
2017

LAWASIA INTERNATIONAL MOOT COMPETITION

Asamura International Development Co., Ltd.

(Claimant)

v.

Shwe Pwint Thone Co., Ltd.

(Respondent)

MEMORIAL FOR CLAIMANT

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STATEMENT OF JURISDICTION

The Arbitral Tribunal has jurisdiction over the dispute arising from the Partnership Agreement (“**the Agreement**”) on 9 September 2008 between Asamura International Development Co., Ltd. (hereinafter “**AID**”) and Shwe Pwint Thone Co., Ltd. (hereinafter “**SPT**”) because the parties agreed and demonstrated the arbitration agreement as a clause in the Agreement. That the Agreement is concluded in written form indicates that the arbitration clause meets the formal requirement for the valid arbitration agreement.

AID and SPT have shown the mutual intentional to submit the dispute before the Kuala Lumpur Regional Centre for Arbitration (“**KLRCA**”) pursuant to KLRCA i-Arbitration Rules.

The Arbitral Tribunal is requested to resolve the current dispute under the law of the Golden Land of Myanmar. The hearing will be held in Tokyo, Japan.

This Tribunal is requested to decide the issues submitted and will not decide the determination of damages.

QUESTIONS PRESENTED

1. Whether the agreement between SPT and AID was legitimate under the law of the Golden Land of Myanmar.
2. Whether the termination of the agreement made by SPT was valid to end the partnership with AID.
3. Whether the statement of Dr. Fiona Lum to the interview about their views on the plea of the Rohingya minority in the Rakhine state was harmful to national interest and solidarity of Myanmar and, if so, whether this constituted a breach of AID's obligation under the agreement.
4. Whether SPT had the ownership over jade-mining machinery, equipment.
5. Whether SPT or AID had the authority of subsistence and ownership of rights in the JADEYE software.

STATEMENT OF FACT

The case involves the dispute arising between Asamura International Development Co., Ltd (hereinafter AID) and Shwe Pwint Thone Co., Ltd. (hereinafter SPT). AID was invited by SPT to be in partnership in term of jadeite venture. Subsequently, on 9 September 2008, leaders of the two companies eventually signed an agreement.

AID bought second hand machinery and equipment in Japan and reconditioned them. SPT, in January 2009, imported those machinery and equipment into Myanmar.

In March 2009, leader of AID Dr. Yugi Asamura suggested that AID and SPT jointly create capital contributions, with the amount of USD 1.5 million and USD 2.5 million respectively.

According to arrangement, SPT was in charge of providing visa and accommodation for AID's employees. It also acquired permission as to mining equipment and jade mining from the government but the granted permit would expire on 31 March 2019.

At the studios of SPT, jewellery was made from jades and then sold to all retailers around Myanmar. However, the majority of commercial quality jades were sold to major jade production in Myanmar right after they leaved Hpakant jade mines. Even Dr. Fiona Lum, Dr. Yugi Asamura's wife, also distributed and sold rough jades imported from Myanmar to her friends in Japan through her personal capacity.

On 11 April 2012, Joe Yamashita, AID's finance executive, informed Dr. Yugi Asamura that he has successfully developed software, namely JADEYE, which could test the quality and viability of jades at 99% accuracy. After the trial test, Dr. Yugi Asamura determined to use this software on all computers and equipment on the sites.

U Thein Kyaw, leader of SPT, offered USD 18000 to buy JADEDY but Joe Yamashita refused the offer on the ground that JADEDY was “for benefits of all of us”.

On 4 January 2013, Joe Yamashita resigned from AID but the source code of software was stored in a hard disk driver and handed to Head of Finance of AID.

In an interview with Asian Influencers Magazine, Dr. Fiona Lum answered the question of interviewers that “Everyone must work together to end the persecution of the Rohingyas, and the new Myanmar government under the leadership of Daw Su must end the problem immediately, especially the ethnic cleansing. They should not be deprived of their basic human rights. We will continue to champion for their rights.”

