



LAWASIA International Moot

MOOT PROBLEM



INTERNATIONAL CENTER OF ARBITRATION

2009

BENEVOLENT HERITAGE INC
(CLAIMANT)

V

THE GOVERNMENT OF ROLGA
(RESPONDENT)

MOOT PROBLEM

A. Background Information and Facts Leading to the Dispute

1. Historically, Astoria was a colonial empire of the West, and it was using the riches of the New World of the East to finance her military adventures in the 17th century. There are records of numerous expeditions from the West to the New World during the period. One of the most notable adventures was that of the journey made by the Coeur de l' Ocean led by Captain Van Cleef in 1800 to conquer the ancient trading city of Zamzala, which is now part of the territory of the State of Rolga. The battle was fought, but Zamzala was soon conquered. The riches of the Sultan's palace were robbed and the palace burnt. After tearing down the city, Astoria's army left, the Coeur de l' Ocean was greedily laden by the soldiers of Astoria, with cargoes of exotic goods, silks and spices, as well as trunks of royal jewelry, and other riches of the Palace of Zamzala. Whilst enroute to another destination, the vessel sank, as it failed to battle the prevailing might of the monsoon. According to archival records, she was also carrying, on her last known voyage, a large amount of cargoes, the amounts of which constituted commercial shipments and other war booty.
2. Rolga gained independence from Astoria on 7th November 1959. In the span of almost 50 years following independence, Rolga has prospered on agriculture and tourism. With astounding collection of cultural and natural resources, eco-tourism is a particular niche, which contributes significantly to its economic development. Several of its islands are listed under the 1972 World Natural and Cultural Heritage Convention for their rich biodiversity and ecosystem values. In addition to that, there are also remnants of the World War II scattered in its maritime waters in the form of war wrecks including the Japanese submarines. Because of this extraordinary collection of war wrecks, Rolga is also an extremely popular destination among wreck divers from around the world.
3. In the 1980s, however, the world witnessed the rise of treasure hunting at sea due to technological advancement in underwater scientific research and recovery. The illustrious trading history of Zamzala and the existence of old archival records in Astoria regarding maritime adventures and disasters at sea in the waters surrounding Rolga, have lured treasure hunters into the area. Although the war wrecks are not much affected by the amateur 'souvenir collecting divers', other wrecks have been the targets of illegal treasure hunting

-
- activities. There are reports made by the Historical and Cultural Society of Zamzalah, a non-governmental organization situated in Rolga, of rampant lootings of historic wrecks in territorial waters of Rolga due to lack of policing in maritime areas and lack of awareness of the significance of the artefacts to the country. By mid 1980s, middlemen were seen to have approached local fishermen to seek information regarding artifacts trapped during trawl-net fishing and information regarding its location.
4. In 1990, Mr. Bernard Bodd, a well known salvor and a major shareholder in Benevolent Heritage Inc (hereinafter 'Heritage Inc') with expertise in historic wrecks recovery submitted a proposal to the Rolga Cultural Heritage Committee for the survey and recovery of significant historical wrecks belonging to the era of expansion of Astorian presence in the region. His proposal received the attention of the Government of Rolga as it involved the discovery of much coveted Coeur de l' Ocean among deep sea treasure hunters. Pursuant to the then existing law of Rolga, the relevant authority must approve all survey or recovery or excavation projects involving historical objects or sites.
 5. After extensive research and study of records at the maritime archives of Astoria, Benevolent predicted that the vessel was to be located between 20-25 kilometers off the coast of Rolga. After some years of endless survey, on 1st June 1993, a wreck identified as the Coeur de l' Ocean was discovered some well within the proximity of the initial prediction, some 20 kilometers off the coast of Rolga. The actual location was not made known to the public for security reasons. In order to convince the relevant authority to approve an extensive recovery project, they have recovered some silver coins from the wreck and these were confirmed by government archaeologists as 'rare items' and were found in mint condition. Further, some gold bars were found, which made the finding even rarer, as gold bars would at that time normally have been melted down and made into coins. There were also gold bullions and ingots. The National Geographic has described the find as the most "bedazzling underwater treasures ever found today" with an estimate worth more than USD \$1 billion. The Government eventually approved the project and the 'Partnering Agreement Memorandum' was signed on 27th September 1995 (See: Appendix 1).
 6. Today, many of the artefacts have been recovered from the wreck Coeur de l' Ocean. Some parts of the collection have been auctioned off at overseas auction houses to partly finance the costs of the project. The government has yet to reveal the actual collection of recovered artefacts to the public today. However, a maritime exhibition was set up within the National Museum by the Government in 2000 to showcase some of the recovered artifacts from the wreck of Coeur de l'

Ocean ranging from trade items such as cannons, elephant tusks to gold coins. The showcase has also doubled, in the words of the Director of Museum, as reported in a local daily, “the number of tourist visits to the National Museums”.

