THE 10th LAWASIA INTERNATIONAL MOOT COMPEITITION 2015

AT THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2015

ARBITRATION REGARDING THE STONE STATUE OF LORD VISHNU

THE GOVERNMENT OF NEPAL

Claimant

v.

THE AUSTRALIAN MUSEUM (SYDNEY)

First Respondent

THE NATIONAL MUSEUM (MALAYSIA)

Second Respondent

DR. JOHN THOMAS SMITH, JR.

Third Respondent

Respondents

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STATEMENT OF JURISDICTION

1. To ensure an expeditious resolution of the dispute, the Parties have agreed in writing to submit this dispute to arbitration.

2. The Parties have also agreed to resolve their dispute in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules (“i-Arbitration Rules”) under the auspices of the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”).

3. The Parties do not dispute the validity and enforceability of the arbitration agreement, and any award rendered by the tribunal is acknowledged to be final and binding upon the Parties as per Rule 12(7) of i-Arbitration Rules.
QUESTIONS PRESENTED

I. What are the laws governing the procedures of this arbitration.

II. Whether the laws of Australia are applicable to the merits of this dispute.


IV. Whether the Claimant has any proprietary rights over the Statue to demand for its return.

V. Whether the Third Respondent donation of the Statue to the First Respondent is valid.

VI. Whether the First and Second Respondent may retain possession of the Statue.

VII. Whether repatriation of the Statue is a suitable and enforceable remedy.
STATEMENT OF FACTS

The Parties To This Arbitral Proceeding

The Claimant, the Government of Nepal, is the executive body and the central government of Nepal, and represents the interests of the State, its people, and the Tribhuvan University in the arbitral proceedings.

The Respondents involved in the series of transfers concerning the subject matter in dispute are the Australian Museum, Sydney ("First Respondent"), the National Museum of Malaysia ("Second Respondent"), and Dr. John Thomas Smith, Jr. ("Third Respondent").

The Series Of Transfers Involving The Subject Matter

The subject matter in dispute is the stone statue of Lord Vishnu ("Statue"), a deity significant to the Hindu population in Nepal. The Parties to the dispute have accepted the finding of experts that the Statue is an authentic artefact estimated to be around 300 years of age, and worth $100,000.

Prior to its transfers to the Respondents, the Statue was first discovered in 2010 by Nepalese sheep herders within Nepal’s geographical borders, who turned it over to local governmental officials. It was later put on display at the Chhauni Museum in Nepal in the same year, and moved to the Tribhuvan University in Kathmandu, Nepal. The University had also agreed orally to return the Statue upon the Museum’s request, or when the institution is no longer able to display the Statue.
The Visit By The Third Respondent

As the facts indicate, the Third Respondent was invited by the Dean of the Central Department of Sociology/Anthropology at Tribhuvan University in Nepal, to present several lectures at the University in April 2014. After his last lecture, as a matter of customary practice, the Dean, who is also high ranking governmental official, gifted the Third Respondent a local artefact in the form of the Statue as a token of gratitude for his services to the Tribhuvan University. This was done without any conditions or qualifications attached.

The Exportation Of The Statue To Australia By The Third Respondent

As an internationally-known anthropologist who deals with antiquities on a frequent basis, the Third Respondent was able to verify the authenticity of the Statue upon receipt. The facts pertaining as to how the Third Respondent was able to remove the Statue from Nepal without being stopped by custom officials in Nepal and Australia remain ambiguous. Nonetheless, the Statue was never officially registered with the regulating bodies of Nepal, nor was it ever gazetted in the Nepal Gazette to be an inalienable object.

The Subsequent Loan Agreement Between The First And Second Respondent And Their Conduct In Receiving The Statue

Following the Statue’s importation into Australia, the Third Respondent subsequently donated the statue to the First Respondent, who initially displayed it in the museum on April 2014 as part of an exhibit promoting knowledge, understanding and enjoyment of diverse cultures. A month later, the statue was loaned to the Second Respondent as part of a renewable two-year loan agreement between both parties. Although the First and Second Respondent was merely informed that the Statue was obtained from a credible source, the First and Second Respondent
had nevertheless confirmed the authenticity of the Statue in accordance to the findings by experts from the Respondent museums.