In September 2016, the interview was published. SPT’s workers were angry because they believed that Dr. Fiona Lum’s statement implied that Myanmar government was involved in ethnic cleansing. Nonetheless, the couple neither apology nor had any reaction.

In October 2016, the US lifted its trade sanction on Myanmar. Moreover, on August 2016, Myanmar government also declared that “it would not issue any new permits or renew any existing permits for jade mining and mining equipment until a new legal reformed were implement”.

On November 2016, AID and Hashimoto Co., Ltd (hereinafter HCL had entered into USD 1.2 million contract with the consent of U Thein Kyaw. AID thereby would supply jades to HCL for the next year.

On 21 November 2016, Patrick Green wanted to become a trading partner with SPT as to jade business and offered SPT with more benefits than AID.

Under the recommendation of U Soe Myint, on 10 January 2017, U Thein Kyaw met Dr. Yugi Asamura and informed him about the decision to end their partnership. The reason is that SPT's employees were unable to continue working with AID due to the intolerable interview of Dr. Yugi Asamura and his wife in the past. U Thein Kyaw also offered to have SPT bear relocation cost for AID's employees.

Furthermore, both men argued about the ownership of machinery, equipment and especially JADEYE. U Thein Kyaw said that SPT possessed all machinery and equipment because they imported them into Myanmar and also had obtained the government permits to operate. Dr. Yugi protested as well as refused to provide SPT with the source code of JADEYE.

AID and SPT agreed to arbitrate in Tokyo using the KLRCA i-Arbitration Rules.

SUMMARY OF PLEADINGS

- I. The partnership agreement between SPT and AID is legitimate under the law of the Golden Land of Myanmar.

- II. The termination of the agreement made by SPT was invalid to end the partnership with AID. The Respondent has been estopped from terminating the partnership for four promissory estoppel requirements. Firstly, the Respondent modified their legal obligation under the agreement; secondly, SPT has made an obvious promise to the Claimant; thirdly, SPT has changed the position about the duration of the agreement; and lastly, it is equitable for AID to allow SPT to go back to the agreement. In addition, the Respondent violates all the procedural matters to terminate the partnership. The partnership is partnership at will and SPT does not meet all the requirements to terminate. It is also pointed that the terms of the agreement do not allow the Respondent to terminate.

- III. The statement of Dr. Fiona Lum to the interview about their views on the plea of the Rohingya minority in the Rakhine state was not harmful to national interest and solidarity of Myanmar. The action of Dr. Fiona Lum is neither willful nor persistent. Moreover, Dr. Yugi Asamura is the only legal representative of AID so the answer of Dr. Fiona Lum could not be the official statement of AID. That her interview made SPT's workers and students be upset does not breach the obligations of AID to SPT under the Agreement.

- IV. It is undeniable that all the jade-mining machinery and equipment belonged to the joint venture between SPT and AID. However, after the termination of the Agreement, those assets are legal properties under Myanmar Laws. They are the contribution of

AID into the joint venture. Also, there is no implied contract that AID would sell them for SPT. SPT was registered as importer of jade-mining machinery and equipment.

V. The Claimant has ownership of rights of JADEYE software under the Berne Convention.

This software was created by an AID financial executive – Joe Yamashita. Before clearly exiting from AID, he assigned the source code of the JADEYE software for AID. Besides, he was an employee under the control of AID, meeting all the requirements to prove that the invention of Joe Yamashita belongs to AID.

PLEADINGS

COUNT 1: THE TERMINATION OF THE PARTNERSHIP FROM SHWE PWINT THONE CO. LTD. (Hereinafter SPT) IS INVALID

I. Myanmar law is the applicable law of this case.

According to article 35KCLRA- I Arbitration Rule, the arbitral tribunal shall apply the rule of law designated by the parties as applicable to the substance of the dispute.¹

In this case, pursuant to article 10 of the partnership agreement, it provides that “everything in this agreement shall be in accordance with and interpreted under the law of the Golden Land of Myanmar”.² As a result from the approval of both parties to the agreement, the designated law chosen to apply to solving this conflict is Myanmar law.