7. In the same year, the Government of Rolga strengthened its cultural heritage appreciation as “symbol of nationhood”. Such a change was influenced by the development of international legal regime protecting the underwater cultural heritage, particularly the negotiations initiated by United Nations Educational, Social and Cultural Organisation (UNESCO), which later led to the adoption of the United Nations Convention in the Protection of the Underwater Cultural Heritage in Paris on 2nd November 2001. The new economic plan which was introduced in the same year (2000) also promises more efforts to be undertaken by the Government in protecting and ensuring sustaining use of its cultural resources. Further, the Government of Rolga has also taken steps to bolsters its credibility at UNESCO including among others by reviewing laws relating to cultural heritage protection. Riska Benti, Minister of Rolga Cultural Heritage, in her speech before the Committee to study and review the inadequacies of legal mechanism to address the problems of illicit dealings, looting and destruction of cultural property stated that:

“It is the duty of every civilized nation to protect its cultural heritage from unlawful and destructive human interferences. It is only from our understanding of the past, done by scientific and in a scholarly manner, can we preserve our heritage for our future generation. Unlike the case of the natural resources, cultural heritage is finite and once destroyed, the very ‘capsule’ containing our history will be lost forever.”
8. A new law was passed in late 2000 to protect wrecks of historical and cultural significance to Rolga. The relevant provision reads:

“If the Minister is satisfied with respect to any site in Rolga waters that - (a) it is, or may prove to be, the site of a vessel lying wrecked on or in the seabed, and (b) on account of the historical, archaeological or artistic importance of the vessel, or of any objects contained or formerly contained in it, the site ought to be protected from unauthorized interference he may order by order designate an area around the site as a restricted area.”
9. Following this, the Government of Rolga entered into an agreement on the “Protection of Astorian Wrecks” with the Government of Astoria in 2001 with the main object of providing better protection to historic wrecks where both countries share genuine “historical and cultural” following the successful adoption of the

2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage in Paris on 2nd November. In the agreement, Astoria agreed that:

“Astoria as successor to the property and assets of the Astorian ancient wrecks, transfers all its right, title and interest in and to wrecked ancient vessels of the Astoria lying on or off the coast of Rolga and in and to any articles thereof to Rolga which shall accept such right, title and interest”.

At the ceremony of the agreement, the Astorian Minister of Foreign Affairs express hope that, in the light of “current development of international law in cultural heritage protection” that Rolga will endeavor to do “its best to preserve any objects recovered from its seabed for the benefit of mankind”. Further, as provided in the Agreement, Rolga on the other hand, “recognizes that Astoria has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in the Agreement” (“Guiding Principles” to be read together with the Agreement with Astoria. See: Appendix No. 2)

10. In the light of these developments, the government was questioned in many forums on its alleged involvement with the “commercial exploitation” of the artefacts recovered from the Coeur de l’ Ocean. There were calls from various quarters to quit activities motivated by the commercial exploitation of cultural objects. In one scholarly article it was argued that “disposal of cultural objects divorced from its historical and cultural context is a great loss to humankind”. Further, as confirmed by a government underwater archaeologist stationed on site that many of the artefacts (eg. Chinese porcelains) were destroyed due to poor handling of objects. The Rolgan Cultural Society was fearful of the impact of salvage activities on the wreck and the site of wreck of Coeur de l’ Ocean. The government was urged to designate the wreck of Coeur de l’ Ocean and its site as restricted area under the new law but no such move has been made so far.