**Nepalese Intervention And Dispute Resolution**

After being informed that the Statue had left Nepal, the Claimant had demanded for the Statue to be returned to Nepal immediately on the assertion that the Statue belongs to the People of Nepal. The Claimant however, does not assert that the statue was stolen, nor have they pursued legal action against the Tribhuvan University or the Third Respondent for any breaches of local laws. As such, both the First and Second Respondent have refused to return the Statue, asserting that it was a ‘gift’ from the Tribhuvan University.

Following the Respondents’ refusal, the Parties to the dispute have agreed to submit this dispute to binding arbitration in Kuala Lumpur, Malaysia to avoid expensive and time consuming litigation. Pursuant to that agreement, the dispute is before the Kuala Lumpur Regional Centre For Arbitration ("KLRCA").
SUMMARY OF PLEADINGS

I. Malaysian law governs the procedural aspects of this arbitration and the arbitration agreement, because the seat of arbitration is in Kuala Lumpur, Malaysia.

II. The laws of Australia will govern the substantive aspects of this dispute as the Malaysian conflict of laws principles of the *lex situs*, and *lex loci delicti* indicate as such.

III. If there is a conflict between international law and Australian law, the latter will prevail.

IV. The First and Second Respondent are not liable to return the statue to the Claimant under the laws of Australia, given that the Claimant’s right to demand for the return of the statue is not recognised under the Protection of Movable Cultural Heritage Act 1986.

V. The First and Second Respondent are also not liable to return the statue under the tort of conversion and detinue as the Claimant does not have a requisite proprietary right (no ownership, actual possession, or an immediate right to possession) over the Statue to bring such actions.

VI. Consequently, the Claimant may not demand for the return of the statue because the Third Respondent had acquired a right to possession following the Dean’s authority to gift the Statue, pursuant to the Tribhuvan University Act 1992.

VII. Even assuming that Nepalese law is the applicable law, the First and Second Respondent will not be liable to return the Statue to the Claimant. The Claimant has no right to obtain custody of the Statue under the Ancient Monument Preservation Act (1996) as it has never registered or gazetted the Statue with the regulating bodies of Nepal, and also has not
classified the statue to be an inalienable object under Nepalese laws. Consequently, the Dean’s transfer of the Lord Vishnu statue to the Third Respondent is not prohibited and the Third Respondent will have the right to donate the Statue to the First Respondent.

VIII. The legal merits of this dispute does not warrant the return of the Statue to the Claimant under Australian law. Alternatively, in the event that the laws of Nepal are applicable, the First and Second Respondent remain without liability to return the Statue.

IX. In any event, the arbitral tribunal should not order for the return of the statue as such a remedy is not a suitable remedy in the present dispute.
PLEADINGS

1. **THE PROCEDURAL LAW OF THE ARBITRATION IS THE LAWS OF MALAYSIA AND THE LAW GOVERNING THE SUBSTANTIVE MATTERS OF THIS DISPUTE IS THE LAWS OF AUSTRALIA**

1. In an international arbitration, multiple laws may govern different aspects of the arbitration. Generally, the laws governing the procedural aspects and the substantive merits of the dispute may be different.¹

2. Although the Claimant and the Respondents ("**Parties**") have not expressly chosen an applicable law, they have agreed to use the KLRCA i-Arbitration Rules ("**Rules**").

A. **THE LAWS OF MALAYSIA GOVERN THE PROCEDURES OF THIS ARBITRATION**

3. The procedural aspects of an arbitral proceeding is regulated by the institutional rules chosen by the parties and the laws of the seat of arbitration.²

   (a) **Kuala Lumpur, Malaysia is the seat of arbitration**

4. The importance of the seat of arbitration stems from the theory of the jurisdictional nature of arbitration,³ where an arbitration operates within the framework of a national legal order

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¹ *Arsanovia Ltd. and Others v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702, para. 9; *Kuwait Airways Corp v. Iraqi Airways* [2002] 2 AC 883, pg. 1078.

and never in a vacuum. In *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Incorporated*, it was held that where the parties have not designated a seat of arbitration, the arbitral panel must consider all significant factors in determining an appropriate seat of arbitration.\(^4\)

