

INTERNATIONAL CENTRE OF ARBITRATION

2009

BENEVOLENT

(APPLICANT)

v

THE GOVERNMENT OF ROLGA

(RESPONDENT)

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

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

QUESTIONS PRESENTED

1. Whether Rolga interfered with Benevolent The Claimant’s rights and performance under the 1995 Agreement by entering into the 2001 Agreement with Astoria;
2. Whether Rolga interfered with Benevolent The Claimant’s rights and performance under the 1995 Agreement by ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage;²
3. Whether Rolga interfered with Benevolent The Claimant’s 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;

¹ Clause 10 of PAM; Corrections [4]

² Convention on the Protection of the Underwater Cultural Heritage, opened for signature on 2 November 2001 (entered into force 2 January 2009)(hereinafter ‘UNESCO Convention’)

4. Whether Benevolent The Claimant has exclusive rights of photographing and documenting of the Coeur de l' Ocean;
5. Whether the calculation a 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.³ Prior to its sinking, Captain Van Cleef led the vessel on an expedition to conquer the city of Zamzala,

³ Official Moot Problem [1]

now part of Rolga.⁴ The Coeur de l' Ocean was used for military purposes prior to its sinking.⁵ Astoria's army successfully conquered the city and robbed the palace.⁶ Upon leaving the city the Coeur de l' Ocean sunk off the coast of Rolga containing war booty and other cargoes.⁷

In 1990, Mr Bernard Bodd, a salvor and shareholder in Benevolent Heritage Inc ('the Claimant') submitted a proposal to Rolga for the survey and recovery of Astorian colonial era wrecks in the region. Pursuant to the then law of Rolga, the relevant authority was required to approve all projects involving historical objects or sites.⁸

On 1st June 1993, a wreck identified as the Coeur de l' Ocean was by The Claimant exactly 12 n.m from Rolga's baseline, but beyond a 10 n.m limit⁹. 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.¹⁰ The location of the wreck was kept secret for national security reasons.

On 27th September 1995 the Government approved the project and the 'Partnering Agreement Memorandum' was signed.¹¹ The agreement provides for The Claimant to submit a project plan for approval,¹² and provides for an arrangement to share artefacts between the parties.

⁴ Ibid.

⁵ Further Clarifications [6]

⁶ Official Moot Problem [1]

⁷ Ibid.

⁸ Ibid. [4]

⁹ Ibid. [5]

¹⁰ Ibid., Further Clarifications [1]

¹¹ Ibid. [5]

¹² Further Clarifications [21]

Today, some of the artefacts recovered have been auctioned at overseas auction houses to finance project costs.¹³

In 2000, influenced by the international adoption of the UNESCO Convention, the Rolgan Government made a commitment to strengthen its protection of cultural heritage. The Minister of Rolga Cultural Heritage made a statement to a UNESCO committee outlining the duty of every nation to protect its cultural heritage.

In 2001, the Government of Rolga entered into an agreement on the Protection of Astorian Wrecks. 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.¹⁴ These guiding principles provide for maintaining 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.¹⁵

Following this, government archaeologists have confirmed that many artefacts were destroyed due to poor handling by the Claimant’s personnel.¹⁶

At the same time, Aquatic View, a tour operator, was given a permit by the Government to organise trips to view the wreck of the Coeur de l’ Ocean. The company has sold tickets at

¹³ Official Moot Problem [6]

¹⁴ Ibid. [9]

¹⁵ Appendix (2)

¹⁶ Official Moot Problem [10], Further Clarifications [34]

USD 20000 each. Aquatic View staff have also taken photographs and made video clips of the wreck; these have been posted on the company's website as promotional material for the trips. The company has also engaged a songwriter to write a song entitled "Cour de l' Ocean", CDs of which are marketed as souvenirs. The Claimant argues these activities have jeopardised an ongoing broadcasting deal.¹⁷

These developments, as well as the stated Rolgan policy of the need to protect underwater cultural heritage and the move towards ratification of the 2001 Convention, have prompted Heritage Inc to reconsider their position and seek a final distribution of artefacts. The Claimant accuses the Government of an unfair distribution of artefacts contrary to the 1995 Agreement.

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

All states are party to the 1989 Salvage Convention, 1886 Berne Convention, 1996 WIPO Copyright Treaty, 1969 Vienna Convention on the Law of Treaties.¹⁸

SUMMARY OF PLEADINGS

A. The Respondent did not interfere with the Claimant's rights and performance under the 1995 Agreement by entering into the 2001 Agreement with Astoria ('the 2001 Agreement'). The 2001 Agreement did not affect the rights of the parties, as Astoria retained

¹⁷ Official Moot Problem [11]

¹⁸ Official Moot Problem [17]

full right, title and interest in the shipwreck by virtue of its not having been abandoned or the vessel attracting sovereign immunity. The Claimant had no common law salvage rights or rights under the 1989 Salvage Convention¹⁹, as such rights cannot exist where a vessel is subject to sovereign immunity. The 1995 Agreement thus exhaustively sets out all the rights of the Claimant. The 2001 Agreement is not inconsistent with the 1995 Agreement.

Ratifying the UNESCO Convention does not interfere with any rights or performance under the agreement as the relationship between the parties is governed exclusively by the 1995 Agreement. It is submitted that if had a right to continue salvage without interference the Respondent did not interfere with the right. Further, the Convention does not impose any limitations on the Claimant that are inconsistent with the 1995 Agreement.

Granting a permit to Aquatic View does not interfere with any rights of the Claimant because they were not exclusive rights, because they do not fall within the scope of any rights granted to the Claimant, or alternatively because the purported grant of rights under the 1995 Agreement was ineffective.

B. The Claimant does not have exclusive rights of photography and documentation in the Coeur de l' Ocean. There is no provision in the 1995 Agreement for exclusive rights of photography and documentation, and further, such rights do not fall within the scope of the Claimant's right to confidentiality under the 1995 Agreement.

If salvage law applies, exclusive rights to photography and documentation do not accrue to the Claimant either as part of the right to exclusive possession or as a *sui generis* right. Such rights are limited in their scope. Exclusive rights of photography and documentation would also violate the principle of freedom of the seas.

¹⁹ International Convention on Salvage, opened for signature on 28 April 1989 (entered into force 14 July 1996) (hereinafter 'Salvage Convention')

The law of breach of confidence does not support the grant of an exclusive right, as there is no obligation of confidence, or the information disclosed to Aquatic View does not fall within the scope of any obligation, or the information was disclosed in the public interest. It is also submitted that the Claimant's broadcasting deal does not confer an exclusive right on the Claimant.