11. At the same time, Aquatic View, a specialized tour operator was given permit by the Government to organize exclusive underwater trips to view the wreck of Coeur de l’ Ocean. So far the company has sold 25 tickets at the price of USD \$20,000 each. It was also found out that the Aqua View staff have been taking photographs and making video clips of the wrecks and have posted these materials on their website as promotional materials for the exclusive trips. In addition, Aquatic View has also engaged a songwriter to write a song entitled ‘Cour de l’ Ocean’ and the CDs of which are commercially marketed as souvenirs. Heritage Inc. brought these issues to the attention of the Rolgan Historic Monument Executive Agency but the Agency was unable at this time of the complaint to deal with the matter. The activities of the tour operator have, according to Heritage Inc., jeopardized their ongoing television documentary deal with an International Broadcasting Company.

-
12. These developments plus the change of mindset within society regarding the need for the protection of underwater cultural heritage and the move towards ratifying the 2001 UNESCO Convention, which, have prompted Heritage Inc. to reconsider their position under the contract with the Government of Rolga. By 2003, they felt that further investment in efforts, time and money into other Astorian wrecks would only be harmful to the company. Soon the parties took steps at finalizing the distribution of artefacts recovered from the wreck of Coeur de l' Ocean but things got worse when Heritage Inc. accused the Government of Rolga of unfair distribution of artefacts contrary to the 1995 Agreement. The relevant artifacts which currently remain in the custody of the Government authority are as follows:

No	Item/Articles/Objects	Quantity
1	Gold Ingots and Bullions	360
2	Gold Bars	100
3	Silver Ingots	700
4	Silver coins with Astorian marks	50,000
5	Copper planks	200
6	Indigo	200 chests
7	Tobacco	10 tons
8	Bronze cannon with Astorian marks	2
9	Silver containers	1
10	Bronze forks	4
11	Silver pendant	1
12	Comb	2 pieces
13	Olives and pickles	3 jars
14	Unknown Liquid	1 bottle
15	Ornaments	5 pieces
16	Elephant tusks	50
17	Cannon balls	12
18	Chinese porcelains	20,000 pieces
19	Swords bearing some Arabic words	57 pieces
20	Silver daggers with precious stones	2 pieces
21	Spices	70 bottles

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

B. Moot Points

14. The Claimant argues that:
- (a) The Respondent has interfered with their salvage rights and performance under the 1992 Agreement when it entered into Agreement with Astoria in 2003, ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and by allowing other tour operator to organize and make profits from visiting activities to the site including the taking of photographs.
 - (b) They have exclusive rights of photographing and documenting of the Coeur de l' Ocean.
 - (c) The calculation of profits and/or distribution of artifacts between the Parties to be made solely on the basis of salvage legal principles.
15. The Respondent argues that:
- (a) It has not interfered with the Claimant's rights and performance under the Agreement by entering into Agreement with Astoria, by ratifying the 2001 UNESCO Convention and by allowing the tour operators to organise wreck divers to the wreck site including the taking photographs.
 - (b) The Claimant does not enjoy exclusive rights of photographing and documenting of the Coeur de l' Ocean.
 - (c) The distribution of artefacts solely on the basis of salvage legal principles was not envisaged by the 1992 Partnering Agreement Memorandum.

C. The International Legal Framework

16. Rolga ratified '1982 UNCLOS' and the UNESCO Convention on the Protection of the Underwater Cultural Heritage (the '2001 UNESCO Convention') on 10 February 1993 and 9th January 2005 respectively. Rolga established a 12 n.m territorial waters and 200 n.m. Exclusive Economic Zones pursuant to UNCLOS.
17. All States are parties to the following international instruments either by ratification or acceptance;
- (a) 1989 Salvage Convention
 - (b) 1886 Berne Convention for the Protection of Artistic and Literary Works
 - (c) 1996 WIPO Copyright Treaty
 - (d) 1982 United Nations Convention on the Law of the Sea
 - (e) 1969 Vienna Convention on the law of Treaties

D. Instructions

18. This Moot International Arbitration Tribunal adopts the UNCITRAL Model Law on International Commercial Arbitration.
19. The dispute on 'unfair distribution of artefacts' is not detailed here but participants are required to include in their written submission, on how the artefacts listed under para 14 should be distributed or disposed of amongst the parties.
20. For the purpose of present moot competition, the term 'salvage' is used within the meaning of the common law's use and meaning of the term.

PARTNERING AGREEMENT MEMORANDUM

PARTNERING AGREEMENT MEMORANDUM (the “Memorandum”) is made effective the **27th day of September 1995**, between the Government of the **Rolga** (“Government”) and **Benevolent Heritage Inc.** (“Heritage Inc”).