One might argue that the validity of this agreement is still questionable. In case it is void, the provision about designated law would be invalid. However, even in case the partnership agreement is void, the court will have the discretion to choose the most appropriate applicable law to the case.³ In the case at hand, the applicable law must be Myanmar law due to the principle of *lex loci actus*. The *lex loci actus* is the law of the place at which a transaction was carried out.⁴ Applying to this case, the agreement was performed in the land of Myanmar. Myanmar law would be chosen to govern the conflict that had arisen.

¹ Kuala Lumpur Regional Center for Arbitration, Arbitration Rule, art 35(1)

² *Partnership Agreement*, Annex I, art 10

³ Kuala Lumpur Regional Center for Arbitration, Arbitration rule supra note 1, art 35(2)

⁴ Adrian Briggs, *Private international law in Myanmar*, (Oxford University Faculty of Law 2015), p 35

II. SPT has no right to unilaterally terminate the agreement

1. SPT shall be estopped from terminating the partnership

*“Promissory estoppel is an equitable doctrine which in some instances can stop a person going back on a promise which is not supported by consideration.”*⁵

Compared the act of SPT to the regulation of this principle, it has been estopped from terminating the partnership with the commitment of 4 promissory estoppel required signs:

1.1. *There exists a pre-existing contract or legal obligation which is then modified*

In the case *Combe v Combe*, the judge held that one of the elements of estoppel is the existence of pre-existing contract or legal obligation which is then modified.⁶ In this case, under the partnership agreement, the agreement has stated that the partnership will be for a long term.⁷

Moreover, AID, under the agreement of U Thein Kyaw, has entered into contract with Hashimoto as to providing jadeite souvenirs and merchandise for the Tokyo Olympics in 2020.⁸ Thus the partnership has to continue at least to 2020.

1.2. *SPT has made a clear and unambiguous promise*

When U Thein Kyaw - the owner of SPT, allowed his co-partner - AID, to *co-operate with Hashimoto*, he has implied a promise to extend the partnership with AID at least to 2020.⁹

1.3. *There is a change of position*

The agreed duration of this agreement is “long term”, consequently, the agreement should end at least at 2020 in the condition of extending the partnership in order to let AID co-operate

⁵ *Hughes V. Metropolitan Railway* (1877)2 App Case 439

⁶ *Combe v Combe* [1951] 2 KB 215

⁷ Partnership Agreement, supra note 2, art 11

⁸ Moot Problem, paras 35- 36

⁹ *ibid*

with Hashimoto. However, on 10 January 2017, U Thein Kyaw made up his mind to end the partnership between AID and SPT. Therefore, there exists a change of position raised by SPT.¹⁰

1.4. It must be inequitable to allow the promisor to go back on their promise

Because SPT has changed its mind of continuing to be partner with AID, AID will suffer detrimental effect from the act of terminating the contract with SPT. Firstly, it will suffer the negative consequence such as paying penalty for not complying with the contract with Hashimoto. Secondly, AID could lose its profit as well as reputation if ending the partnership with SPT. On the other hand, SPT, the one who has determined to end the partnership, suffers no detriment at all. Not only does SPT enter a new partnership with other to foster its profit, but also workers and students of SPT could have more chances to thrive and develop their skills and knowledge. Hence, it will be inequitable for AID if SPT could terminate the contract.

Therefore, based on the promissory estoppel principle, SPT has been estopped from unilaterally ending the partnership agreement with AID.