5. These factors include the proposed procedure, the centrality of the dispute, the subject matter in dispute, and the convenience of the parties.\(^5\) In the present dispute, Malaysia is the most appropriate seat of arbitration for the following reasons:-

5.1. Pursuant to Rule 6(1) of the i-Arbitration rules, Malaysia shall be the seat of arbitration, given that there is no other appropriate seat.\(^6\)

5.2. Though the parties involved are from different States, the express choice of venue is a strong indication of the parties’ intention as to the seat of arbitration.\(^7\)

5.3. The subject matter is currently located in Kuala Lumpur, Malaysia. As such, it is expeditious and efficient to enforce the arbitral award within the jurisdiction of Malaysia, in accordance with Malaysian rules of procedures.\(^8\)

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\(^3\) Loukas Mistelis, *Reality Test: Current State Of Affairs In Theory And Practice Relating To “Lex Arbitri”*, pg. 172.

\(^4\) *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Incorporated* [2001] 1 All ER (Comm) 514, para. 52.

\(^5\) *Ibid*.

\(^6\) KLRCA i-Arbitration Rules, Rule 6(1).

\(^7\) *Shashoua & Ors v. Sharma* [2009] EWHC 957 (Comm), para. 26; *Shagang South-Asia (Hong Kong) Trading Co Ltd. v. Daewoo Logistics* [2015] EWHC 194 (Comm), pg. 4, para. 22.
(b) As Malaysia Is The Seat Of Arbitration, The Laws Of Malaysia Shall
Gover The Procedures Of This Arbitration

6. It is trite that the laws of the seat of arbitration regulate the powers of an arbitral tribunal and supervise the arbitral award of an arbitral proceeding.\(^9\)

7. Since the seat of arbitration of the present proceedings is in Malaysia, the laws of Malaysia shall be the procedural law of this arbitration, and the determination of the applicable law (\textit{lex causae}) shall primarily be governed by the 2005 Arbitration Act of Malaysia ("MAA 2005").\(^{10}\)

B. The Laws of Australia Govern The Substantive Matters Of This Arbitration

(a) The Conflict Of Laws Principles Of Malaysia Indicate The Laws Of Australia To Be The Applicable Law

8. S.30(4) of the MAA 2005 provides that where parties have failed to agree upon the applicable law, "the arbitral tribunal shall apply the law determined by the conflict of laws rules".

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\(^8\) Mobil Investments Canada Inc. \& Murphy Oil Corporation v. Canada, Decision of the Tribunal on the Place of Arbitration [2009], ICSID CASE NO. ARB(AF)/07/4, para. 40.


\(^{10}\) MAA 2005, S.30(4).
9. It is submitted that the conflict rules of the *lex arbitri* shall be applied in the present dispute. The present wording of S.30(4) of the MAA 2005 restricts the application of conflict of laws principles to the conflict of laws rules of Malaysia for the following reasons:

9.1. Although S.30(4) of the MAA 2005 was modelled after the Article 28(2) of the UNCITRAL Model Law, S.30(4) of the MAA 2005 departed from the original provisions of the UNCITRAL Model Law that allowed for the choice of the most appropriate conflict of laws rules.¹¹

9.2. An agreement to commence arbitration at a specified place pursuant to specified arbitration rules and procedures constitutes an implied agreement to use the conflict of laws rules of the *lex arbitri*.¹²

10. The Respondents submit that there are two relevant conflict of laws principles under the laws of Malaysia, indicating the applicable law to the substantive matters of the dispute to be the laws of Australia.

   (b) The Laws Of Australia Are The Applicable Laws Following The *Lex Situs* Rule


i. *The lex situs rule requires the application of the laws of the place of the last transfer*

11. With regard to the validity of a transfer of a tangible movable property, the principle governing a dispute of title over property is the *lex situs* by virtue of the 1956 Civil Law Act of Malaysia, which incorporates the common law of England and Wales established prior to 1956 as part of the Malaysian law.

12. In this regard, the *lex situs* rule dictates that the applicable law shall be the laws of the jurisdiction at where the property is situated at the time of the last transfer of title, in the series of transactions.

