submarine Antiquities and the International Law of the Sea" (1982)12 *Netherlands Year.Book of. International Law.* 3, 32. Malta, for example, declared that "the immunity afforded by the UNCLOS to warships and other government ships operated for non-commercial purposes applies only as long as they remain in operation: if wrecked, they do not continue to enjoy this immunity": *Comments on Malta Concerning the Draft Convention on the Protection of Underwater Cultural Heritage*, distributed at the 2000 meeting, 3 July 2000.

### **a. The Claimant has common law salvage rights**

Common law salvage must meet the following requirements: services must have been rendered voluntarily, the salvage operation must be a success, either in whole or in part,<sup>46</sup> and the property must be in marine peril.<sup>47</sup> Shipwrecks as a matter of law are in marine peril if one or more of the following criteria are satisfied: there is risk of complete destruction of the wreck on the part of the elements,<sup>48</sup> the location of the wreck was unknown for a substantial period of time prior to the commencement of salvage operations,<sup>49</sup> or there is a risk that artefacts or property will not be returned to the stream of commerce.<sup>50</sup>

The Claimant has rendered salvage services voluntarily, having been under no pre-existing duty to save the *Coeur de l' Ocean*. The recovery of artefacts satisfies the requirement of success. The Claimant submits that the *Coeur de l' Ocean* is in marine peril by virtue of its location, the passage of 193 years during which the location of the *Coeur de l' Ocean* was unknown, the risk that the property on board will not be returned to the stream of commerce unless salvaged and the risk posed to the property by looters and wreck divers. Furthermore, the Claimant submits that its due diligence in salvaging the *Coeur de l' Ocean* reduced the

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<sup>46</sup>*The Sabine* (1879) 101 US 384, see also Geoffrey Brice, *Maritime Law of Salvage* (3<sup>rd</sup> ed.,1999) 1-05, Salvage Convention Art.s 12(1) and (2).

<sup>47</sup> Art. 1(a) of the Salvage Convention uses the term 'danger' instead of marine peril Art.s. 1,8, Brice (Ibid.) states that the terms may be used synonymously.

<sup>48</sup> *Columbus America Discovery Group v Atlantic Mutual Insurance Company*, 974 F.2d 450; *Treasure Salvors, Inc v Unidentified, Wrecked and Abandoned Sailing Vessel* 569 F.2d 330, 337; *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel* 549 F.Supp. 540 (1982); *Robinson v Western Australia* (1982) 153 CLR 168 per Mason J, 663.

<sup>49</sup> *Platoro Ltd. v. Unidentified Remains of a Vessel*, 695 F.2d 893, (1983),901.; *Bemis v. The R.M.S. LUSITANIA*, 884 F. Supp. 1042 (1995)

<sup>50</sup> *Columbus* above n.35

Coeur de l' Ocean to its exclusive possession. This satisfied the requirements of being a salvor-in-possession.<sup>51</sup>

### **b. The Claimant has rights under the Salvage Convention**

The Salvage Convention is presumed to apply to maritime cultural property unless a state makes a reservation under Article 30.1(d).<sup>52</sup> Rolga has entered no such reservation. The Coeur de l' Ocean is property in danger, for the purposes of the Salvage Convention.<sup>53</sup> The Salvage Convention applies to any salvage operations save to the extent that a contract otherwise provides expressly or by implication.<sup>54</sup> Courts may refer to pre-existing common law in order to interpret the Salvage Convention.<sup>55</sup> As the Coeur de l' Ocean has either been abandoned or is not subject to sovereign immunity, the Salvage Convention applies to the extent that it does not conflict with the 1995 Agreement.<sup>56</sup>

### **c. The Claimant has rights under the 1995 Agreement**

The Agreement was validly entered into by the parties, and imposes obligations upon both the Claimant and the Respondent.

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<sup>51</sup> *R.M.S. Titanic Inc v The Wrecked and Abandoned Vessel believed to be the RMS Titanic* 9 F.Supp 2d 624 (1998), 627

<sup>52</sup> Salvage Convention, Art. 30.1(d). This is illustrated in the travaux preparatoires : see Craig Forrest, "Historic Wreck Salvage : An International Perspective" (2009) 33(2) *Tulane Maritime Law Journal* 371. See further Brice, above n 51, [4-24].

<sup>53</sup> Salvage Convention, Art. 1.

<sup>54</sup> Salvage Convention, Art. 6.

<sup>55</sup> 43 Halsbury's Laws of England 928 (4<sup>th</sup> ed. Reissue 1997) cited in Craig Forrest "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past" 34(2) *Journal of Maritime Law & Commerce* 309, 330 at footnote 96.

<sup>56</sup> Salvage Convention, Art. 4.