2. *SPT has not complied with all procedural matters to terminate the partnership*

According to Partnership Act 1932, “Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.”¹¹

In order to analyze the agreement, there are 2 elements need to be satisfied. Firstly, the type of the partnership has to be partnership at will. Secondly, partner whose intention is to dissolve the partnership has to give notice in writing to all other partners.

¹⁰ Moot Problem, paras 40-42

¹¹ Myanmar Partnership Act 1932, art 43(1)

2.1 *The type of the partnership is partnership at will.*

Under article 7, Partnership Act 1932 provides that “where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is “partnership at will”.”¹²

One of two elements in the article needs to be satisfied in order that a partnership could be a partnership at will: no provision is made or determination of the partnership.

2.1.1. The agreement has not had any provision indicates the duration of the partnership.

There are 2 possible types of duration in contract: definite duration and indefinite duration. In regard to indefinite duration, the definition of this term is that the duration may not be determinable with certainty.¹³

According to article 8 of the Partnership agreement, “*our partnership and brotherhood will be for the long term.*”¹⁴ The parties have assigned the contract with the phrase “long term” to indicate the duration of their contract, therefore, the duration does exist in this agreement.

2.1.2. The duration of their contract is an undeterminable one.

According to the provision of their agreement, the validity of their contract is a “long term” period.¹⁵

The phrase “*long term*” is an obviously uncertain term, “long term” illustrates an unfixed validity time of the agreement, which is inconsistent with the “may not be determinable with certainty” element in the mentioned duration definition above.

Because of the satisfaction of both 2 elements, the agreement between both parties is partnership at will.

¹² Myanmar Partnership Act, 1932, art 7

¹³ Liaquat Ali Khan, *Temporality of Law*, vol 40 issue 1, (McGeorge Law Review 2008), p 58

¹⁴ Partnership Agreement, Annex I, art 8

¹⁵ *ibid*

2.2. *The intention to terminate the contract raised by SPT did not satisfy the element “notice in writing” of the mentioned provision.*

In the case, both men met up in the Sarkies Bar at the Strand Hotel that evening, where Dr. Yugi Asamura was informed of U Thein Kyaw’s decision to end the partnership.¹⁶

The word “inform” itself could not refer to any noticing form in writing, consequently, the intention to end the agreement had not been noticed in writing thus not satisfying the second element mentioned above.

In conclusion, SPT has no right to terminate the agreement under the Partnership act 1932.

3. *Based on the partnership agreement: the contract does not allow party to end the partnership agreement arbitrarily*

Under the partnership agreement, article 8, it stipulates that “our partnership and brotherhood will be for the long term. The party causing the partnership to end must pay compensation.”¹⁷

According to modern approach to interpreting the contract Lord Hoffman in the case *Investors Compensation Scheme Ltd v. West Bromwich Building Society* has applied an objective and contextual approach to interpret the contract.¹⁸ Therefore, from the context and intention of both parties, we can refer to intention of continuing partnership for a long term and no one shall terminate the partnership without paying adequate compensation.

Therefore, under the provision of the agreement, SPT is not allowed to end the partnership arbitrarily.

¹⁶ Moot problem, para 40

¹⁷ *Partnership agreement*, Annex I art 8

¹⁸ *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1WLR 896, HL

III. This partnership cannot be terminated:

1. All partners did not agree to end the partnership.

According to article 40, the Partnership Act 1932 about dissolution by agreement, “a firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.”¹⁹

According to case facts, Mr. U Thein Kyaw - head of SPT made up his mind to end the partnership between SPT and AID. In that event, Dr Yugi Asamura has protested against the unilateral offer of terminating agreement from SPT and claimed that SPT had no right to end the partnership between them.²⁰ Thus, Dr Yugi has not agreed with the termination raised by SPT. In this case, SPT ended this agreement autonomously without the concurrence of the other party, as the claimant protested against it and he did not recognize the right to terminate the contract of the defendant.