C. The distribution of artefacts on the basis of salvage principles was not envisaged by the 1995 Agreement. An award of artefacts in accordance with the terms of the 1995 Agreement is required by said agreement given the failure to conclude a joint marketing plan. Rolga is entitled to retain artefacts of archaeological importance and dispose of them for the benefit of humanity. It is also submitted that for the purposes of distribution that a reduction in the Claimant's *in specie* salvage reward is justified by their negligence.

PLEADINGS

A.1 THE RESPONDENT DID NOT INTERFERE WITH THE CLAIMANT’S RIGHTS AND PERFORMANCE UNDER THE 1995 PARTNERING AGREEMENT (‘THE 1995 AGREEMENT’) BY ENTERING INTO THE AGREEMENT ON THE PROTECTION OF ASTORIAN WRECKS IN 2001 (‘THE 2001 AGREEMENT’)

The Respondent submits that prior to the commencement of operations Astoria retained right, title and interest in the Coeur de l’ Ocean because:

A.1.1 Astoria did not abandon the Coeur de l’ Ocean;

A.1.2 The Coeur de l’ Ocean attracted sovereign immunity; and

A.1.3 The Claimant did not obtain express permission from Astoria to salve the Coeur de l’ Ocean.

As a result, the Claimant did not acquire salvage rights²⁰ or rights under the 1989 London Salvage Convention (“Salvage Convention”). The Claimant’s rights to salve the Coeur de l’ Ocean are exhaustively prescribed in the 1995 Agreement.

The 2001 Agreement is consistent with the Claimant’s rights and performance under the 1995 Agreement because the “continuing interest” granted to Astoria in the disposition of articles provided in 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”) can be achieved consistently with the terms of the 1995 Agreement.

²⁰ Any reference to “salvage rights” refers to salvage rights at common law.

A.1.1 ASTORIA DID NOT ABANDON THE COEUR DE L' OCEAN PRIOR TO THE COMMENCEMENT OF OPERATIONS BY THE CLAIMANT

a) An express standard of abandonment applies to public vessels

The Coeur de l' Ocean is a state owned vessel of Astoria.²¹ The Respondent submits that an express standard of abandonment applies to warships and other state owned vessels (hereafter "public vessels").²² An express standard of abandonment requires that public vessels can only be abandoned through an express act of denunciation or relinquishment of title.²³ Ownership cannot be extinguished by the passage of time or inaction by a sovereign owner.²⁴ In contrast, an implied standard of abandonment allows an inference of abandonment for public vessels where there is "strong and convincing evidence" of an intention to abandon the vessel.²⁵

There is no rule in customary international law prohibiting the application of an express standard of abandonment to public vessels.²⁶ Domestic courts have inconsistently applied the standard of abandonment to public vessels. Recent case law and state practice has supported

²¹ Official Moot Problem, [1].

²² *Sea Hunt, Inc v. Unidentified Shipwrecked Vessel or Vessels* 2000 AMC 2113; Jeffrey W. Yeates, "Clearing up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels" (1999-2000) 12 *University of San Francisco Maritime Law Journal* 359.

²³ *Ibid. 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 U.S.S. Hatteras* 1984 AMC 1094 : for U.S Government approach see *Statement by the President of the United States on U.S. Policy for the Protection of Sunken warships* (19 January 2001).

²⁴ *United States v. Steinmetz* 973 F.2d 212 (1992).

²⁵ *Columbus-America Discovery Group v Atlantic Mutual Insurance Company* 974 F.2d 450 (1992), 464-465.

²⁶ Craig Forrest, "An International Perspective on Sunken State Vessels as Underwater Cultural Heritage" (2003) 34 *Ocean Development & International Law* 41, 48; see further David J. Bederman, "Rethinking the Legal Status of Sunken Warships" (2000) 31 *Ocean Development & International Law*, 97, 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.

the application of an express standard of abandonment to public vessels.²⁷ In *Sea Hunt, Incorporated Et al v Unidentified Shipwrecked Vessel or Vessels Et al*, the court held that because Spain never expressly relinquished title to two state vessels, the vessels were not abandoned.²⁸ The court emphasised that it was immaterial that over 150 years had lapsed since the vessels sunk; a claim of ownership had not previously been asserted; and no recent attempts had been made to raise or salve the wreck.²⁹ The court emphasised that because Spain had appeared and had asserted ownership over the vessels an express standard of abandonment applied.³⁰ State practice outside the U.S however has not consistently applied either an express or an implied standard.³¹ The Respondent submits that in line with recent authority the application of an express abandonment standard is appropriate.

(b) Astoria did not abandon the Coeur de l' Ocean prior to the commencement of operations

The 2001 Agreement recognised that Astoria retained title to wrecks on or off the coast of Rolga including the Coeur de l' Ocean. Prior to the 2001 Agreement, Astoria never expressly indicated an intention to relinquish its title in the Coeur de l' Ocean. Therefore, at no point prior to the 2001 Agreement, had Astoria expressly abandoned the Coeur de l' Ocean.

²⁷ *Sea Hunt, Inc v. Unidentified Shipwrecked Vessel or Vessels* 2000 AMC 2113; *Aircraft Recovery L.L.C. v Abandoned Aircraft* 54 F.Supp.2d 1172 (1999); *United States v. Steinmetz* 973 F.2d 212 (1992); *Statement by the President of the United States on U.S. Policy for the Protection of Sunken warships* (19 January 2001).

²⁸ *Sea Hunt, Inc* Ibid. See Kyle Salvador Sclafani, "Sea Hunt. Inc. v. Unidentified Shipwrecked Vessels: Defining a Standard for 'Abandonment' for the Shipwreck of a Sovereign" (2001) 25 *Tulane Marine Law Journal* 559.

²⁹ *Sea Hunt, Inc* above n.27; Yeates, above n 23, 377.

³⁰ Ibid.

³¹ See Yeates, above n 23, 373; Walker, above n 26, 335-336; *Simon v Taylor* [1975] 2 Lloyd's List L.R 338, 342; *Nordsjø Dykker Co. v. Høvding Skipsopphugging* 135 Norsk Retstidende 346, 349 (Norwegian Sup. Ct. March 21, 1970).

Alternatively, if an implied standard of abandonment is adopted, the Respondent submits that there is no “strong or convincing evidence” supporting an inference that Astoria abandoned the Coeur de l’ Ocean prior to 2001. Abandonment cannot be inferred from Astoria’s inaction or the passage of 193 years from when the Coeur de l’ Ocean sunk.

A.1.2 THE COEUR DE L’ OCEAN ATTRACTS SOVEREIGN IMMUNITY

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 that provides that these vessels are entitled to immunity from coastal state enforcement authorities within waters of national jurisdiction.³²

a) The Coeur de l’ Ocean is ‘warship’ attracting sovereign immunity

The definition of a warship is provided for 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.³³

The Respondent submits that the Coeur de l’ Ocean is a warship attracting sovereign immunity. It is submitted that because the journey to Zamzala was characteristic of the

³² Churchill and Lowe, *The Law of the Sea* (1999), 99.

