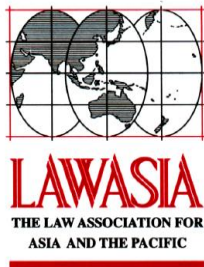




10th LAWASIA International Moot

CLARIFICATIONS TO THE MOOT PROBLEM



Organiser of the LAWASIA International Moot Competition

CLARIFICATIONS

PART I:- GENERAL OVERVIEW

Unlike many other moot competitions which use fictional entities from fictional cities in fictional countries, this year's LAWASIA Moot - as it frequently has in recent years - deals with **real institutions** (e.g. Tribhuvan University) in **real countries** (e.g. Nepal). In the author's opinion, this makes questions such as: "What kind of relation was there between the Tribhuvan University and Nepalese government?" inappropriate for the "clarification process" which, in the author's opinion should be reserved for information dealing with fictional persons and institutions. A simple internet search for "Tribhuvan University" will lead to <http://tribhuvan-university.edu.np/about-us/> which would quickly reveal: "Tribhuvan University (TU) is the first national institution of higher education in Nepal. It was established in 1959" and other information about the university and the Faculty of Law.

In contrast, additional information about Dr. Smith ("Queensland Smith"), *a fictional character* and *his fictional exploration* is quite appropriate as a Request for Clarification as the information is NOT available on the INTERNET! Such requests will be answered **if they seem to be at least potentially relevant.**

PROPER LAW

The published Problem contains the following directions:

- (a) While sometimes overlooked, the question of which country's or state's law should be applied to the issues raised in an international legal dispute [commonly known as "proper law" or "choice of law"] often is the single *most important legal issue* to be resolved. **It may be in this Problem!**
- (b) "Mooters" are advised to approach this question **not** as a judge or academic might (i.e. by determining what is **the best** or the "**proper**" law to apply in this case BUT by first determining which *potentially applicable law* would best serve your client's interest and then try to persuade the arbitrators to choose that law or, conversely, try to dissuade the arbitrators from applying the law which will make it most difficult for your client to prevail.

The above directions would, at least in the author's opinion, make it inappropriate for the author to answer such questions as:

1. Have parties decided on the law to be applied in the substantive dispute? If so, what is the applicable law?
2. Have parties decided on the procedural law to be applied? If so, what is the procedural law?

3. Have parties decided on the curial law to be applied? If so, what is the curial law?
4. Which law, as stated in the arbitration agreement, would the dispute be resolved according to?

PART II SPECIFIC REQUESTS AND RESPONSES

A) Applicable Law

Question:- What specific Nepalese law should be used to "assist in solving the problem?"

Answer:- *Nepal is, of course a REAL country with REAL laws. Whichever Nepalese law seems to provide the clearest answer to the question should be used. [The author doesn't believe it is his responsibility to lead teams to the answers to issues raised in the Problem.]*

B) The Statue

Question:- Where was the Statue located before it was given to Dr. Smith?

Answer:- *It was initially on display at the [National Museum](#) (Chhauni Museum) but was moved to the National University campus in Kathmandu in 2010.*

Question:- What did the Dean say when he gave the statue to Dr. Smith?

Answer:- *While his comments were not recoded and no copy of his notes have been found, it is generally agreed that the Dean thanked Dr. Smith for his visit and his lectures and said he was pleased to present him with "an appropriate gift" in gratitude for his service to Tribhuvan University.*

Question:- Before taking the statue abroad, did Dr. Smith confirm with other Nepalese authorities that removal of the statue was lawful?

Answer:- *No. Dr. Smith maintains that since it was a gift from the National University without any conditions or qualifications he assumed he could take it home with him.*

Question:- Where was the statue physically located before it was given to Dr. Smith and who was responsible for its safekeeping?

Answer:- *It was in the lobby of the building housing Central Department of Sociology/ Anthropology of Tribhuvan University. While no specific documents dealing with who was responsible for its safekeeping have been located, it can be assumed that the Dean's general responsibilities would extend to the care and protection of the statue.*

Question:- Is there any "special relation" between the Nepalese government and the statue?

Answer:- *The Nepalese government asserts that the statue has always belonged to "the People of Nepal."*

Question:- Has the Nepalese Government ever made a report to IFRA (International Foundation for Art Research) which gathers information about the "stolen property"?

Answer:- *No. The Government does not assert the statue was "stolen" but that it belongs to the People of Nepal and should be returned immediately.*

Question:- Did the Nepalese government classify the statue as an inalienable one? (Pursuant to Article 13(d) of the UNESCO on illicit transfer of cultural property).

Answer:- *No. It appears that the Nepalese government was either not aware of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) or did not believe it applied in this situation.¹*

Question:- Has the Nepalese Government ever made a report to IFRA (International Foundation for Art Research), international organization gathering the information about the stolen property after it recognizes that the statue was stolen?

Answer:- *No. It appears that the Nepalese government was either not aware of the IFRA or did not believe it would be useful in this situation.²*

Question:- Did the Australian Museum and National Museum (Malaysia) believe the statue to be a replica or the original statue?

Answer:- *After examination by its own "experts" both museums were satisfied that it was authentic - and displayed it as such.*

Question:- Where did the Tribhuvan University keep the statue before giving it to Dr. Smith?

Answer:- *It was on display in a locked glass display cabinet near the office of the Dean of Central Department of Sociology/ Anthropology.*

Question:- What were the terms of the loan agreement between the Australian Museum and the National Museum in Kuala Lumpur, Malaysia?

Answer:- *Key terms of the agreement included the following:-*

Borrower Responsibilities

(a) Absorb all costs incurred by the loan (e.g. transportation, packing, insurance, and preparation of the object(s) for travel and exhibition);

(b) Wall-to-wall, all risk fine arts insurance must be carried for the duration of the loan. The Museum will insure objects under its

¹ This does NOT mean that it does not apply or that Moot Teams should not consider its possible application.

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comprehensive, all-risk policy and the premium will be billed to the Borrower;

- (c) Comply with the Museum's environmental, security, handling and exhibition requirements. Requirements include 24-hour physical and/or electronic security, a fireproof building and protection from damage, mishandling, fire, water, insects, vermin, dirt and extremes of light, temperature and humidity. The Museum will advise the Borrower of specifications for environmental and security control as well as installation and handling requirements;*
- (d) Comply with the Museum's packing and transportation specifications; and*
- (e) Objects will be transported to and from the Borrower by means acceptable to the Museum.*

C) The Arbitration

Question:- Who are "the parties" and "all parties" as those terms are used in the Problem?

Answer:- *The Nepalese Government is the Claimant (it represents the interests the country, its institutions (including Tribhuvan University) and its people; the Respondents include the Australian National Museum, the National Museum (Malaysia), and Dr. John Thomas Smith, Jr. The term "all parties" includes all of the above.*

Question:- Have parties agreed on the "seat of arbitration"? If yes, where?

Answer:- *Not explicitly, but they agreed that the arbitration would take place in Kuala Lumpur.*

D) Potentially Important Dates

The discovery of the statue	2010
The first public display of the statue in Nepal	2012
Dr. Smith's visit to Nepal	2014
Dr. Smith's return to Australia (with the statue)	March 2014
The display of the statue at the Australian Museum	April to July 2014
The loan of the statue to the Malaysian Museum	July 2014
The display of the statue at the Malaysian Museum	July 2014 to present