On the other hand, the defendant may argue that Dr. Yugi Asamura might implicitly accept to end the partnership when he said that at the event of a termination, SPT had to compensate more than just relocation cost for AID.²¹ This somehow indicates his acceptance to end their partnership and SPT must pay more compensation for AID, therefore, this cease still has the other side’s concurrence. However, the statement of Yugi Asamura indicates merely his assumption on the event of termination, and he did not only agree with the termination but also the compensation offer raised by SPT. It does not truly reflect his permission to end the partnership.

Therefore, there is one party in the agreement does not agree with the termination raised by SPT, hence the invalidity of the termination.

¹⁹ Myanmar Partnership Act, 1932, art 40

²⁰ Moot problem, para 42

²¹ *ibid*

2. *The partnership cannot end due to expiry.*

Article 42(a) of the Partnership Act stipulates that: “a firm is dissolved when constituting for a fixed term, by the expiry of that term.”²²

A fixed term basically means a certain period that is set in the agreement by parties, showing the valid time-limit of that agreement. Thereupon, when the duration of the agreement ends, the agreement itself will automatically terminate if there is no further deal between parties to extend the agreement.

Under article 8 of the partnership agreement, there is no provision demonstrating the expiration of the agreement, the only phrase indicates the period of the agreement in this article is “long-term”. Long-term could not be determined, as a result, there is no expiry provided. Therefore, the contract between both sides is an unlimited time and the agreement will not end by an expiry.

3. *AID has not committed a breach of the agreement*

AID shall not be in charge of legal consequences caused by the statement of Ms. Fiona Lum during the Asian Influencer interview.

According to the background of Moot problem, Dr. Yugi is the beneficiary of AID from his father Atsuko Asamura in 2005, therefore, he is the legal leader of AID. According to question 14 and question 19, Additional Clarification to the Moot Problem, it provided that Dr. Yugi Asamura holds 70% shares and is the chairman. Dr. Fiona Lum is not an existing shareholder of AID. She does not hold managerial position in AID, she is only a non-executive director.²³

²² Myanmar Partnership Act, 1932, art 42 (a)

²³ Additional Clarification of Moot Problem 2017

As can be seen, Dr. Yugi Asamura is the only person could represent AID to state for the company and only statements made by Dr. Yugi Asamura could be considered as official statement of AID. In this case, Ms Fiona Lum answered the interview by herself, therefore, SPT has no legal basis to end the agreement in light of Ms Fiona Lum's answer in the interview about Myanmar.

In additional, it is true that Many of SPT's employees and students were very upset by Dr. Fiona Lum's statement as it implied that the government was involved in ethnic cleansing, and 102 of SPT's workers went on strike for seven days.²⁴ Nonetheless, U Thein Kyaw had made a peace arrangement that he took it upon himself to coax the angry workers to resume their duties.²⁵ Hence seeing that the conflict occurred within the SPT's employees and students had been resolved amicably.

Thus, AID is not in charge of any legal consequences caused by the statement of Ms. Fiona Lum during the Asian Influencer interview

²⁴ Moot problem, para 29

²⁵ Moot problem, para 30

COUNT 2: AID SHALL HAVE THE OWNERSHIP OVER THE MACHINERY AND EQUIPMENT THEY HAVE BOUGHT

I. Before termination of partnership, the equipment and machinery belonged to both companies.

Under Myanmar law, it stipulated that “subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.”²⁶

In this case, because those machinery and equipment were bought by AID for the purpose of mining jadeite, those stuffs shall be considered as property of the firm. There is no evidence indicating that the existence of other intentions.

II. After termination of partnership, the equipment and machinery shall belong to AID

1. AID could bring the equipment and machinery they imported to Myanmar back to Japan

Under the foreign investment law of Myanmar, foreign investors who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business.²⁷

Because of this rule, foreign investor shall have the right to repatriate what they have brought to operate the business back home. However, in order to invoke the rule, three

²⁶ Myanmar Partnership Act, art 14

²⁷ Foreign investment of Myanmar Law, *statement on foreign investment law of Myanmar*, p 2

requirements are necessarily fulfilled. Firstly, investor must be foreign investor. Secondly, the business they operate must be equitable principles and finally the assets they brought in must be legitimate.