³³ *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982 (entered into force 16 November 1994)(hereinafter ‘UNCLOS’)Art. 29

ordinary military ventures undertaken by the Astorian government³⁴ and the Coeur de l' Ocean was used for military purposes prior to sinking,³⁵ it is reasonable to infer that the Coeur de l' Ocean would meet the definitional requirements of a 'warship' for the purpose of attracting sovereign immunity.

It can be reasonably assumed that the Coeur de l' Ocean would have had external marks showing that it was a warship of Astoria, Captain Van Cleef would have been an officer duly commissioned and the crew who were soldiers of Astoria's army would have been under regular armed forces discipline. For these reasons, the Respondent submits that the Coeur de l' Ocean should be classified as a 'warship' for the purpose of attracting sovereign immunity.

b) In the alternative, the Coeur de l' Ocean is a state vessel on 'government non-commercial service' attracting sovereign immunity

Sovereign immunity at international law attaches to state owned vessels used on "government non-commercial service".³⁶ The Respondent submits that the Coeur de l' Ocean was engaged in government non-commercial service on its final voyage as it was used for military purposes prior to sinking. The cargo on board the Coeur de l' Ocean was primarily state cargo consisting of war booty from the Palace of Zamzala. Commercial shipments would have been for a subsidiary purpose and do not alter the nature of the final voyage of the Coeur de l' Ocean.

³⁴ Official Moot Problem, [1].

³⁵ Further Clarifications [5]

³⁶ UNCLOS art 96; Salvage Convention Art 4; UNESCO Convention Art 1(8).

A.1.3 THE CLAIMANT’S RIGHTS TO THE COEUR DE L’ OCEAN ARE EXHAUSTIVELY PRESCRIBED ON THE TERMS OF THE 1995 AGREEMENT

a) The Salvage Convention does not apply

The Salvage Convention does not apply to the Coeur de l’ Ocean because Astoria did not abandon title to the Coeur de l’ Ocean and it was, at the time of salvage operations, entitled to sovereign immunity.³⁷ The Salvage Convention does not apply to “warships or other non-commercial vessels owned or operated by a state” entitled to sovereign immunity at the time of salvage.³⁸ As a result express permission must be obtained from a sovereign owner before salvaging a sovereign vessel. As the Claimant did not obtain Astoria’s permission prior to commencing operations, the Salvage Convention does not apply.

b) Common law salvage does not apply

The Claimant does not meet the common law requirements to salvage the Coeur de l’ Ocean. 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,³⁹ and the property must be in marine peril.⁴⁰ The Respondent submits that shipwrecks are in marine peril only when there is a risk of complete destruction of the wreck on the part of the elements.⁴¹ Marine antiquities, such as the Coeur de l’ Ocean, that have remained undisturbed for centuries are

³⁷ Salvage Convention, Art 4, this extends to State owned cargo see Art 25.

³⁸ Ibid.

³⁹ *The Sabine* (1879) 101 U.S. 384, see also Geoffrey Brice, *Maritime Law of Salvage* (2003), 1-05, Salvage Convention Arts. 12(1)-(2).

⁴⁰ Article 1(a) of the Salvage Convention uses the term ‘danger’ instead of marine peril, Brice states that the terms may be used synonymously Brice, *ibid.*

⁴¹ *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515, (11th Cir. 1985); *Subaqueous Exploration and Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel*, 577 F. Supp. 597, 611, (D. Md. 1983); *Her Majesty the Queen in right of Ontario v Mar-Dive Corp*, 1997 AMC 1000, 1062-63 (Ont Ct 1997); *Simon v Taylor* [1975] 2 Lloyd’s Rep. 338; *In re La Lavia* [1999] 3 I.R. 413 (H. Ct. 1994) (Ir.)

not the proper subjects of salvage because they are not in “marine peril”. The *Coeur de l’Ocean* has remained underwater for 193 years and is not under any immediate threat of destruction by the elements.

If the law of salvage does apply in conjunction with the 1995 Agreement then it only applies to the extent it is expressly or impliedly incorporated into the 1995 Agreement.⁴²

c) The 1995 Agreement exhaustively governs the relationship between the parties

The 1995 Agreement exclusively governs the rights and obligations of the Claimant and Respondent as the Salvage Convention and common law salvage do not apply.

A.1.4 THE 2001 AGREEMENT IS CONSISTENT THE CLAIMANTS RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT

The 2001 Agreement grants Astoria a “continuing interest” in articles recovered from Astorian wrecks on or off the coast of Rolga. The Respondent submits that the scope of this interest is limited to the disposition of artefacts in accordance with the Guiding Principles. The Guiding Principles provide that artefacts must be distributed in accordance 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. Under the 1995 Agreement the Claimant is presently entitled to own and possess its relative share of artefacts.⁴³ The aggregate amount of

⁴² *The Unique Mariner* [1979] 1 Lloyd’s Rep 37; *The Tojo Maru* [1971] 1 Lloyd’s Rep 341.

⁴³ 1995 Agreement, Cl. 5

appraised values, not including artefacts already sold at auction, is \$616,298,000 USD.⁴⁴

Based on the sharing arrangements, the Claimant's relative share is approximately \$310,019,200 worth of artefacts.⁴⁵

The Respondent submits that a disposition can occur under the 1995 Agreement in a manner that is consistent with Astoria's continuing interest in a distribution according to the Guiding Principles. There is no express term in the 1995 Agreement as to how the recovered artefacts will be disposed of between the parties. The Claimant only has a right under the 1995 Agreement to own and possess artefacts equal to a prescribed aggregate value. The Claimant does not have a right to determine the specific artefacts to which it is entitled. Accordingly, the Guiding Principles can be taken into account when determining the disposition that is to take place.

The transfer of title to the Respondent of all 'right, title and interest' in the Coeur de l'Ocean does not affect the obligations of the Respondent under the 1995 Agreement. This is because Rolga was always deemed to be the owner of the Coeur de l'Ocean for the purposes of the 1995 Agreement.⁴⁶

A.2 THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE 1995 AGREEMENT BY RATIFYING THE UNESCO CONVENTION

A.2.1 THE UNESCO CONVENTION DOES NOT INTERFERE WITH THE CLAIMANT'S CONTINUING PERFORMANCE UNDER THE 1995 AGREEMENT

⁴⁴ Official Moot Problem, [6]; Further Clarifications [18]

⁴⁵ Though it will be slightly less than this depending on the value of artefacts already sold and the values yet to be determined.