1. Memorandum

This Memorandum sets forth the principal terms “Agreement Concerning the Shipwreck Coeur de l’ Ocean” (“Agreement”).

2. Project Plan

Heritage Inc. and the Government have made arrangements for the approval process of the 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 and the conservation and documentation of any artefacts that may be retrieved from the shipwreck.

The approval process provides 60 days for the Government to provide comments and may take up to one hundred days from the date on which Heritage Inc submits the project plan to the Government for approval. Benevolent Heritage has agreed not to conduct any activities at the site until such time as the project plan has been agreed, provided however, that Heritage Inc is entitled to conduct a pre-disturbance survey in advance of the approved project plan.

3. Fees and Deposits

Within seven days of signing the Agreement, Heritage Inc. shall pay a refundable license fee of USD \$30,000. Prior to beginning the exploration, Heritage Inc. will place on deposit with the Government the sum of up to USD \$1,250,000. In the event the exploration does not provide sufficient revenue to pay the Governments expenses related to the Agreement, the funds would be used to pay such expenses.

In the event it becomes reasonably evident that the wreck is that of Coeur de l’ Ocean and approximately USD \$3,500,000 worth of artefacts have been retrieved and transported to a secure conservation facility, Heritage Inc. will notify the Government and the Government shall return the Expense Deposit to Benevolent Heritage forthwith.

Prior to beginning the exploration, Heritage Inc. shall place on deposit with the Government the sum of \$100,000 to assure the Government that funds are available for the conservation and documentation of any artefacts retrieved from the site. This deposit may be adjusted upwards or downwards depending upon the anticipated cost of conservation and documentation.

When it becomes reasonably apparent that the cost of conserving and documenting the artefacts will be substantially less than the Deposit, the Government will return such excess Deposit to Heritage Inc.

Upon payment of the License Fee, the Expense Deposit, the Conservation Deposit and agreement of the Project Plan, Benevolent Heritage may commence the Activities subject to the provisions of this Agreement.

4. Government Representatives

The Government may appoint two representatives to monitor and record the exploration to determine whether the activities are being carried out in compliance with the project plan.

5. Sharing Arrangements

Benevolent Heritage and the Government have agreed upon the following sharing arrangements with respect to the aggregate amount of the appraised values and/or selling prices of the artefacts, net of agreed selling expenses.

Range	Government	Heritage Inc
i. \$0 - \$45 million	20%	80%
ii. \$45 million to \$500 million	50%	50%
iii. Above \$500 million	60%	40%

Once the aggregate amount of the appraised values for the artefacts and the net proceeds of any sales of artefacts exceed forty-five million dollars, Heritage Inc. will be entitled to own and possess its relative share of the remaining artefacts. If the aggregate amount of the appraised values for the artefacts and the net proceeds of any sales of artefacts exceed forty-five million dollars, the Parties will endeavor to formulate a joint marketing plan for the placement and sales of the remaining artefacts. The Government shall at all time be considered the owner of the shipwreck.

6. Merchandising Income

The Government has granted the right to use the name “Coeur de l’ Ocean” in association with sales and marketing of merchandise (exclusive of artefacts) related to the wreck of Coeur de l’ Ocean.

Heritage Inc. will pay the Government a fee equal to three percent of its gross sales of merchandise that utilizes the name “Coeur de l’ Ocean”.

7. Expenses of the Project

Benevolent Heritage will be responsible for the payment of all expenses, including financing expenses and up to USD \$1,250,000 of government expenses related to the project.

8. Term and Termination

The term of the Agreement is for twenty years from the date Heritage Inc. commences operations. The agreement may be terminated in the event:

- (a) The Parties cannot agree upon a project plan within 100 days from the date on which Benevolent Heritage submits the project plan to the Government.
- (b) The shipwreck is not Coeur de l' Ocean.
- (c) No artefacts have been retrieved from the site with eighteen months from the date that the Parties agree to the project plan.

Any serious breach of obligation by Benevolent Heritage or by the Government under the Agreement.

9. Governing Law

The Agreement will be governed under the Rolgan Law and the Parties have mutually agreed to arbitration for the settlement of any disputes related to the Agreement.