1.1. AID was foreign investor

Foreign investor is a person who is not citizen of Myanmar or an economic organization investing in Myanmar under permit.²⁸

Because Dr. Asamura, nationality of Japan,²⁹ has made joint-venture with SPT,³⁰ a company in Myanmar, Asamura was granted as foreign investor within the meaning of Myanmar law

1.2. The business has functioned on equitable principles

Under the chapter III of foreign investment law, foreign investment could be made on the following basis: (a) promotion and expansion of exports; (b) exploitation of natural resources which require heavy investment; (c) acquisition of high technology; (d) supporting and assisting production and services involving large capital; (e) opening up of more employment opportunities; (f) development of works which would save energy consumption; (g) regional development.³¹

In this case, more than 4 million dollars investment of AID and SPT into Myanmar to exploit jadeite has created more jobs for Myanmar citizens,³² leveraging the exports of jadeite and assisting the production of jadeite in Myanmar. Moreover, AID increased the productivity of jadeite by bringing software to Myanmar so that the works would also save energy consumption. Because of promoting the exports, creating more work opportunities and acquisition of high

²⁸ Foreign investment of Myanmar Law, chapter I title and definition, art 1

²⁹ Moot problem, para 4

³⁰ Moot problem, para 14

³¹ Foreign investment law of Myanmar, Chapter III basic principles

³² Moot problem, para 17

technology, by its investment, AID has fostered the development of Myanmar. Because AID has operated their business with SPT in pursuant to basic principles above, the business of AID has been operated on equitable principles.

1.3. Those equipment and machinery are legitimate assets

Under the foreign investment law, foreign capital included foreign currency, property required for the operation of the business in Myanmar such as machinery, equipment.³³

In this case, the machinery and equipment bought by AID were clearly served for the purpose of operating the jadeite business while the permission to import such things was handled by SPT. Because those properties have permission to import, serving for the purpose of operation in the business, those are definitely legitimate assets.

Because all three requirements are fulfilled, AID can bring such properties back to Japan.

2. If SPT was granted as the owner of such equipment and machinery, it would be clearly contrary to the law of Myanmar.

Under article 64 of contract law, it stipulates that “When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received”.³⁴

Supposing that the court gives the ownership over such machinery and equipment to the SPT when the partnership agreement is void, SPT has clearly benefited from the void of the contract because AID is the one who bought such things as well as provide necessary assistance for workers to operate them in the mining field without any rewards or payment from SPT.

³³ Foreign investment law of Myanmar, Chapter I title and definition, (h)

³⁴ Myanmar Contract law 1872, art 64, p.29

Hence, it would be apparently unfair for the AID if SPT was decided to be the owner of the machinery and equipment which AID has bought.

3. When dividing the joint property between AID and SPT, AID shall be granted the ownership over the equipment and machinery which they have bought.

According to article 48 of Partnership Act, in case of dissolution, the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:³⁵

- (i) in paying the debts of the firm to third parties;
- (ii) in paying to each partner ratably what is due to him from the firm for advances as distinguished from capital;
- (iii) in paying to each partner ratably what is due to him on account of capital ; and
- (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

To divide the residue equitably, this process is very similar to the process of division the joint property in the case of divorce.³⁶ In the case *Ma Sung Kyin v Ma Saung*, this case is about the wife who neither has joint establishment with her husband. Nor did she involve in his business, merely visiting his business.³⁷ The court has held that the defendant who did not involve in the business, having the separate establishment shall not be granted to hold the property acquired by the others after division.

³⁵ Myanmar Partnership Act, article 48

³⁶ Greg Callhill, Murray Shume, *Property joint ventures – getting them rights* (2013), p 6.