⁴⁶ 1995 Agreement, clause 5

a) The ratification of the UNESCO Convention does not interfere with salvage rights or rights under the Salvage Convention

The Claimant does not have common law salvage rights or rights under the Salvage Convention.⁴⁷ The restriction on the application of salvage law in Article 4 of the UNESCO Convention therefore, does not interfere with the Claimant's rights.

b) The UNESCO Convention does not retroactively interfere with the Claimant's rights and performance under the 1995 Agreement

International treaties do not apply retroactively unless expressly provided.⁴⁸ There is no provision for retroactivity in the UNESCO Convention. The parties failed to comply with procedures under articles 9 to 12 of the UNESCO Convention when initiating operations on the Coeur de l' Ocean.⁴⁹ As this occurred prior to Rolga's ratification of the Convention these provisions do not interfere with the Claimant's rights.

c) The Claimant has no right to continue to remove artefacts from the Coeur de l' Ocean without interference

There is no express contractual term that the Claimant has the right to continue removing artefacts from the Coeur de l' Ocean for the period of the 1995 Agreement. Additionally, the Respondent submits that there is no implied term to that effect. Such a term is not necessary for the business efficacy⁵⁰ of the agreement and does not reflect the parties' intentions. The Respondent submits that on the correct construction of the 1995 Agreement the Claimant is under no obligation to continue the removal of artefacts for the twenty year period of the

⁴⁷ See submission A.1.3 above

⁴⁸ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980), Art. 28.

⁴⁹ Further Clarifications [28]

⁵⁰ *The Moorcock* (1889) 14 Ph.D 64, 68.

agreement. Under the 1995 Agreement the Claimant may cease recovery of artefacts at any point. As a corollary to this, Rolga is not under an obligation to afford the Claimant exclusive rights of the removal of artefacts for the period of the Agreement. It is submitted that Rolga is entitled to impose further standards relating to the recovery of artefacts, or prohibit the removal of artefacts from the wreck.

The Respondent submits that in the absence of a term requiring the Claimant to use their “best endeavours” to recover artefacts, it is not necessary to imply the aforementioned term into the agreement.⁵¹ The Respondent submits that the 20 year term of the 1995 Agreement exists only to place continuing obligations on the parties in relation to the Sharing Arrangements and Merchandising Income.⁵²

d) In the alternative, the Respondent did not interfere with the right to continue the removal of artefacts from the Coeur de l’ Ocean

Rolga’s ratification of the UNESCO Convention does not prevent the Claimant from continuing to remove artefacts from the wreck.

i) The location of the wreck

There is some ambiguity in relation to Rolga’s territorial sea. If Rolga has established a 12 n.m territorial sea,⁵³ the Coeur de l’ Ocean will either be within its territorial sea; the Exclusive Economic Zone (“EEZ”); or on the border of the territorial sea and the EEZ.⁵⁴ If

⁵¹ *The Unique Mariner* [1979] 1 Lloyd’s Rep 37; *The Tojo Maru* [1971] 1 Lloyd’s Rep 341.

⁵² 1995 Agreement, clauses 5, 6.

⁵³ Official Moot Problem [16].

⁵⁴ Official Moot Problem [16].

Rolga has established a 10 n.m territorial sea the Coeur de l' Ocean will be located in Rolga's EEZ.⁵⁵ Rolga does not appear to have established a contiguous zone pursuant to UNCLOS.⁵⁶

ii) Rights in the territorial sea

If the wreck is located within Rolga's territorial sea, article 7(2) of the UNESCO Convention requires conformity with the Rules Concerning Activities Directed at Underwater Cultural Heritage ("the Rules") for removal of underwater cultural heritage. Without further information as to the content of the project plan,⁵⁷ it cannot be established that the Rules impose any additional obligations on the Claimant.

iii) Rights in the EEZ

If the Coeur de l' Ocean is located within Rolga's EEZ, the UNESCO Convention will permit foreign State parties to declare an interest in being consulted on the protection of underwater cultural heritage.⁵⁸ The UNESCO Convention permits the involvement of state parties in determining how activities relating to underwater cultural heritage shall proceed.⁵⁹ The Respondent submits that as this involvement is only consultative these procedures do not interfere with the Claimant's rights in relation to the Coeur de l' Ocean.

iv) In the alternative, the Salvage Convention applied at the commencement of salvage operations⁶⁰

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, it is

⁵⁵ Further clarifications [1], *cf.* Official Moot Problem [16].

⁵⁶ Official Moot Problem [16].

⁵⁷ Further clarifications [23].

⁵⁸ UNESCO Convention, Article 9(5).

⁵⁹ UNESCO Convention, Article 10.

⁶⁰ See submission A.1.3(a).

unclear whether Astoria has done so. Article 4 of the UNESCO Convention restricts the circumstances in which salvage law can be applied to underwater cultural heritage and may limit the right to freely salvage under the Salvage Convention. The Respondent submits that notwithstanding the nationality of Mr Bernard Bodd,⁶¹ the Respondent is not under an international obligation to apply the provisions of the Salvage Convention in place of the UNESCO Convention. This is because the true salvor of the Coeur de l' Ocean is Heritage Inc; a company incorporated under Rolgan law.⁶²

e) The Respondent is not liable for the parties' failure to enter into a joint marketing agreement

The parties failed to conclude a joint marketing agreement.⁶³ Under general principles of contract law, a contract to negotiate in the future is not enforceable due to lack of certainty.⁶⁴

The respondent submits that the stipulation that the parties would “endeavour to formulate a joint marketing plan” is an agreement to negotiate and is thus unenforceable.

A.2.2 THE PROHIBITION ON COMMERCIAL EXPLOITATION OF UNDERWATER CULTURAL HERITAGE CONTAINED IN THE UNESCO CONVENTION DOES NOT INTERFERE WITH THE CLAIMANT'S RIGHTS UNDER THE 1995 AGREEMENT

a) Restrictions on the Claimant's power to sell or irretrievably dispose of artefacts recovered from the Coeur de l' Ocean do not interfere with the 1995 Agreement

The UNESCO Convention prohibits the commercial exploitation of underwater cultural heritage.⁶⁵ This requires that artefacts recovered from the Coeur de l' Ocean can only be sold

⁶¹ Further Clarifications [22].

⁶² Further Clarifications [21].

⁶³ Further Clarifications [20].

⁶⁴ *Courtney & Fairbairn Ltd v Tolaini Bro (Hotels) Ltd* [1975] 1 WLR 297, 301; *Star Steamship Society v Beogradska Plovidba (The Junior K.)* [1988] 2 Lloyd's Rep. 583; *Walford v Miles* [1992] 2 AC 128; *Little v Courage* (1995) 70 P. & C.R. 469.