A.1.4. GRANTING ASTORIA A ‘CONTINUING INTEREST’ IN THE DISPOSITION OF ARTEFACTS INTERFERES WITH THE APPLICANT’S RIGHTS UNDER THE 1995 AGREEMENT

The Claimant is entitled under ordinary principles of salvage law and the Salvage Convention to an award. The Claimant submits that Clause 5 of the 1995 Agreement is an agreement to determine a salvage award. Under this Clause, the Claimant is entitled to either a share of the profits from the sale of artefacts or a share of artefacts as an *in specie* salvage award. Specifically, given the failure of the joint marketing plan, the Claimant is presently entitled to own and possess its relative share of artefacts under the 1995 Agreement.<sup>57</sup> The aggregate amount of appraised values, not including artefacts already sold at auction, is \$616,298,000 USD.<sup>58</sup> Based on the sharing arrangements, Rolga’s relative share is approximately \$310,019,200 worth of artefacts.<sup>59</sup>

The 2001 Agreement grants Astoria a continuing interest in the articles recovered from Coeur de l’ Ocean in accordance with the Guiding Principles. This is inconsistent with the Claimant’s ownership rights under the 1995 Agreement and its entitlements under salvage law because it restricts the ability of the Claimant to deal freely with the artefacts recovered. Rolga and the Claimant are required to distribute the artefacts consistently with the following principles: non-division of collections of related artefacts, deposition of collections of representative samples in both Astorian and Rolgan museums and that the total assemblage of artefacts are capable of reassembly.

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<sup>57</sup> 1995 Agreement, Cl. 5

<sup>58</sup> Official Moot Problem, paragraph 6; further clarifications (add to our summary of facts)

<sup>59</sup> This amount may be slightly less than this depending on the value of Artefacts already sold and the values yet to be determined.

These considerations restrict the type of artefacts the Claimant is capable of owning and possessing, effectively eliminating any claim to rare artefacts. The requirement that the total assemblage be capable of reassembly restricts the Claimant's ability to market and dispose of artefacts. Furthermore, in granting Astoria a continuing interest, the 2001 Agreement, grants Astoria the right to influence the distribution of artefacts, interfering with the privity of the contract between the Claimant and Rolga.

## **A.2 ROLGA HAS INTERFERED WITH THE CLAIMANT'S SALVAGE RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY RATIFYING THE UNESCO CONVENTION**

### A.2.1 ROLGA'S RATIFICATION OF THE UNESCO CONVENTION INTERFERES WITH THE CLAIMANT'S RIGHT TO CONTINUE SALVAGE OPERATIONS ON THE COEUR DE L' OCEAN WITHOUT INTERFERENCE

**a) There is an implied term of the 1995 Agreement that the Claimant has the right to continue to conduct salvage on the Coeur de l' Ocean without interference for the period of the agreement**

The Claimant's recovery activities are subject to the 1995 Agreement, which provides that the term of the agreement is 20 years and provides for circumstances in which the agreement may be terminated.<sup>60</sup>

The Claimant submits there is an implied term that the Claimant has the right to continue salvage operations on the Coeur de l' Ocean without interference for the period in which the agreement remains on foot. This term is necessary for the business efficacy of the 1995

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<sup>60</sup> 1995 Agreement, clauses 2, 8.

agreement and to give effect to the parties' intentions.<sup>61</sup> This implied term places a duty on the Respondent not to interfere with the Claimant's operations in recovering artefacts from the Coeur de l' Ocean. Without this implied term, the Claimant would be restricted from performing its obligations under the 1995 Agreement and would risk losing the benefit of the agreement due to interference from the Respondent.

The necessity of implying a term of non-interference with salvage operations has been recognised outside of the scope of historic wreck salvage but in analogous circumstances of contractual salvage.<sup>62</sup> The Claimant submits that it is necessary to imply the term in this case due to the nature and terms of the 1995 Agreement and the conduct of the parties.

The Claimant submits that the Respondent's duty to not interfere with continuing operations can also be inferred from the duty of owners to co-operate with salvage operations in the 1989 Salvage Convention.<sup>63</sup> This duty of non-interference with performance forms part of general principles of contract law.<sup>64</sup>

**b) Article 4 of the UNESCO Convention infringes the implied term that the Claimant has the right to continue salvage**

Article 4 of the UNESCO Convention restricts the circumstances in which the law of salvage can be applied to underwater cultural heritage. For salvage law to apply to underwater cultural heritage the salvage operation must be authorised by the competent authorities, be in

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<sup>61</sup> *The Moorcock* (1889) 14 Ph.D 64, 68.

<sup>62</sup> *The Unique Mariner* [1979] 1 Lloyd's Rep 37; *The Tojo Maru* [1971] 1 Lloyd's Rep 341.