10. Confidentiality

The Agreement contains a confidentiality clause governing the release of information concerning the Agreement and all documents relating to its execution.

Acknowledged this 27th day of September, 1995

SIGNED

For the Government of the **Rolga**, by:

SIGNED

For **Benevolent Heritage, Inc.**, by:

GUIDING PRINCIPLES FOR THE DETERMINATION OF THE DISPOSITION OF MATERIALS FROM THE SHIPWRECKS OF ASTORIA OFF THE COAST OF ROLGA (2001)

A. *General Principles*

1. Representative collections

The cost of recovery (including treatment) is likely to exceed by far the intrinsic or antiquarian sale value of material recovered. Although a division would not be warranted by consideration of cash value alone, the historic, educational, scientific and international considerations are such as to make the deposition of representative collections in the National Museums / Museums of Astoria and Rolga most desirable.

2. Considerations governing the partition of archaeological collections

In modern archaeological practice sites are no longer regarded merely as a source of important individual items, but rather as a body of material whose collective value far outweighs the importance of the individual pieces and in which the relationship of the individual objects within the sample are a major part of its historical value. Accordingly, the sharing of material from an archaeological site is best regarded as the accommodation in several localities of a corporate entity rather than its division into parts.

If the decision is made that the contents of an archaeological site are to be apportioned between two or more institutions, the first principle to be observed is that the total assemblage should be capable of reassembly to allow further statistical and scholarly analysis. It follows, therefore, that unnecessary splitting of a sample of closely similar objects capable of statistical treatment should be avoided and, where samples are accommodated in more than one institution, those institutions should contract not to disperse them further and, moreover, to agree to allow samples to be brought together for analysis and study as required. The second principle is that where unique or rare objects, themselves, form a meaningful assemblage within the whole, this assemblage should not be split or, if split, perfect replicas be made to complete the assemblage. As in the case of the division of statistical samples an agreement should be made between the recipients to reconstitute the original assemblage if it is required for scholarly research.

3. Treatment of material recovered

The contents of the ancient shipwrecks of Astoria include abundant statistical samples such as coin, bricks, objects of pottery, elephant tusks, and so on. There are also many articles which are less abundant but which are duplicated many times over. Many of these are ship fittings such as cannon, anchors, cannon balls, etc. There are also other articles which are relatively rare, or even unique, in the deposits (e.g. articles possessed by crew members, or passengers, such as barber's instruments, navigational instruments, ornaments, etc.). Most articles are fragmentary and in need of immediate chemical conservation and stabilization in the laboratory as soon as they are recovered. This treatment cannot await distribution.

B. *Operating Principles*

4. Code of Operation

The Committee appointed will operate by reviewing proposals for distribution made, from time to time, by the Director of the National Museum of Rolga; it could decide that the proposed samples be increased or decreased in content in the light of the total material collected and other factors.

5. General aims

In its deliberations the Committee will have, as its general aim, the purpose of ensuring that representative series of statistical samples and sufficient examples of the rarer objects will be deposited in the museums of the Astoria and Rolga to convey the variety and contents of each wreck to both the public and to scholars while, at the same time, ensuring that major projects of scholarly research will not be impeded by over fragmentation of the collection. Dispersal in this way, among separate repositories will also help to ensure the permanent safety of representative material in the event of the destruction of any one repository.

6. Statistical samples

A representative collection of the contents of each statistical sample should be made available to a museum of the Astoria and a museum of Rolga. Thus, in the case of coin, for example, both the Astorian and Rolga Governments would receive as complete a series as possible representing the mintings and values contained within each of the wrecks. These will provide their museums with ample material of this class of objects for display purposes and sufficient to enable a scholar to make the initial qualitative studies

7. Less common or rare objects

In order to ensure that both the Astoria and Rolga Governments acquire, in due course, representative collections of the less common and even unique objects, the following procedure will be adopted. Since the relationships of such objects to the whole sample cannot be known until excavation is complete, the distribution of specimens of this nature cannot be considered during the continuing process of recovery. However, at reasonable intervals it should be possible to assemble a representative sample with fair certainty that all duplicates of any rare object present in a particular excavation should have been recovered and their nature taken into consideration during the deliberations of the Committee.

HISTORIC CITY OF ZAMZALA
6th November, 2001

Wednesday, 4 March 2009