13. Therefore, if new title is validly acquired under the laws of the country where the object was last received, it would have the effect of overriding and displacing prior titles regardless of which law they may have been derived from.

ii. *The place of the last transfer of title occurred in Australia*

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13 *Cammell v. Sewell* [1860] 5 H. & N. 728;

14 Civil Law Act 1956, S.3(1); *PL Narayanan & Anor v. PL Subramaniam & Another* [1998] 7 MLJ 770, pg. 5.


14. In the present case, it is common ground that the Third Respondent’s donation of the Statue took place in Sydney, Australia\textsuperscript{17}, where the First Respondent is situated.

15. Further, the fact that the current location of the Statue is with the Second Respondent in Kuala Lumpur, Malaysia is merely the consequence of the last transfer that had occurred.\textsuperscript{18} Thus, the place of where the last transfer of the Statue occurred remains in Sydney, Australia in accordance with the \textit{lex situs} rule.

\textit{iii. Accordingly, the laws of Australia as the jurisdiction of the last transfer shall be the applicable law.}

16. Following the \textit{lex situs} rule, the Respondents submit that the laws of Australia shall be applicable to determine the merits of the present dispute.

17. Thus, it is immaterial even if the laws of Nepal do not recognise the transfers of title in Australia\textsuperscript{19} as Nepalese laws may only apply to the extent of determining whether the Dean’s gift of the Statue in Nepal would give the Third Respondent a good title. It has no application to decide if the First and Second Respondent have derived a valid title from the Third Respondent in Australia.\textsuperscript{20}

\textsuperscript{17}Moot Problem, pg. 2, [2] The Statue.

\textsuperscript{18}\textit{Ibid.}


\textsuperscript{20}\textit{Ibid.}, para. 24-025.
18. As such, the arbitral tribunal shall apply the laws of Australia to establish the First and Second Respondents’ right to retain possession of the Statue.

   iv. *The exceptions to the lex situs rule are not applicable*

19. Further, this dispute does not fall within the five exceptions to the lex situs rule:

   19.1. If the goods are in transit and their situs is casual or not known.

   19.2. The absence of *bona fide* conduct.

   19.3. Violation of the public policy of the forum.

   19.4. The existence of a statutory obligation to apply the laws of the forum.

   19.5. If the dispute involves the general assignments of movables on bankruptcy or succession.

20. In the present dispute, the most relevant exception is the requirement of *bona fide* conduct.

   It is further submitted that the Third Respondent has acted *bona fide* due to the following reasons:

   20.1. The Third Respondent’s lack of knowledge of any alleged defect in the Dean’s title to provide the Statue as a gift suggests *bona fide* conduct by the Third Respondent.

21 *Winkworth v. Christie, Manson & Woods Ltd And Another* [1980] 1 All ER 1121, pg. 1125.

22 Clarifications, pg. 2, [B], Question 3.
20.2. It was reasonable for the Third Respondent to believe that a person in the position of the Dean was entitled to provide the Statue as a gift, because the Tribhuvan University is an autonomous body with the requisite right to dispose and manage movable property belonging to the institution;¹²³

20.3. Further, the fact that the Statue is a gift in appreciation of the Third Respondent’s lectures in Tribhuvan University also substantiates the Third Respondent’s reasonableness for believing that he is entitled to the Statue.

21. As such, the Respondents submit that the *lex situs* rule remains applicable as the exceptions to the rule do not apply in the present dispute.

(c) **In Any Event, The Lex Loci Delicti Rule Will Also Indicate The Laws Of Australia To Be The Applicable Law**

22. In the present case, the Claimant has alleged that the First and Second Respondent has committed a wrongful act with regard to the retention of the Statue in the respective museums.²⁴

23. Thus, in applying the conflict of laws rules of Malaysia, the applicable law shall be the *lex loci delicti*, i.e. the laws of the jurisdiction where the alleged tort was committed.²⁵

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24. As such, the law applicable to the substantive matters of this dispute between the Parties will still remain to be the laws of Australia.