<sup>63</sup> Salvage Convention, Art. 8(2)(a).

<sup>64</sup> See *Stirling v Maitland* (1864) 5 B. & S. 840, 852; *The Unique Mariner* [1979] 1 Lloyd's Rep 37.

full conformity with the Rules Concerning Activities Directed at Underwater Cultural Heritage (“the Rules”) and any recovery must achieve its maximum protection.<sup>65</sup>

It is submitted that Article 4 interferes with the Claimant’s rights under the 1995 Agreement by modifying the conditions under which the Claimant could conduct future salvage operations. In order for the Claimant to continue salvage operations, the Claimant would have to comply with the Rules because the UNESCO Convention does not exclude pre-existing salvage operations from its effect. The Claimant would also be obliged to achieve the maximum protection of underwater cultural heritage. The effect of the additional requirements is analogous to wrongful dispossession under a salvage contract.<sup>66</sup>

**c) The UNESCO Convention applies to the Coeur de l’ Ocean prospectively, and not retroactively**

The Coeur de l’ Ocean and all recovered artefacts are underwater cultural heritage for the purposes of the UNESCO Convention.<sup>67</sup> The UNESCO Convention applies as the Coeur de l’ Ocean is not subject to sovereign immunity.<sup>68</sup>

**d) Articles 7, 9 and 10 of the UNESCO Convention interfere with the Claimant’s rights**

If Rolga has established a 12 n.m territorial sea, the Coeur de l’ Ocean will either be within the territorial sea, the Exclusive Economic Zone (“EEZ”) or on the border of the territorial sea and the EEZ.<sup>69</sup> If Rolga has established a 10 n.m territorial sea the Coeur de l’ Ocean will

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<sup>65</sup> *UNESCO Convention*, Art. 4.

<sup>66</sup> *The Unique Mariner* [1979] 1 Lloyd’s Rep 37; *The Tojo Maru* [1971] 1 Lloyd’s Rep 341.

<sup>67</sup> *UNESCO Convention* Art. 1(a)(ii).

<sup>68</sup> See Submission A.1.2 b) and c) above; *UNESCO Convention*, Art. 2(8).

<sup>69</sup> Official Moot Problem [16].

be located in Rolga's EEZ.<sup>70</sup> Rolga does not appear to have established a contiguous zone pursuant to UNCLOS.<sup>71</sup>

If the Coeur de l' Ocean lies within Rolga's EEZ, then Rolga may be in breach of an international obligation to apply the provisions of the Salvage Convention. Rolga and Astoria have both ratified the Salvage Convention and neither party has entered a reservation under Article 30.1(d). Although Rolga has ratified the UNESCO Convention, Astoria does not appear to have done so. As such, Rolga is under an obligation to apply the earlier treaty where the salvor, Bernard Bodd, is a national of Astoria and the wreck is located in an area where Rolga does not have preferential rights, such as the EEZ.<sup>72</sup> Article 4 of the UNESCO Convention restricts the circumstances in which salvage law can be applied to underwater cultural heritage. This contradicts the right to freely salvage under the Salvage Convention. The Respondent is therefore in breach of this by imposing obligations under Article 4 of the UNESCO Convention on the Claimant.<sup>73</sup>

#### A.2.2 THE RESPONDENT'S RATIFICATION OF THE UNESCO CONVENTION RESTRICTS THE CLAIMANT'S RIGHT TO OWN AND POSSESS ITS RELATIVE SHARE OF ARTEFACTS UNDER THE 1995 AGREEMENT

##### **a) The prohibition on commercial exploitation of underwater cultural heritage in the UNESCO convention removes the Claimant's power to sell artefacts**

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<sup>70</sup> Further clarifications [1], *cf.* Official Moot Problem [16].

<sup>71</sup> Official Moot Problem [16].

<sup>72</sup> Forrest "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past" 34(2) *Journal of Maritime Law & Commerce* 309, 347; UNCLOS Arts. 56, 58, 59.

<sup>73</sup> Further clarifications [20].