⁶⁵ UNESCO Convention, Article 2(7), Annex Rule 2.

in limited circumstances.⁶⁶ In addition, artefacts cannot be irretrievably dispersed.⁶⁷ Under the 1995 Agreement the Claimant is presently entitled to own and possess its relative share of artefacts in accordance with agreed values.⁶⁸

It is submitted that the prohibition on commercialisation of underwater cultural heritage is consistent with the 1995 Agreement. There is no express term in the 1995 Agreement that authorises the Claimant to commercially exploit artefacts through sale. The parties' intention was that the power to commercially exploit artefacts through sale did not form an indispensable component of the claimant's ownership rights under the 1995 Agreement. This is evidenced in the intention of the agreement to conserve and document artefacts recovered from the Coeur de l' Ocean.⁶⁹ As such, the Claimant is entitled to own and possess their relative share of artefacts but they are prohibited from commercially exploiting them. Rolga has therefore not interfered with the Claimant's rights.

b) In the alternative, the UNESCO Convention does not interfere with the rights of existing owners

The respondent submits that the rights of existing owners of underwater cultural heritage are preserved by the UNESCO Convention.⁷⁰ In particular, the UNESCO Convention preserves the flag state's ownership rights under UNCLOS and customary international law.⁷¹

⁶⁶ The Rules 2(2).

⁶⁷ The Rules 2(2).

⁶⁸ 1995 Agreement, clause 5; See submission A.1.4.

⁶⁹ 1995 Agreement, Clause 2.

⁷⁰ Sarah Dromgoole, "UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: implications for commercial treasure salvors", [2003] LMCLQ 317, 333; Sarah Dromgoole 'Murky Waters for Government Policy: the case of a 17th century British warship and 10 tonnes of gold coins', Marine Policy 28 (2004) 189, 194; Sarah Dromgoole '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', (1999) 14(2) *International Journal of Marine and Coastal Law* 171.

⁷¹ UNESCO Convention, Article 2 (8); *Ibid*.

Astoria transferred its ownership of the Coeur de l' Ocean to Rolga in the 2001 Agreement.⁷²

The ownership rights that the Respondent received included the power transfer title to the Coeur de l' Ocean and artefacts. The UNESCO Convention preserves these rights. The Respondent did not infringe the prohibition on commercialisation⁷³ when it granted ownership of the recovered artefacts to the Claimant in the 1995 Agreement.

The Claimant's entitlement to own and possess its relative share of artefacts accrued when the aggregate appraised values reached \$45 million USD. It is likely that this occurred prior to Rolga's ratification of the UNESCO Convention in 2005. As the Convention does not affect pre-existing ownership rights, the rights under the 1995 Agreement are preserved. This includes the right to commercially exploit artefacts.⁷⁴ The Convention therefore does not impede a distribution of artefacts as envisaged by the 1995 Agreement.

A.3 THE RESPONDENT HAS NOT INTERFERED WITH THE CLAIMANT'S RIGHTS AND PERFORMANCE UNDER THE AGREEMENT BY ALLOWING AQUATIC VIEW TO ORGANISE DIVES TO THE WRECK SITE AND THE TAKING OF PHOTOGRAPHS

A.3.1 ALLOWING AQUATIC VIEW TO ORGANISE DIVES DOES NOT INTERFERE WITH ANY RIGHTS OF THE CLAIMANT AS THE CLAIMANT DOES NOT HAVE EXCLUSIVE RIGHTS OF ACCESS

⁷² See submission A.1 above

⁷³ UNESCO Convention, Article 2(7); Annex Rule 2.

⁷⁴ 1995 Agreement, clause 5.

No provision in the 1995 Agreement confers an exclusive right of access allowing the Claimant to exclude others from the site of the Coeur de l' Ocean, nor does such a right exist at common law.⁷⁵

A.3.2 ALLOWING AQUATIC VIEW TO PHOTOGRAPH THE COEUR DE L' OCEAN DOES NOT INTERFERE WITH THE CLAIMANT'S RIGHT TO CONFIDENTIALITY UNDER THE 1995 AGREEMENT

The Respondent concedes that the Claimant has a right to photograph and document certain artefacts under the 1995 Agreement, and that the processes of such documentation in the Project Plan are subject to the confidentiality clause in the 1995 Agreement. The scope of the confidentiality clause does not however protect any right of photography or documentation.

The Respondent has not disclosed to Aquatic View any information concerning the Agreement or its terms, or any documentation associated with the agreement in permitting Aquatic View to visit the site of the Coeur de l' Ocean to take photographs.

A.3.3 ANY USE OF THE NAME "COEUR DE L' OCEAN" BY AQUATIC VIEW DOES NOT INTERFERE WITH THE GRANT OF MERCHANDISING RIGHTS UNDER THE 1995 AGREEMENT

The rights granted to the Claimant in respect of merchandising are a mere licence to use the name "Coeur de l' Ocean". As a matter of interpretation, a right cannot be an exclusive right where the word "exclusive" is not used to describe it. An exclusive licence authorises the licensee to exercise a right to the exclusion of all others.⁷⁶ A licence will not, without more, confer an exclusive right to do that which is the subject of the licence.⁷⁷ A licensor retains

⁷⁵ *R.M.S. Titanic Inc. v Haver* 1999 AMC 1330

⁷⁶ See for example ss.92 and 225 *Copyright, Designs and Patents Act 1988* (UK)

⁷⁷ *Douglas v Hello! Ltd* [2006] Q.B. 125

rights in any copyright and remains at liberty to license other parties.⁷⁸ The Respondent, having been assigned all right, title and interest in the Coeur de l' Ocean in the 2001 Agreement, was assigned all rights in the name "Coeur de l' Ocean". Such rights will vest exclusively in Rolga,⁷⁹ and it is for Rolga to determine the terms on which the name will be licensed.

Under the 1995 Agreement, the Respondent grants "the right to *use* the name "Coeur de l' Ocean".⁸⁰ The limited scope of the right conferred under the 1995 Agreement demonstrates that this is a mere licence. There is nothing in the terms of the 1995 Agreement that indicates that the right has been granted to the exclusion of all others. Therefore any failure to prevent Aquatic View from using the name in the sale and marking of their own merchandise does not infringe any rights held by the claimant.

Furthermore, Aquatic View is not infringing the right to use the name "Coeur de l' Ocean", but "Cour de l' Ocean" in the marketing of merchandise. The Respondent submits that this is a sufficient difference that will differentiate merchandise produced by the Claimant and Aquatic View in the minds of purchasers, and that Aquatic View has not therefore interfered with any rights held by the Claimant.