³⁷*Maung Kyin v Ma Saung*, civil appeal court [1874], 27. Cf. Judicial Commissioner, Lower Burma and Special Court, *Selected judgment and ruling* (1872- 92), p.27

In our case, AID has bought machinery and equipment, operating them in the Myanmar and teaching Myanmar workers and students how to use such technology.³⁸ However, SPT solely imported and handled registration documents with government without paying even small amount of money to buy or re-condition such machinery and equipment.³⁹ Therefore, neither did SPT jointly bought nor used such technology with AID.

As consequences, AID shall be granted as the owner of such equipment and machinery.

III. There did not exist an implied agreement between AID and SPT as to the sale of such imported machinery and equipment.

In order to constitute a contract, four requirements shall be fulfilled. Firstly, the agreement has made with free consent. Secondly, parties have competent to enter into contract. Thirdly, the agreement must have lawful consideration and lawful object.⁴⁰ In the contract, each party will have benefits and each also has to suffer detriment. The gained benefit or the detriment is regarded as consideration.

In this case, even assuming that SPT and AID have agreement over the machinery and equipment, the agreement cannot become a contract because SPT has not made any offer for AID in exchange of the ownership over such machinery and equipment in the field. The lack of offer from SPT led to the lack of consideration in this agreement.

³⁸ Moot problem, para 16

³⁹ Moot problem, para 17

⁴⁰ Myanmar Contract Act 1872 Chapter II, art 10, p.13

IV. Even assuming that there existed an implied contract between SPT and AID with regard to the machinery and equipment imported by SPT, AID still possesses the ownership over such machinery and equipment.

1. The nature of the implied contract as to the machinery and equipment is bailment contract

Under Myanmar contract law, there are several types of contract but in this case, we argue that the contract between AID and SPT with regard to the equipment and machinery imported to Myanmar is bailment contract.

Under Myanmar law, a “bailment” is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them- The person delivering the goods is called the “bailor.” The person to whom they are delivered is called the “bailee.”⁴¹

According to this rule, bailment is constituted when firstly, one person delivers goods for another for some reasons; and second is after the purpose is achieved, the goods have to be returned or disposed in compliant with instruction of the person delivering them.

With regard to the first criterion, in this case, AID clearly transferred those machinery and equipment to SPT in order to extract jades from the earth.

With regard to second criterion, the law has provided a primary point which is the bailee has to follow the instruction of bailor with regard to those properties. In this case, AID has mainly operated such machinery in the field while instructing SPT’s workers how to operate and maintain jade-mining equipment. Therefore, SPT merely follows the instruction of AID.

⁴¹ Myanmar Contract Act 1872, Chapter IX art 148, p.40

However, SPT may argue that they have their name over such machinery. However, having the name over the imported product does not mean to actually own the product. AID has clearly bought machinery serving for operational purpose while SPT was only in charge of importing those stuffs. Moreover, there are no evidence indicating that AID has transferred the ownership of those properties to SPT or in other words, AID was still a de jure owner of such machinery.

Thus, the contract between SPT and AID is bailment and therefore SPT has the obligation to return or act in accordance with the instruction of the owner of those machinery and equipment, which is AID.

2. Even in case the nature of contract between SPT and AID is not bailment contract and AID has merely transferred those equipment and machinery to SPT, AID still has the ownership over their machinery and equipment.