Due to the Respondent's ratification of the UNESCO Convention, the Claimant is prohibited from commercially exploiting artefacts recovered from the Coeur de l' Ocean.<sup>74</sup> The UNESCO Convention bars the Claimant from selling or irretrievably dispersing artefacts which it is otherwise entitled to own and possess under the 1995 Agreement.<sup>75</sup> Future sales at auction such as those that have already taken place would be prohibited.<sup>76</sup>

**b) The UNESCO Convention interferes with the Claimant's ownership rights by removing or restricting the Claimant's power to sell the artefacts**

The Claimant has the right to own and possess its relative share of artefacts under the 1995 Agreement.<sup>77</sup> It is submitted that the power to sell artefacts is a necessary component of the bundle of rights which comprise the "ownership" to which the Claimant is entitled to under the 1995 Agreement. The plain and ordinary meaning of the term "ownership" includes the incident of alienability. The parties' objective intention<sup>78</sup> that ownership includes the power of sale is also evidenced by the 1995 Agreement as a whole<sup>79</sup> and the parties' conduct, including sale at auction.<sup>80</sup>

Furthermore, as the Claimant has successfully salvaged items from the Coeur de l' Ocean, they are entitled to a salvage reward under salvage law and the Salvage Convention.<sup>81</sup> The 1995 Agreement specifies that the reward is a percentage of either the proceeds of sale or the value of the artefacts as an award *in specie*. The purpose of a salvage award is to reward a salvor

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<sup>74</sup> UNESCO Convention Art. 2(7), Rule (2)

<sup>75</sup> UNESCO Convention Annex Rule 2(b); Forrest "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past" 34(2) 2003 *Journal of Maritime Law & Commerce* 309, 343; Sarah Dromgoole '2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', 18(1) 2003 *International Journal of Marine and Coastal Law*, 59, 68.

<sup>76</sup> UNESCO Convention Annex Rule 2(b)

<sup>77</sup> See submission C below

<sup>78</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 767, 775, 782.

<sup>79</sup> *Throcmerton v Tracey* (1585) 1 Plow. 145, 161; *Miller v Borner* [1900] 1 QB 691

<sup>80</sup> Official Moot Problem [6]

<sup>81</sup> Salvage Convention Art. 12

for their efforts in saving property from marine peril. An award of ownership and possession of the artefacts *in specie* which did not include the power of sale would be fundamentally inconsistent with the nature and purpose of a salvage award.

### **A.3 THE RESPONDENT HAS INTERFERED WITH THE 1995 AGREEMENT BY GRANTING AQUATIC VIEW A PERMIT TO VISIT THE WRECK AND ALLOWING IT TO PROFIT FROM THE TAKING OF PHOTOGRAPHS AND OTHER ACTIVITIES**

#### **a) Permitting Aquatic View to visit the wreck and profit from the taking of photographs and other activities breaches the implied duty of co-operation**

Salvage contracts are construed according to the ordinary principles of contract law save where these conflict with a principle peculiar to the law of salvage.<sup>82</sup>

The Claimant submits that the Respondent is under a general, implied duty of co-operation in respect of the terms of the 1995 Agreement to do all that is necessary for the Claimant to have the benefit of the agreement.<sup>83</sup> The duty requires that parties will “take all such necessary or additional steps in the performance of the contract that will...contribute to the full realisation of the bargain”.<sup>84</sup> The activities of Aquatic View have diminished the benefit of rights held under clause 6 of the 1995 Agreement, insofar as Aquatic View have marketed CDs bearing the name “Cour de l’ Ocean” and taken photographs and video footage for use as promotional material. The marketing of such material diminishes the income that might have been earned by the Claimant (and the Respondent under the fee provision in clause 6)

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<sup>82</sup> *The Tojo Maru* [1972] A.C. 242 at 292, *The Unique Mariner (No 2)* [1979] 1 Lloyd’s Reports 37 at 50-57.

<sup>83</sup> The duty is one which is generally accepted in common law jurisdictions as universally applicable to contracts: see *Mackay v Dick* (1881) App Cas 251 at 263, *Butt v McDonald* (1896) 7 QJ 68 at 70-1, the rule in *Mackay* or the rule in *Butt* continues to be applied, see *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 597, *General Trading Co(Holdings) Ltd v Richmond Corp Ltd* [2008] 2 Lloyd’s Rep. 475

<sup>84</sup> Samuel J. Stoljar, “Prevention and Co-Operation in the Law of Contract” (1953) 31 *Canadian Bar Rev* 231 at 231-2

from the sale and marketing of merchandise. Such merchandise would reasonably include material such as songs and photographs.

It is submitted that the Respondent has failed to take such steps as are necessary to prevent the above activity by Aquatic View, for example limiting access to the Coeur de l' Ocean to the Claimant under the provisions of the 2000 law.<sup>85</sup> The Respondent also failed to act on information supplied by the Claimant that Aquatic View staff were visiting the wreck and undertaking activities which would diminish the benefit of the 1995 Agreement.<sup>86</sup> The failure to undertake either of these actions has diminished the value of the benefit conferred by clause 6 of the 1995 Agreement, such that the bargain can no longer be fully realised. The Claimant submits that this constitutes a breach of the general duty of co-operation and an interference with the 1995 Agreement.