A.3.4 IN THE ALTERNATIVE, ANY USE OF THE NAME "COEUR DE L' OCEAN" BY AQUATIC VIEW DOES NOT INTERFERE WITH THE GRANT BECAUSE THE RESPONDENT NEVER ACQUIRED ANY PROPRIETARY RIGHT IN THE NAME

Proprietary rights in a name may be acquired through either copyright protection or the registration of a trademark. Nothing in the statement of facts suggests that the Respondent

⁷⁸ Sterling, J.A.L., *World Copyright Law* (3rd ed., 2008), 12.02, p.585

⁷⁹ s. 11 *Copyright Act 1987* (Malaysia)

⁸⁰ 1995 Agreement, Clause 6 (emphasis added)

has registered “Coeur de l’ Ocean” as a trademark. To gain trademark protection, the mark must be registered.⁸¹

The right to licence use of a literary or artistic work is vested in the author of an original work.⁸² A mere name is not sufficiently substantial or the result of sufficient effort to attract copyright protection as a literary or artistic work.⁸³ This will be the case even where the name is well known and widely used and capable of producing substantial revenue.⁸⁴ Aquatic View’s use of the name “Cour de l’ Ocean” or “Coeur de l’ Ocean” in producing a song and any other incidental use of the name associated with the photographs and tours do not infringe any rights held in the name.⁸⁵ Therefore as no rights can exist in the name “Coeur de l’ Ocean” or any derivative thereof, there can be no infringement.

B. THE CLAIMANT DOES NOT HAVE EXCLUSIVE RIGHTS OF PHOTORGRAPHING AND DOCUMENTING THE COEUR DE L’OCEAN

B.1.1 THE CLAIMANT HAS NO RIGHTS OF PHOTOGRAPHY AND DOCUMENTATION UNDER THE 1995 AGREEMENT AS THE RELATIONSHIP BETWEEN THE PARTIES IS PRESCRIBED EXHAUSTIVELY BY THE 1995 AGREEMENT

The relationship is prescribed exhaustively by the 1995 Agreement.⁸⁶ The Claimant has a limited right to photograph and document artefacts retrieved from the Coeur de l’ Ocean. The Claimant is given no right to photograph the Coeur de l’ Ocean itself.

⁸¹ See s.32, *Trade Marks Act 1994* (UK), s.10, *Trade Marks Act 1976* (Malaysia)

⁸² See, for example, s.27 *Copyright Act 1987* (Malaysia)

⁸³ *Exxon Corp. v Exxon Insurance* [1982] RPC 69

⁸⁴ *Tavener Rutledge Pty Ltd v Trexapalm Ltd* [1977] RPC 25, *ELVIS PRESLEY Trade Marks* [1997] RPC 543

⁸⁵ *Francis Day and Hunter v 20th Century Fox* [1940] A.C. 112

⁸⁶ See submission A.1.3(c)

The Respondent is under an obligation of confidence in respect of what is contained in the Project Plan.⁸⁷ The Plan includes a description of processes of documentation of artefacts retrieved from the Coeur de l' Ocean.⁸⁸ There are however, no rights conferred in respect of photography and documentation of the Coeur de l' Ocean. The Respondent submits that this is evidence of the parties' intentions that no such rights were to be conferred under the 1995 Agreement.

B.1.2 IN THE ALTERNATIVE, IF THE LAW OF SALVAGE APPLIES, THE EXCLUSIVE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L' OCEAN DOES NOT ACCRUE TO THE CLAIMANT UNDER THE LAW OF SALVAGE

a) Rights accruing to salvors under the law of salvage do not include the right to prevent others from viewing or photographing the Coeur de l' Ocean

Salvors have a right to exclusive possession of property; where photographs and other methods of documenting the wreck are not property, a salvor has no rights, exclusive or otherwise, in their use. Photographs and other documentation do not form part of the Coeur de l' Ocean and therefore cannot form part of the property to which a salvor's maritime lien will attach.⁸⁹ Furthermore, photographs and other means of documentation are not property in marine peril as there is no risk of physical damage or destruction.⁹⁰

Photographs and other means of documenting the wreck do not form part of the Claimant's right to exclusive possession or its maritime lien. The Claimant's right of exclusive

⁸⁷ Clause 10, 1995 Agreement

⁸⁸ 1995 Agreement, Clause 1

⁸⁹ *Bemis v Lusitania* 884 F.Supp 1042(1995)

⁹⁰ Brice, Geoffrey, *Maritime Law of Salvage* (3rd ed., 1999), 1-142 at p.46

possession under the law of salvage therefore does not afford the Claimant an exclusive right to photograph and document the Coeur de l' Ocean.

b) There is no support in law for a *sui generis* accruing to salvors in possession to photograph and document a wreck

The doctrine of telepossession extends only to the establishment of salvor in possession status, and does not exhaustively define the requirements of being a salvor in possession. Possession in the law of salvage means something less than actual possession. Under salvage law, a salvor can reduce a wreck to their exclusive possession by means of a “telepresence”.⁹¹ The doctrine does not affect the principle that a diligent salvor will maintain the right to exclusive possession; therefore the doctrine does not mandate the establishment of a *sui generis* exclusive right to photograph and document the Coeur de l'Ocean.

The Claimant's status as salvor in possession is not undermined by the mere taking of photographs and dives on the wreck site by Aquatic View. Provided the Claimant can demonstrate that it continues to salvage the wreck and perform its obligations under the 1995 Agreement, the doctrine of telepossession will not undermine its status as a salvor in possession.

c) In the alternative, if a *sui generis* right of photography and documentation exists, it is not an exclusive right

A salvor obtains a right to exclusive possession of property salvaged from a ship, and over the ship itself in order to prevent other parties from interfering with salvage operations.⁹² The right to exclusive possession ensures that salvage operations are conducted in safety with

⁹¹ *Columbus* above n.23

⁹² *Treasure Salvors Inc.* 640 F.2d at 567

minimum damage to the wreck.⁹³ Any right to photograph and document the wreck extends only so far as is necessary to prevent interference and to ensure the safety of personnel involved in salvage operations. This does not warrant the grant of an exclusive right at common law.