II. IF THERE IS A CONFLICT BETWEEN AUSTRALIAN LAW AND INTERNATIONAL LAW, AUSTRALIAN LAW WILL PREVAIL

25. Provisions of an international treaty to which Australia is a state party is not automatically incorporated into the domestic laws of Australia. The provisions of the treaty may be resorted only to assist in resolving an ambiguity in domestic primary or subordinate legislations in Australia, but not to displace the plain words of the statute.26

26. Thus, as a general rule, the laws of Australia will prevail and shall not be overridden even by provisions of international law which has been ratified by the state of Australia.27

27. Nevertheless, since Australia’s ratification of the 1970 UNESCO Convention On The Means Of Prohibiting And Preventing The Illicit Import, Export And Transfer Of Ownership Of Cultural Property (“1970 UNESCO Convention”),28 it has implemented provisions of the UNESCO Convention into its domestic legislation, through the Protection


28 Moot Problem, pg. 3, fn. 8.
of Movable Cultural Heritage Act 1986 ("PMCHA"). Thus, there are no issues of conflict or inconsistencies between both bodies of law in the present dispute.

III. **THE RESPONDENTS ARE NOT LIABLE TO RETURN THE STATUE UNDER THE LAWS OF AUSTRALIA**

A. **THE CLAIMANT HAS NO REQUISITE PROPRIETARY TITLE TO DEMAND FOR THE RETURN OF THE STATUE**

(a) The Claimant’s proprietary right over the statue is not recognised under the Protection of Movable Cultural Heritage Act 1986

28. Under S.14 of the PMCHA, the recognition of the Claimant’s rights to demand for the return of its cultural object will depend on the following elements:

28.1. The object is a protected object under the laws of the exporting state;

28.2. The export of the object is prohibited under the laws of the exporting state.

29. Since the Statue was discovered and exported out of Nepal, the determination of its protected status and export prohibitions will require reference to Nepalese laws according to S14 of the PMCHA.  

i. **The Statue is not a protected object under the laws of Nepal**

29 Further Clarifications, pg. 3, [C], Question 6; Clarifications, pg. 2, [B], Question 3.
30. The right of the Department of Archaeology of Nepal to obtain custody of antiquities extends only to ‘archaeological objects’ defined under S.2(b) of the Ancient Monument Preservation Act 1996 (“AMPA”) and the Nepal Gazette of 1969.

31. An archaeological object is an object “made or used by human beings in the pre-historical period”, referring to the period of human existence before the availability of written records, with which recorded history begins. It is generally accepted that the pre-historical period ended around 5150 years ago, 3200 B.C.E.

32. Therefore, the Respondents submit that the Statue is not a protected object under the laws of Nepal due to the following reasons:

32.1. The Statue is not an ‘archaeological object’ because it is merely 300 years of age;

32.2. The Statue was never registered under any Nepal Gazette to be a protected object;

32.3. The Statue was not registered under any regulating bodies in Nepal or Australia.

30 AMPA, S.17A.


34 K. Kris Hirst, The Egyptian Narmer Palette: Early Period Ancient Egypt.
ii. The transfer and export of the Statue is not restricted under the laws of Nepal

33. The restrictions on the export of objects must be prescribed by a notification in the Nepal Gazette. Further, “if it is to be transferred to any place, prior approval of Government of Nepal shall be taken”.

34. The transfer and export of the Statue is not restricted under the laws of Nepal for the following reasons:

34.1. The Statue was not registered by the Claimant to be restricted from export under any Nepalese Gazettes;

34.2. The Statue was not classified to be an ‘inalienable’ object under Article 13(d) of the 1970 UNESCO Convention. Therefore, the Statue is not prohibited from export;

34.3. The Statue was given to the Third Respondent by the Dean (and Chairman) of the Central Department of Sociology/Anthropology at the Tribhuvan University, who is also a ‘high ranking governmental official’. Thus, the gift of the Statue was approved by a state official of Nepal.

35 AMPA, S.13.

36 Ibid.

37 Clarifications, Pg. 3, [B], Question 7.

38 Third Round of Clarifications, Pg. 3, Question 3.
35. For the reasons above, the Claimant has no right to demand for the return of the Statue.