**b) The use of the name “Coeur de l' Ocean” by Aquatic View to promote merchandise is an infringement of the Claimant’s rights under the 1995 Agreement**

It is irrelevant that Aquatic View is not using the exact name granted to the Claimant. “Coeur de l' Ocean” is sufficiently connected to the name “Coeur de l' Ocean” as to practically interfere with the Claimant’s exercise of its right to use the name “Coeur de l' Ocean” to sell and market merchandise.

**b) The visits by Aquatic View interfere with the Claimant’s right to conduct salvage operations**

The Claimant has exclusive rights of access in order to conduct salvage operations.<sup>87</sup> The right to exclusive access is founded in considerations of safety and preservation of a salvage

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<sup>85</sup> Official Moot Problem [8]

<sup>86</sup> Ibid. [11]

<sup>87</sup> See Submission B.1 below

site.<sup>88</sup> The presence of Aquatic View personnel and tourists interferes with the Claimant's exercise of their salvage rights by reducing the frequency and length of periods when the Claimant may safely salvage the Coeur de l' Ocean. These visits also interfere with rights under the 1995 Agreement to explore the Coeur de l' Ocean and recover artefacts.

**c) Permitting Aquatic View to take photographs interferes with the Claimant's salvage rights**

The Claimant has the exclusive right to photograph and document the Coeur de l' Ocean.<sup>89</sup>

The activities of Aquatic View interfere with the exercise of this exclusive right.

**B. THE CLAIMANT HAS EXCLUSIVE RIGHTS OF PHOTOGRAPHING AND DOCUMENTING THE COEUR DE L' OCEAN**

The Claimant is seeking exclusive rights of photography and documentation over the wreck of the Coeur de l' Ocean. Such rights accrue under the internationally recognised law of salvage<sup>90</sup> or under the law of intellectual property.

**B.1 THE RIGHT TO PHOTOGRAPH AND DOCUMENT A WRECK FORMS PART OF THE *JUS GENTIUM* OF THE LAW OF SALVAGE**

**a) The Claimant is entitled to all the privileges accruing to a salvor-in-possession**

The Claimant has fulfilled the common law requirements necessary to be awarded salvor-in-possession status.<sup>91</sup> These rights accrued from the point the Claimant commenced salvage operations. Salvors have exclusive rights of access to the wreck site for the purpose of retrieving artefacts,<sup>92</sup> as well as the right to exclusive possession of any property retrieved from a ship until such time as a salvage reward is paid. These rights are protected and

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<sup>88</sup> See Submission B.2 below; *R.M.S. Titanic Inc. v Haver* 1999 AMC 1330

<sup>89</sup> See Submission B below

<sup>90</sup> UNCLOS, Art. 303(1)

<sup>91</sup> See submission A above

<sup>92</sup> *Marex International v The Unidentified, Wrecked & Abandoned Vessel*, 952 F.Supp 825 at 830

enforceable by a maritime lien against such property.<sup>93</sup> The lien is enforceable against the whole world to secure payment of a salvage award.<sup>94</sup> Therefore, where salvage rights accrue to a salvor-in-possession, these rights are exclusive and good against the whole world.

**b) The right to photograph and document the Coeur de l' Ocean forms part of the Claimant's exclusive salvage rights**

The relevant question in determining whether the law of salvage may apply to property is whether that property is in marine peril.<sup>95</sup> Photographs and means of documentation can constitute property in marine peril. Photographs and other visual media are in marine peril by virtue of their relationship to the wreck; where a wreck remains in marine peril, photographs and other materials taken of the wreck are likewise in marine peril.<sup>96</sup>

The Coeur de l' Ocean is in marine peril.<sup>97</sup> The Claimant, as salvor in possession, has exclusive rights to save the Coeur de l' Ocean. This includes the exclusive right to photograph and document the Coeur de l' Ocean, in order to return such visual media to the stream of commerce.

**c) The right to exclude others from photographing and documenting the Coeur de l' Ocean is justified by the same considerations underpinning a traditional salvage award**

Both preservation of a wreck and the safety of those engaged in salvage operations would be compromised were a court or other authority to permit multiple salvors access to the Coeur de l' Ocean in a "free-for-all".<sup>98</sup> A failure to award exclusive rights of photography and

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<sup>93</sup> Fletcher-Tomenius et al., "Salvor in Possession: Friend or Foe to Marine Archaeology?" (2000) 9(2) *International Journal of Cultural Property* 263, 270

<sup>94</sup> Salvage Convention, Art. 20.1

<sup>95</sup> Brice, above n.57, p.46, 1-142, *The Charlotte* (1848) 3 W.Rob 68 at 71

<sup>96</sup> *Lindsay v Wrecked & Abandoned Vessel R.M.S. Titanic*, 1998 Lexis US Dist. 13604 at 10-11

<sup>97</sup> See submission A above

<sup>98</sup> *MDM Salvage Inc. v The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F.Supp 308 at 310

documentation may lead to any number of parties seeking access to the Coeur de l' Ocean in order to take photographs and otherwise document the wreck.<sup>99</sup> This would be an unsafe result contrary to the principles of the law of salvage and the preservation of the underwater cultural heritage.