The Claimant is permitted to photograph and document the wreck as part of its salvage operations. Whilst it is in the process of conducting salvage operations, Aquatic View or any other party may not interfere, as to do so would jeopardise the safety of the Claimant's personnel and risk danger to the Coeur de l' Ocean. However, when the Claimant is not salvaging the Coeur de l' Ocean, there is no risk to the Claimant's personnel or the wreck in allowing Aquatic View to visit and photograph the Coeur de l' Ocean. An exclusive right to photograph and document the wreck is not necessary to protect the Claimant's personnel or the Coeur de l' Ocean.

d) An exclusive right to photography and documentation would impermissibly infringe the principle of freedom of the seas

If the Coeur de l' Ocean is located in Rolga's EEZ,⁹⁴ it will lie within the high seas as defined at international law. The high seas include all parts of the sea which are not part of a state's territorial sea or internal waters.⁹⁵ The high seas are subject to a freedom of navigation for all

⁹³ *MDM Salvage Inc. v The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F.Supp 308 at 310

⁹⁴ See submission A.2.1(d)(i) above

⁹⁵ United Nations Convention on the High Seas 1958, opened for signature 29 April 1958 (entered into force 30 September 1962), Article 1

ships, regardless of the state of origin.⁹⁶ If the Claimant was granted exclusive rights of photography and documentation of the Coeur de l' Ocean, the enforcement of these rights would require the imposition of a zone surrounding the wreck which none but the Claimant and its servants/agents could enter. To impose such a zone would effectively bar navigation by ships other than those operated by the Claimant, rendering that portion of the high seas off-limits to all other shipping. The Respondent submits that this would be inconsistent with the principle of freedom of the high seas.⁹⁷

B.2 THE LAW OF BREACH OF CONFIDENCE PROVIDES NO REMEDY FOR THE CLAIMANT

a) There was no obligation of confidence imposed upon the Respondent

It is standard industry practice in salvage cases to publicise the location of a wreck; any conduct of the Respondent in not doing so was founded upon national security concerns rather than upon any obligation of confidence. An obligation of confidence with respect to the location of the ship would be contrary to salvage industry practice.⁹⁸ Furthermore, keeping the location of a wreck a secret runs counter to the purpose of salvage law.⁹⁹ An objective observer would not assume that the location of a wreck under salvage was information supplied in confidence.

⁹⁶ UNCLOS, Art. 87(1)(a)

⁹⁷ *R.M.S. Titanic Inc. v Haver*, 1999 AMC 1330 at 1359

⁹⁸ *Coco v A.N.Clark (Engineers)*[1969] RPC 41, *Haver* *ibid.*

⁹⁹ *Haver*, *above n.95*

Objectively, the location of the Coeur de l' Ocean has been kept confidential at the Respondent's request. The Respondent may thus choose to free itself from its self-imposed obligation of confidence.

An obligation of confidence may also be inferred from the parties' subjective intentions.¹⁰⁰ The conduct of the Respondent does not support an inferred obligation of confidence; if such an obligation arose, it was imposed by the Respondent and so may be lifted by the Respondent. The location of the Coeur de l' Ocean was not kept confidential at the request of the Claimant or because the Claimant subjectively regarded the information as confidential, but because the Respondent chose not to disclose the location on the basis of national security considerations. The Respondent subjectively regarded the information as confidential, and is thus free to determine that the information is no longer confidential, or determine that it may be disclosed to Aquatic View.

b) In the alternative, if an obligation of confidence exists, the scope of the obligation does not extend to protecting an exclusive right of photography and documentation

In the absence of an express contractual term defining the scope of an obligation of confidence, the scope of the obligation is determined objectively.¹⁰¹ According to the principles of salvage, the scope of an obligation of confidence extends to limiting the access of rival salvors to the wreck. The Respondent has not breached an obligation of confidence by simply disclosing the wreck's location.

¹⁰⁰ *Schering Chemicals v Falkman* [1982] Q.B. 1, *Carflow Products v Limwood Securities* [1996] FSR 424

¹⁰¹ *Smith Kline & French v Department of Community Health* [1990] FSR 617, 647)

In permitting Aquatic View to dive on the wreck, the Respondent has not caused the location of the Coeur de l' Ocean to be made known to rival salvors or threatened their status as salvor in possession.

c) In the alternative, it was in the public interest for the location of the wreck to be disclosed

Whether it is in the public interest for information to be disclosed will depend on the nature of the information in question.¹⁰² The wreck forms an important part of the shared national heritage of Astoria and Rolga, and there is a broader public interest in ensuring that a permanent record of its final resting place is readily accessible to the general public. The Government of Rolga has a stated policy of preserving and ensuring sustainable use of underwater cultural heritage.¹⁰³ Granting Aquatic View the right to take photographs encourages appreciation for underwater cultural heritage and is in pursuance of a policy which is in the public interest. The wreck of the Coeur de l'Ocean constitutes Underwater Cultural Heritage¹⁰⁴; in addition to the interest of Rolga and Astoria, there is also a public interest on the part of the broader archaeological community in the wreck. Furthermore, the private interest of the Claimant and its ability to salvage artefacts is not undermined by release of the information to Aquatic View. It is also entirely responsible to disclose the location of the wreck to a party such as Aquatic View in the interests of documenting underwater cultural heritage *in situ*,¹⁰⁵ particularly where that party has no interest in salvaging the wreck.

B.3 The law of copyright does not confer an exclusive right to photograph and document the Coeur de l' Ocean upon the Claimant

¹⁰² Lionel Bentley and Brad Sherman, *Intellectual Property Law* (2nd ed, 2004), 1041

¹⁰³ Official Moot Problem [7] and [8]

¹⁰⁴ UNESCO Convention, Art. 1(1)(a)

¹⁰⁵ *Ibid.*, Art. 2(5)

B.3.1 ANY PROPRIETARY RIGHTS IN THE NAME “COEUR DE L’ OCEAN” DO NOT EXTEND TO THE COEUR DE L’ OCEAN ITSELF

Regardless of whether the Claimant has moral and economic rights including the exclusive right to control reproduction of the name “Coeur de l’ Ocean” as a literary and artistic work, the wreck of the Coeur de l’ Ocean does not meet any of the definitions of a literary or artistic work, not being the expression of any form of creativity on the part of the Claimant.¹⁰⁶ The law of copyright will protect any work produced of the Coeur de l’ Ocean, but not the ship itself. It will thus not confer an exclusive right to photograph and document the Coeur de l’ Ocean on the Claimant.

B.3.2 THE CLAIMANT’S BROADCAST LICENCE DOES NOT CONFER AN EXCLUSIVE RIGHT TO PHOTOGRAPH AND DOCUMENT THE COEUR DE L’ OCEAN

a) The Claimant has no rights of authorship and hence is not entitled to any protection under copyright law

Under the Berne Convention and the 1996 WIPO treaty, rights in works apply to authors or joint authors.¹⁰⁷ The Claimant has not created the broadcast footage nor guided its creation, or played any significant part therein. The Respondent submits that the Claimant has not made a creative contribution sufficient to be considered an author or joint author.¹⁰⁸

b) In the Alternative, the Claimant’s copyright and rights in derivative works does not extend to other media or other footage

¹⁰⁶Paris 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

¹⁰⁷ Ibid., *Preamble*

¹⁰⁸ Sterling, J.A.L., above n.76, 1209

A derivative work must be a ‘translation, adaptation, arrangement or other alteration of a literary or artistic work’. It must at least contain either a part of the original work or infringe the idea of the original work. Footage of the same wreck is an entirely new creative work, particularly where it contains none of the footage in the original work; the idea to film the Coeur de l’Ocean is not protected under copyright law as an idea which has not been reduced to a material form.¹⁰⁹ Similarly, any songs or other media featuring the Coeur de l’Ocean are not derivative works merely because, like the original creative work, they both concern the same ship. There is no infringement of an idea such that any song could constitute a derivative work.