(b) The Claimant Has Not Derived Any Right Of Ownership Over The Statue Upon Its Discovery

36. For a foreign state to claim a right to ownership based on its domestic laws, the laws of that foreign state must have an effect equivalent to ownership under the applicable law. In Iran v. Barakat Gallery Ltd.:-

“In deciding whether Iran has ownership under Iranian law, it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of the conflict of laws.”39

37. Generally, rights of ‘ownership’ may include the following factors:-40

37.1. Rights to exclusive enjoyment;

37.2. Rights of alienation;

37.3. Rights to recover possession of the property from all other persons;


37.4. Rights to maintenance; or

38. Rights to alteration and destruction.

39. The Respondent submits that the Claimant does not have any rights of ownership under its domestic laws, based on the aforesaid factors:

   i. *The relevant provisions of the AMPA does not apply to confer an exclusive right to the Claimant over the Statue*

40. Under the AMPA, the Claimant’s right to custody applies only to ‘archaeological objects’[^41]. Furthermore, the right to confiscate objects are only applicable to objects prescribed and notified in the Nepal Gazette.[^42]

41. In accordance with paragraphs 30 to 35 above, S.13 and S.17A of the AMPA is not applicable to the Statue. As such, the Claimant has no exclusive right over the Statue.

   ii. *The Statue is not classified to be inalienable*

42. The right of inalienability in the context of cultural property is the right of a state to restrict the export of objects, and the right to facilitate recovery of objects that were exported.[^43]

[^41]: AMPA, S.17A.


[^43]: 1970 UNESCO Convention, Article 13(d).
43. Although the 1970 UNESCO Convention is enforceable in Nepal\textsuperscript{44}, the Statue was not classified to be inalienable under Nepalese regulations. In addition, the Claimant does not regard such provisions to be applicable to the Statue.

\textit{iii. The Claimant has no rights of alteration or destruction over cultural objects}

44. In accordance to the Expert Committee On State Ownership of Cultural Heritage, the term ‘state ownership’ of cultural objects does not aim at the enrichment of a State, but merely for the State to “fulfil its role as custodian of the heritage.”\textsuperscript{45}

45. Consequently, even if the Claimant may maintain and preserve cultural objects under the AMPA\textsuperscript{46}, the Claimant does not have any right to destroy or alter the condition of cultural objects under the AMPA.

\begin{itemize}
\item \textbf{(c) The Claimant Has No Immediate Right To Possession Over The Statue}
\end{itemize}

46. Following the inapplicability of the AMPA, the Claimant cannot derive any right to obtain possession or custody under S.13 and S.17A of the AMPA upon the discovery of the Statue.\textsuperscript{47}

\begin{flushleft}
\textsuperscript{44} Nepal Treaty Act 1990, S.9(1).
\textsuperscript{45} Expert Committee on State Ownership of Cultural Heritage, Model Provisions on State Ownership of Undiscovered Cultural Objects 2011, Provision 3, Guidelines.
\textsuperscript{46} AMPA, S.16A.
\end{flushleft}
B. ACCORDINGLY, THE FIRST AND SECOND RESPONDENT IS NOT LIABLE TO RETURN
THE STATUE UNDER THE TORT OF CONVERSION AND DETINUE

47. With regard to the tort of conversion and detinue, the Respondents do not dispute the elements of the torts. However, the Respondents contend that the Claimant does not have a requisite proprietary right over the Statue to bring an action under conversion and detinue.

48. Nonetheless, it is necessary to list the elements for both torts that are not in dispute.

(a) Elements For The Tort Of Conversion That Are Not In Dispute

49. The mere asportation or possession of the Claimant’s property in itself would not constitute the tort of conversion, as conversion only occurs when the “degree of user amounts to employing the goods as if they were one’s own”. 48 There must also be an unjustifiable denial of another’s right over the property. 49

50. Generally, the tort of conversion of goods consists of the following elements: 50

50.1. The defendant’s conduct was inconsistent with the rights of the owner or other persons entitled to possession of the property, so as to exclude him from the use and possession of the property.