**d) The right to photograph and document the Coeur de l' Ocean is a *sui generis* right accruing to salvors-in-possession**

A *sui generis* right to photograph and document the Coeur de l' Ocean is a necessary implication of the doctrine of telepossession. The doctrine provides that in order to reduce a wreck to exclusive possession, a salvor need only maintain a virtual presence by means of capturing images of a wreck.<sup>100</sup> As a result, images are capable of reducing a wreck to the exclusive possession of whoever takes photographs of the wreck. Where images establish rights in a wreck, a salvor in possession has exclusive rights to all images of the wreck.<sup>101</sup> This exclusive right, which has accrued to the Claimant, is potentially undermined by the taking of photographs by Aquatic View. This necessitates a continuous presence in order to prevent such challenges to the Claimant's right to exclusive possession. As a matter of policy, such an outcome would undesirably increase the cost of salvage operations and discourage salvors.

**e) It is just and equitable in all the circumstances to enforce the Claimant's exclusive rights of photography and documentation as salvor-in-possession**

The Claimant has performed a voluntary service in saving the Coeur de l' Ocean and the property on board from marine peril. Typically a salvage award is derived from returning

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<sup>99</sup> *RMS Titanic* above n.56 at 636 and 637

<sup>100</sup> Horrell, Drew F.T., "Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery", (1991) 3 Pace Y.B. Int'l 309

<sup>101</sup> Stern, Justin S., "Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks", 68 *Fordham Law Review* 2489 at 2514

property to the stream of commerce. It is therefore just that the Claimant have the right to earn a salvage award through photographic and other exhibitions.<sup>102</sup>

It would be an unjust enrichment at the expense of the Claimant if Aquatic View were permitted to profit by means of photographic exhibitions from the labours of the Claimant.<sup>103</sup>

The right to take photographs and document the Coeur de l' Ocean as a means of earning a salvage award represents a sustainable means of earning a reward for the Claimant, and further offers an incentive for salvors to continue operations.<sup>104</sup>

## B.2 THE LAW OF BREACH OF CONFIDENCE CONFERS AN EXCLUSIVE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L' OCEAN UPON THE CLAIMANT

### **a) Exclusive rights of photography and documentation are necessary to protect trade secrets and other confidential information of the Claimant**

Salvage is an extremely expensive and technical industry, and salvage operations are extremely complex, requiring the use of sensitive technologies and other means to locate and salvage a shipwreck. The means of excavating a site therefore constitutes information confidential to the Claimant and others in the salvage industry.<sup>105</sup> Imaging access to the Coeur de l' Ocean therefore constitutes information which is economically valuable.<sup>106</sup>

The location of the Coeur de l' Ocean also constitutes confidential information which is economically valuable to the Claimant. The information is capable of being protected. The

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<sup>102</sup> Varmer, Ole, "The Case Against the "Salvage" of the Cultural Heritage", 30 *Journal of Maritime Law and Commerce* 279 at 292

<sup>103</sup> *Treasure Salvors Inc et al v The Wrecked and Abandoned Sailing Vessel, "Nuestra Senora de Atocha" et al.*, 546 F.Supp 919 at 927

<sup>104</sup> Miller, Marian, "Underwater cultural heritage: is the titanic still in peril as court battle over the future of the historical vessel?" (2006) 20 *Emory International Law Review* 345

<sup>105</sup> Odyssey Marine Exploration, *The HMS Sussex Shipwreck Project (Site E-82) Preliminary Report*

<sup>106</sup> *Coco v A.N. Clark (Engineers)* [1969] RPC 41 at 48

location of the wreck is economically valuable to the Claimant, because it is the source of salvage rights and the opportunity to earn a salvage reward.

**b) The Respondent is under an express obligation of confidence under the 1995 Agreement to protect the confidential information supplied to it by the Claimant**

The 1995 Agreement contains a confidentiality clause “governing the release of information concerning the Agreement and all documents relating to its execution”.<sup>107</sup> The Claimant submits that the confidentiality clause extends to cover the means of locating and salvaging the Coeur de l’ Ocean. Clause 2 of the 1995 Agreement notes that the parties will conclude a project plan that “will set forth, amongst other things, the equipment, personnel and methodologies to be employed in the exploration of the shipwreck believed to be the Coeur de l’ Ocean...”. Details of the methodology used to explore and salvage the Coeur de l’ Ocean provided for in the project plan constitute documents relating to the execution of the 1995 Agreement and therefore must be kept confidential by the Respondent. The Claimant also submits that the location of the wreck is protected by the confidentiality clause; it is submitted that the location of the wreck constitutes information concerning the 1995 Agreement.

