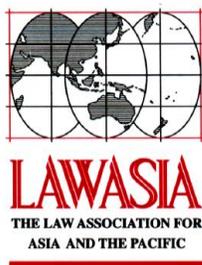




10th LAWASIA International Moot MOOT PROBLEM 2015



Organiser of the LAWASIA International Moot Competition

MOOT PROBLEM

1. Background

Dr. John Thomas Smith, Jr. (a.k.a. ‘Queensland Smith’¹) is a well known Australian anthropologist who has “found” many “lost” antiquities in numerous countries in the Asia-Pacific. He has donated *some* of them to local museums and has brought others back to Australia where he donated many of them to local museums.²

Dr. Smith was recently invited by the Dean of the Central Department of Sociology/Anthropology at Tribhuvan University in Nepal to present several lectures at the University. After his last lecture, a dinner was held in his honour. During the dinner, he was presented with a stone statue of Lord Vishnu seated between goddesses Lakshmi and Garuda. (Somewhat similar to the photograph below)



¹ Any resemblance to Dr. Henry Walton "Indiana" Jones, Jr., the fictional title character of the Indiana Jones movies (first appearing in the 1981 film *Raiders of the Lost Ark*), is *not* completely coincidental. However, the “facts” presented in this Moot Problem are as fictional as the “facts” in the Indiana Jones movies.

² There have been unconfirmed reports that he also sold some to private collectors at very high prices.

2. The Statue

The Dean indicated the statue was a gift in appreciation for Queensland Smith's visit and lectures at the University. [Note:- *Dr. Smith received no other compensation for his visit and lectures at Tribhuvan University other than the statue and a lavish dinner in his honour.*]

Dr. Smith subsequently donated the statue to the Australian Museum, Sydney where it was initially displayed as part of an exhibit promoting knowledge, understanding and enjoyment of diverse cultures. It is currently on loan from the Australian Museum to the National Museum in Kuala Lumpur, Malaysia.

Nepalese Export Regulations: Nepalese law prohibits the export of “objects over 100 years old,³ such as sacred images, paintings, manuscripts that are valued for culture and religious reasons.”⁴ The export of antiques from Nepal requires a special certification from the Department of Archeology in Kathmandu. None was requested or issued for this statue.

3. Nepalese Intervention

The Government of Nepal has demanded that the statue be immediately returned to Nepal asserting that it was “*stolen.*” Both the Australian Museum and National Museum, Malaysia have refused to return the statue, asserting that it wasn't “stolen,” but was a “gift” from Tribhuvan University⁵ to Dr. Smith who then donated it to the Australia Museum.

The Nepalese government also seeks compensation from the Malaysian government for damages to the statue. Although all parties agree that the statue was damaged after it left Nepal, there is no reliable evidence showing when, where or how it was damaged; nor is there any reliable evidence as to the monetary value of the damages, if a monetary value can be calculated. The parties have agreed to appoint an expert to assess the monetary value of the damages after ownership or custody of the statue has been resolved.

³ It is not disputed that the stature is at least 300 years old and its market value is well over \$100,000.

⁴ Dr. Smith has submitted an affidavit stating that while he was aware of the export prohibition, he didn't believe it applied to this statue since he had been given the statue by a representative of Tribhuvan University and assumed it must have been an excellent *replica* or the Dean would never have given it to him.

⁵ There is some doubt as to whether the Dean had the authority to give the statue to Queensland Smith but that question cannot be resolved by this tribunal and is not part of the present dispute.

Dr. Smith’s “Good faith” defense: Dr. Smith emphasizes that he did not “steal” the statute - as foreign anthropologists have been known to do – it was given to him by the Chairman of the Department of Sociology/Anthropology at Tribhuvan University in return for his services to the University. Since he received no other compensation for his services, he believes that it would be unjust to require that it be returned. He adds that he received no economic benefit from the statue as he gave it to the Australian Nation Museum and received no compensation for the gift.

4. Arbitration

Rather than risk engaging in expensive and time consuming litigation, all parties have agreed to submit this dispute to “binding arbitration” under the auspices of the KLRCA.⁶ The Nepalese Government will be the Claimant while the Respondents will be the Australian National Museum, the National Museum (Malaysia), and Dr. John Thomas Smith, Jr. Issues to be resolved include but are not necessarily limited to:

- (a) What laws or legal principles⁷ establish (a) Nepal’s right to demand the return of the statue and/or (b) the National Museum’s right to retain it:
 - i) Australian law;
 - ii) Nepalese law; or
 - iii) International law and/or (UN) Conventions.⁸
- (b) If there is a conflict between them, which law and/or Convention should be applied to this dispute.

⁶ They also agreed to the use of the KLRCA i-Arbitration Rules, found at <http://klrca.org/rules/i-arbitration/>.

⁷ 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! “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 serve your client’s interest the best and then try to persuade the arbitrators to chose that law or, at a minimum, try to dissuade the arbitrators from applying the law which will make it most difficult for your client to prevail.

⁸ Mooters are directed to [1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property](#) a/k/a the “UNESCO Convention). Assume that Malaysia and Nepal have all ratified this Convention even if they haven’t. (Australia’s “reservation” would not seem applicable to this Moot Problem.)

- (c) Will the “outcome” of this legal dispute be governed by which law/convention is applied and, if so, how.
- (d) What is the effect on this dispute of the failure to comply with Nepalese law?