50.2. The defendant’s conduct was intentional.

51. The First and Second Respondent do not dispute that their refusal to return the Statue pursuant to the Claimant’s request amounts to an exercise of dominion over the Statue which is inconsistent with the Claimant’s alleged rights over the Statue.\(^5\)

52. Further, a “mental element in knowing that a wrong is being committed is not required”.\(^5\)

Thus, the First and Second Respondent’s refusal to return the Statue will also be regarded as a manifestation of an intention to deny the Claimant’s alleged proprietary rights.\(^5\) This will amount to the commission of the tort of conversion.\(^5\)

(b) Elements For The Tort Of Detinue That Are Not In Dispute

53. The tort of detinue is the unjustifiable detention of another’s property following a lawful demand.\(^5\)

54. Further, it is necessary under the tort of detinue that the demand for a return of goods and a refusal in response must take place prior to the commencement of proceedings.\(^5\) The


demand for the return of goods must be ‘specific’\textsuperscript{57}, and the indication of a place of delivery is sufficient.\textsuperscript{58}

55. The Respondent does not dispute that the Claimant had demanded for the return of the Statue, wherein both the Australian Museum and the National Museum of Malaysia have refused its return.\textsuperscript{59}

\textbf{(c) Nonetheless, The Claimant Does Not Have The Requisite Proprietary Rights To Pursue An Action In Conversion And Detinue}

56. Even if the substantive elements of conversion and detinue can be established, these claims cannot succeed if the Claimant is not equipped with one of the following proprietary rights over the Statue:-

56.1. Actual Possession;\textsuperscript{60}

56.2. Right To Immediate Possession;\textsuperscript{61}


\textsuperscript{57} \textit{Reglon Pty Ltd v. Hill \& Ors} [2006] NSWSC 1360, para. 21.

\textsuperscript{58} \textit{Lloyd v. Osborne} [1899] 20 LR NSW 190, pg. 194.

\textsuperscript{59} Moot Problem, pg. 2, [3] Nepalese Intervention.

\textsuperscript{60} \textit{Armory v. Delamirie} [1721] 93 E.R. 664; \textit{Reglon Pty Ltd v. Hill \& Ors} [2006] NSWSC 1360, para. 27.

56.3. Right of Ownership.\textsuperscript{62}

\begin{itemize}
  \item[i.] \textit{The Claimant's Actual Possession Of The Statue Will Not Sustain A Claim Against The First and Second Respondent Under Both Torts}
\end{itemize}

56.4. The violation of actual possession must be committed by the tortfeasor under an action in conversion and detinue. In Winkworth v. Christie Manson and Woods Ltd.:\textsuperscript{63}

\begin{quote}
\textit{“...the second defendant has on no footing violated any actual possession of the goods by the plaintiff, who, by reason of theft, had already lost such possession before the time when the contract of sale was concluded in Italy. As against the second defendant therefore the plaintiff must establish the immediate right to possession of the goods.”}
\end{quote}

57. Therefore, this indicates that the Claimant must establish a right to ownership or immediate possession against the First and Second Respondent,\textsuperscript{64} of which is disputed.

58. It is submitted that The First and Second Respondent in the present dispute did not violate the Claimant’s actual possession of the Statue as the dispossessions was committed by the Third Respondent, which the Claimant is not pursuing an action against.\textsuperscript{65}

\begin{itemize}
  \item[ii.] \textit{The Claimant has no right of ownership and immediate possession under the torts of conversion or detinue}
\end{itemize}


\textsuperscript{63} Winkworth v. Christie, Manson & Woods Ltd And Another [1980] 1 All ER 1121, pg. 1124.

\textsuperscript{64} Ibid., pg. 1124.

\textsuperscript{65} Further Clarifications, pg. 3, [C], Question 2.
59. Based on the submissions in paragraph 46 above, the Respondents submit that the Claimant does not have any rights to immediate possession or ownership over the Statue. Therefore, the Claimant cannot pursue an action in conversion or detinue.

C. **THE FIRST AND SECOND RESPONDENT MAY RETAIN POSSESSION OF THE STATUE**

(a) **The Third Respondent Has Acquired A Right To Possession From The Dean’s Gift Of The Statue Under The Laws Of Australia**

60. A gift of chattels may be effected by ‘oral words of gift with delivery’. If the object is a movable tangible property, the physical handing over of the object will suffice for delivery.

61. Furthermore, the Dean may gift the Statue to the Third Respondent pursuant to the authority conferred by the Tribhuvan University Act. Since the Dean has physically gifted the Statue to the Third Respondent with the intention to effect the gift, title over the Statue will vest in the Third Respondent.