The Claimant submits that the Respondent has breached their obligation under clause 10 of the 1995 Agreement by disclosing the location of the Coeur de l’ Ocean to Aquatic view and allowing Aquatic View to visit and take photographs of the Coeur de l’ Ocean.

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<sup>107</sup> 1995 Agreement, Clause 10

**c) In the alternative, if the Respondent is not under an express obligation of confidence, they are under an implied obligation of confidence arising from the circumstances of the instant case.**

The location of the wreck and its contents was supplied in circumstances importing an obligation of confidence upon the Respondent. The obligation arises from the manner in which the information was communicated.<sup>108</sup> Whether the information is communicated in confidence is a question that must be objectively assessed.<sup>109</sup> The conduct of the Respondent in not publicising the wreck's location and other circumstances support an objective inference of an obligation of confidence. An obligation can also be inferred from the limited dissemination of the information and the Claimant's failure to encourage or permit widespread publication.<sup>110</sup>

Aquatic View is barred from making use of any confidential information. It is a breach of an obligation of confidence to make use of confidential information for other than the purpose for which it was supplied. It is a breach of an obligation for a party to make use of confidential information in order to gain a competitive or commercial advantage.<sup>111</sup> In publishing photographs on their website and profiting from the sale of tickets to visit the Coeur de l' Ocean, Aquatic View has obtained a commercial advantage.

### B.3 THE CLAIMANT HAS EXCLUSIVE RIGHTS OF PHOTOGRAPHY AND DOCUMENTATION ARISING FROM ITS BROADCAST ARRANGEMENTS

**a) The Claimant has rights of authorship in footage produced under the ongoing broadcast deal**

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<sup>108</sup> See *Seager v Copydex* [1967] 2 All ER 415

<sup>109</sup> *Coco v Clark*, above n.114

<sup>110</sup> *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251

<sup>111</sup> *Electro Cad Australia Pty Ltd v Mejati RCS SDN BHD* [1999] F.S.R. 291

Where one party commissions work from another and exercises supervision and control over the creation of a work, that party acquires rights as a joint author of the work.<sup>112</sup> An international broadcasting company has been commissioned by the Claimant to make a film of the Coeur de l' Ocean. The Claimant therefore submits that it retains rights of joint-authorship over the footage produced as well as any further creative work produced.

**b) The Claimant's rights of authorship extend to controlling the production and dissemination of derivative works**

Derivative works are defined as a "translation, adaptation, arrangement or other alteration of a literary or artistic work".<sup>113</sup>

Material prepared by Aquatic View constitutes a derivative work in that it can only be based on the work of which the Claimant is a joint-author. Film footage taken by Aquatic View would be "substantially similar"<sup>114</sup> to footage taken under the Claimant's ongoing broadcasting arrangement. By filming the Coeur de l' Ocean, Aquatic View and by extension all others who wish to film or document the wreck infringe the copyright in the idea of filming the wreck and in the footage produced under the ongoing broadcasting deal.<sup>115</sup>

**C. THE CALCULATION OF PROFITS AND/OR DISTRIBUTION OF ARTEFACTS BETWEEN THE PARTIES IS TO BE MADE SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES**

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<sup>112</sup> *Lindsay*, above n.103

<sup>113</sup> Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967, opened for signature 24 July 1971 (entered into force 15 December 1972), Art. 2(3), see also s.8(1), *Copyright Act 1987* (Malaysia)

<sup>114</sup> *Horgan v Macmillan Inc.* 789 F.2d 157

<sup>115</sup> *Micro Star v Formgen Inc.* 154 F.3d 1107

**a) In the absence of an express term in the 1995 Agreement detailing how artefacts are to be distributed between the parties salvage principles should govern the distribution**

Clause 5 of the 1995 Agreement provides for the Claimant's ownership of its relative share of artefacts.<sup>116</sup> The 1995 Agreement envisages that the parties will sell the artefacts and the profits of sale will be divided on an agreed basis. As the parties have failed to agree on a joint sale of plan it is submitted that the appropriate result is that the Claimant is entitled to own and possess a share of the artefacts. This amounts to an agreed salvage award *in specie*, which courts have considered an appropriate award in treasure salvage cases due to the unique and intrinsic value of the property.<sup>117</sup>

**b) The Claimant is entitled to ownership of artefacts *in specie* in proportion to the aggregate value of artefacts to which it is entitled under the 1995 Agreement**