C. THE DISTRIBUTION OF ARTEFACTS SOLELY ON THE BASIS OF SALVAGE LEGAL PRINCIPLES WAS NOT ENVISAGED BY THE 1995 PARTNERING AGREEMENT MEMORANDUM

C.1 THE DISTRIBUTION OF ARTEFACTS SHOULD BE DETERMINED SOLELY ON THE BASIS OF THE 1995 AGREEMENT

As the parties failed to formulate a joint marketing plan, artefacts must be distributed between the parties. Clause 5 of the 1995 Agreement provides for how this distribution is to occur.¹¹⁰

C.2 SALVAGE LAW AND THE SALVAGE CONVENTION DO NOT APPLY

¹⁰⁹ WIPO Copyright Treaty 1996, Article 2

¹¹⁰ 1995 Agreement, Clause 5

Common law salvage and the Salvage Convention do not apply to the relationship between the parties.¹¹¹

C.3 A DISPOSITION SHOULD BENEFIT MANKIND AND FUTURE GENERATIONS

Pursuant to clause 5 of the 1995 Agreement, the Claimant has the right to own and possess its relative share of artefacts recovered from the Coeur de l' Ocean. The 1995 Agreement does not; however, specify which individual items should be awarded to each of the parties. The Respondent submits that a distribution should occur under the 1995 Agreement in a manner that awards items of archaeological significance to the Respondent. As the Respondent holds all right, title and interest in the Coeur de l' Ocean, the Respondent submits that it has a preferential right to artefacts of high archaeological value in accordance with its international and domestic obligations to preserve such items for the benefit of humanity.¹¹²

A distribution needs to be accordance with the Guiding Principles. Upon signing the 2001 Agreement, containing the Guiding Principles, Rolga undertook to do its best to preserve artefacts recovered from the Coeur de l' Ocean for the benefit of mankind. This reflects the obligation on states to preserve underwater cultural heritage for the benefit of humanity under the UNESCO Convention.¹¹³ A disposition on these terms would be consistent with the Respondent's domestic commitments such as the New Economic Plan in which the Respondent promises to undertake more activities to protection and sustainable use of its cultural resources.

¹¹¹ See submission A.1.3 above

¹¹² UNESCO Convention , Art. 2(3), Official Moot Problem [7] and [8]

¹¹³ Ibid., Arts. 2(3) and 2(6)

The Respondent submits that these are necessary considerations when determining a disposition of artefacts in a manner consistent with the interests of the Claimant in 1995 Agreement.

C.4. THE DISPOSITION OF ARTEFACTS SHOULD OCCUR IN THE FOLLOWING MANNER

The Government shall retain the full collection of artefacts that have significant archaeological value: principally items 8 and 18 – 20. The Government shall also retain a full collection of unique or rare items of relatively low commercial value: 9-17. All of these items shall be preserved, lent to museums and shared between Rolga and Astoria. This is important for tracing the shared history of Astoria and Rolga and building cultural ties between these two states. The artefacts if preserved will provide a wealth of information that which will contribute to fields of archaeology and history in which future generations can benefit from.

Remaining items constitute trade goods and goods of high commercial value. The Claimant shall be entitled to own and possess \$310 million worth of gold and silver ingots, bars and coins (items 1-4). A representative sample of each of these items shall be taken for display and sharing at museums in Rolga and Astoria in accordance with the Guiding Principles. Approximately 30,000 silver coins as well as a share of gold and silver ingots and bullion would make up the entitlement of the claimant.

Each of the individual items shall be photographed and recorded in order to ensure that they can be studied as a whole collection. Given the substantial numbers of coins and other precious metals this represents a practical solution.

C.5 A REDUCTION IN THE CLAIMANT'S RELATIVE SHARE IN ARTEFACTS SHOULD BE MADE DUE TO DAMAGE TO SALVED PROPERTY OCCASIONED BY THE CLAIMANT'S NEGLIGENCE

A salvor has a duty to take reasonable care in conducting salvage operations.¹¹⁴ The duty is owed to the owner of the property to be salvaged and arises in common law negligence.¹¹⁵ Where, as in the instant case, the Claimant is a professional salvor and the property to be salvaged is in no imminent danger, the standard of care owed to the Respondent as owner of the property will be relatively strict.¹¹⁶ In cases where a breach of duty occasions loss or damage, the appropriate remedy is to reduce the salvage reward payable to the negligent salvor.¹¹⁷

The Respondent submits that the Claimant has breached its duty in respect of the salvaged property. Many of the artefacts onboard the *Coeur de l' Ocean* have been destroyed "due to poor handling".¹¹⁸ In light of this, the Respondent submits that the destruction of artefacts is a breach of duty by the Claimant, necessitating a reduction of any salvage award payable.

The Respondent submits that the Claimant has manifestly failed to preserve the archaeological value of property salvaged (namely the shattered Chinese porcelains), and thus submits that a reduction in any salvage reward payable to the Claimant is warranted.¹¹⁹

The Respondent further submits that if the salvage convention applies then a reduction in the salvage award is justified by the Salvage Convention, and the Claimant's failure to exercise

¹¹⁴ Salvage Convention Art.8(1)(a)

¹¹⁵ *The Tojo Maru* [1971] 1 Lloyd's Rep 341 above n.40

¹¹⁶ *Ibid.*, per Lord Diplock

¹¹⁷ *Ibid.*, all members of the Court agreeing

¹¹⁸ Official Moot Problem [10]

¹¹⁹ *Columbus-America Discovery Group v Atlantic Mutual Insurance* 974 F.2d 450 at 468.

skill in salvaging the Coeur de l' Ocean.¹²⁰ The Respondent submits that the claimant has failed to exercise skill in salvaging the wreck due to its poor handling of artefacts.

PRAYER FOR RELIEF

The Respondents respectfully ask the Arbitrators to adjudge that:

- a) The Respondent did not interfere with any rights of the Claimant under the 1995 Agreement or performance of the agreement by entering into the 2001 Agreement, ratifying the UNESCO Convention or granting a permit to Aquatic View, and that consequently the Claimant is not entitled to terminate the contract or seek relief;
- b) That the Claimant does not have exclusive rights of photography and documentation over the Coeur de l' Ocean; and
- c) That the 1995 Agreement did not envisage a distribution of artefacts under salvage principles, further that the Claimant is only entitled to an *in specie* award of artefacts to the value of USD 310 million; and
- d) That the award of artefacts ought to be reduced to reflect the negligence of the Claimant in handling artefacts.

¹²⁰ Salvage Convention, Art. 13(1)(e)