62. In any event, the Dean’s authority beyond this is not to be resolved in the present dispute.

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69 Moot Problem, pg. 2, fn. 5.
(b) Ergo, The Third Respondent’s Gift Of The Statue To The First 
Respondent Is Valid

63. Consequently, the Third Respondent may donate the Statue to the First Respondent by 
virtue of the same principles governing the transfer of gifts. Thus, the Loan Agreement 
between the First and Second Respondents shall also be valid.

IV. IN THE EVENT THAT THE APPLICABLE LAW IS THE LAWS OF NEPAL, THE 
FIRST AND SECOND RESPONDENT MAY STILL RETAIN POSSESSION OF 
THE STATUE

A. THE THIRD RESPONDENT’S GIFT OF THE STATUE TO THE FIRST RESPONDENT IS 
VALID

(a) The Claimant Does Not Have Any Right To Obtain Custody Of The Statue

64. Based on the Respondent’s submissions in paragraphs 30 to 35 above, S.17A and S.13(1) 
of the AMPA does not apply to confer any rights on the Claimant vis-à-vis the Statue. 
Therefore, the Claimant has no right to demand for the custody or exercise any rights of 
confiscation over the Statue.

(b) The Third Respondent Did Not Obtain The Statue In Breach Of Any 
Nepalese Regulations

70 Sally Anne Horseley v. Phillips Fine Arts Auctioneers Pty Ltd. NSWSC [1995], para. 53.
65. As per paragraph 34 above, the Claimant’s assertion of a breach of Nepalese regulations would merely be an *ex post facto* restriction on the Statue. It is submitted that the export and transfer restrictions in Nepal are not applicable to the Statue at all material times throughout the sequence of transfers between the Dean and all the Respondents.

66. As such, even under the laws of Nepal, the Third Respondent remains entitled to donate the statue to the First Respondent, wherein the Loan Agreement with the Second Respondent remains equally valid.

V. IN ANY EVENT, THE ARBITRAL TRIBUNAL SHOULD NOT ORDER FOR THE RETURN OF THE STATUE

(a) The Order For The Return Of The Statue Is Not A Suitable Remedy

67. It is the duty of this arbitral tribunal to provide an award that is suitable and enforceable by the parties in this proceeding. The Claimant submits that an order for the return of the Statue is not suitable in this dispute, and a joint conservation effort between the Parties shall be preferred because:-

67.1. In the event that the Claimant may establish a proprietary right over the Statue, the joint conservation of the Statue allows for further opportunity to exhibit and study the Claimant’s heritage.\textsuperscript{72}

67.2. "\textit{The criteria for defining a successful repatriation event should not be restricted to the physical return of materials.}\textsuperscript{73}" Rather, the recognition of the Respondent’s authority to retain possession and the Claimant’s ownership may facilitate a process of preserving the Statue.

\textbf{(b) The Arbitral Award Is Enforceable Against The Parties In This Dispute}

68. Nepal, Malaysia, and Australia, are all State Parties to the 1958 New York Convention On The Recognition and Enforcement of Arbitral Awards. Furthermore, all jurisdictions relevant to this present dispute are also State Parties to the 1970 UNESCO Convention.\textsuperscript{74}

69. Hence, as there is a harmonised policy between the relevant jurisdictions regarding disputes over cultural property, thereby the recognition and enforcement of the arbitral award in this arbitration is not a contentious matter.\textsuperscript{75}


\textsuperscript{74} Moot Problem, pg. 3, fn. 8.

\textsuperscript{75} Convention On The Recognition And Enforcement Of Arbitral Awards 1958, Article 1.
PRAYER FOR RELIEF

The Respondents request this arbitral tribunal to make the following orders:

I. The laws governing the procedures of this arbitration shall be the laws of Malaysia.

II. That the laws of Australia are the appropriate applicable laws to govern the substantive matters of this arbitration.

III. That the laws of Australia would prevail in the event of a conflict with the 1970 UNESCO Convention On The Means of Preventing and Prohibiting the Illicit Import, Export, and Transfer of Ownership.

IV. That the Claimant has no proprietary right over the Statue in accordance with both Nepalese and Australian laws.

V. The First and Second Respondent may retain possession of the Statue.

Respectfully submitted,

Counsel for the Respondents.