Under salvage legal principles the Claimant is entitled to a distribution of artefacts judged on the aggregate appraised value of the artefacts, taking into account the unique and intrinsic value of property recovered. The 1995 Agreement is directed at realising a profit from the proceeds of the wreck. The parties conduct in auctioning parts of the collection overseas is clear evidence of this intention.<sup>118</sup>

These considerations reflect that the principles governing a distribution of artefacts should be primarily concerned with the realization of profit from the recovered artefacts. Based on this and in accordance with the unique and intrinsic value of artefacts,<sup>119</sup> the Claimant submits that it is entitled to a distribution that includes a wide range of all of the different artefacts

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<sup>116</sup> 1995 Agreement Clause 5

<sup>117</sup> *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, above n.125, 469 (4th Cir. 1992); *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 556 F. Supp. 1319, 1340 (S.D. Fla. 1983); *Cobb Coin*, above n.125 (D.C.Fla. 1981)

<sup>118</sup> Official Moot Problem [6]

<sup>119</sup> *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, above n.125 *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, above n.125; *Cobb Coin*, 525 F.Supp, 198 (D.C.Fla. 1981)

recovered from the ship. Furthermore, this is necessary in light of the provisions of the UNESCO Convention restricting the Claimant's power to sell the artefacts recovered.

The Claimant recognises that in a distribution certain items are of significant value to the Government for archaeological and cultural purposes but seeks a share in other items. Items such as bronze cannon (8), items 19, 20 and items number 9-17 which are of relatively low commercial value may be retained by the Government. The Claimant seeks its share of all of the rest of the items which have been recovered from the shipwreck.

**c) In the alternative, the Claimant is entitled to terminate the 1995 Agreement and rely on salvage principles for the distribution of artefacts**

The 1995 Agreement confers a right to terminate on either party in the event of a serious breach of obligation. The Claimant submits that the multiple interferences by the Respondent with its rights and performance under the Agreement<sup>120</sup> constitute a serious breach of obligation on the part of the Respondent, entitling it to exercise the right to termination. The interferences with the Agreement demonstrate an unwillingness to perform the agreement on the part of the Respondent. The law of salvage may apply *ex contractu*,<sup>121</sup> and therefore remains in force to the extent not otherwise provided for by contract and consistent with the Salvage Convention.<sup>122</sup> The effect of termination is to release the parties from all future obligations under the contract.<sup>123</sup> The Claimant submits that this puts at an end any obligation to follow the distribution arrangements in clause 5 of the 1995 Agreement.

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<sup>120</sup> See submission A above

<sup>121</sup> Brice above n.57 1-127 at p.41, *The Five Steel Barges* (1890) 15 P.D. 142 at 146, *The Hestia*, [1895] P.193 at 199

<sup>122</sup> Salvage Convention, Art.s. 2 and 7

<sup>123</sup> See for example *Kaufman v McGillicuddy* (1914) 19 CLR 1

Where the parties are affected by a second set of obligations under the law of salvage, the Claimant submits that, the 1995 Agreement having no ongoing force by reason of termination, ordinary salvage principles apply. Therefore, the Claimant seeks a liberal salvage award, to be determined under the ordinary principles of salvage law.<sup>124</sup>

**d) The distribution of artefacts should also be modified so the award also includes compensation for interferences with The Claimant's performance under the contract**

Should the Respondent wish to retain ownership of all or some of the artefacts, the Claimant seeks compensation for the loss of opportunity from not being able to commercialize the artefacts. The Claimant also seeks compensation for the various interferences with its salvage rights and rights under the contract.<sup>125</sup> As for ordinary breaches where a salvage award is involved the compensation in this case may be added to the award that is made of artefacts to the Claimant or the monetary award. The effect of compensating the Claimant for the expectation loss resulting from various breaches of contract would be to put the Claimant in the position it would have been in had the contract been fulfilled.

**PRAYER FOR RELIEF**

Benevolent Heritage Inc respectfully requests the Arbitrators to adjudge that:

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<sup>124</sup> Salvage Convention, Arts. 12 and 12, *Columbus* above n.26

<sup>125</sup> See Submissions A.1, A.2, A.3

- a) The Respondent has interfered with its rights and performance under the 1995 Agreement by entering into the 2001 Agreement with Astoria, ratifying the UNESCO Convention and permitting Aquatic View to visit the wreck and profit from activities. The Claimant seeks damages to compensate for these interferences with its rights.
- b) The Claimant has exclusive rights of photography and documentation of the Coeur de l' Ocean, and that such rights have been infringed by Aquatic View, entitling the claimant to compensation and orders ensuring the removal of all offending photographs and other material from Aquatic View's website.
- c) That the distribution of artefacts should be solely on the basis of salvage legal principles.