“Transfer of property ” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or to himself and one or more other living persons, and to transfer property ” is to perform such act.⁴²

The transferor could transfer all the interest vested within the property to the transferee unless different intention is expressed or necessarily implied.⁴³

In this case, AID has transferred those properties to SPT without the intention of transferring the ownership of them. In particular, AID did not mention or include the transfer of ownership over operational machinery and equipment to SPT in any contract or any writing document. Secondly, according to the partnership agreement, SPT only has the role of arranging accommodation, preparing visa for AID’s employees coming to Myanmar and taking care of all

⁴² Myanmar Transfer of property act, chapter II, art 5, p. 10

⁴³ Myanmar Transfer of property act, chapter art 8, p. 146

relevant documents with government regarding the permission of mining operation and import of such machinery and equipment. While, AID has bought, reconditioned those trucks, excavators... and sent employees to the mining field for the sake of mining operation. Therefore, it is clear that AID has no intention of abandon the ownership over such equipment and machinery.

On the other hand, SPT may argue that AID has been aware of the fact that SPT has their name over such machinery and equipment as importer. However, the name as importer provided no guidance of whether they are in fact the owner of such properties or not.

Because AID has not transferred all interests to SPT, AID can still retain its ownership over the machinery and equipment.

COUNT 3: THE CLAIMANT HAS ALL RIGHT RESERVED TO JADEYE SOFTWARE

I. JADEYE software shall be governed by Berne Convention

1. JADEYE software is invalid under Intellectual Property Laws of Myanmar

Intellectual property rights are the rights to protect intellectual products granted to creators. They are divided into three groups, including copyright, patent right and trademark.

In Myanmar, both the Copyright Act and the Patents and Designs Act do not cover computer program or computer software.

In this case, JADEYE is a computer software which is not registered under any formalities.⁴⁴ Thus, the software is not protected under Myanmar Laws.

As aforementioned, Myanmar Laws do not cover any protection to JADEYE. However, Myanmar is a party to the TRIPS Agreement, which stipulates that the computer programs shall be treated as literary works and therefore being protected under Berne Convention.

Herein, according to Article 1(c) of the Computer Science Development Law, computer software is defined as the computer program written to give directions as may be necessary to the computer. JADEYE is computer software so it should be governed by Berne Convention.

In addition, AID is a Japanese company.⁴⁵ Japan is one of the members of Berne Convention. Accordingly, copyright protection is formality-free in countries party to the Berne Convention for the Protection of Literary and Artistic Works, which means that protection does not depend on compliance with any formalities such as registration or deposit of copies.⁴⁶ Thus, despite the non-registration of JADEYE, it is still protected by Berne Convention.

Therefore, JADEYE has valid protection under the Berne Convention.

⁴⁴ *Additional Clarification of Moot Problem*

⁴⁵ *Moot Problem, para 1 .*

⁴⁶World Intellectual Property Organization, *Copyright protection of computer software, available at <http://www.wipo.int/copyright/en/activities/software.html>* (lasted visit: August 10th 2017 at 9:25 am (GMT+7))

2. *JADEYE software belongs to the Claimant*

2.1. *JADEYE software was owned by Joe Yamashita*

In this case, the software is created by Joe Yamashita, one of financial executives of AID.⁴⁷ When JADEYE was used, U Thein Kyaw gave Joe Yamashita an offer to sell SPT the software with \$18,000 in cash but he declined the cash and said JADEYE was “for the benefit of all of us”.⁴⁸

Hence, Joe Yamashita did not claim that he would transfer the ownership of JADEYE software to any party, SPT or AID.

2.2. *Joe Yamashita assigned JADEYE to AID*

On 4 January 2013, Joe Yamashita resigned from AID. In his resignation process, he saved the source code of JADEYE in a hard disk drive, and handed to Head of Finance of AID in Tokyo.⁴⁹

With this action, Joe Yamashita implied that JADEYE was assigned to AID.

3. *Even Joe Yamashita did not assign the software to AID, AID has still the ownership of rights of it.*

Although the general rule is that the one who creates a work in the author of that invention, there is an exception to that principle: works for hire. If a work is made for hire, the employer or the party who commissioned the work is considered the author of the work.⁵⁰

Unless the parties have agreed otherwise on writing, the employer owns all the rights pertaining to the works created by an employee on the job.⁵¹

⁴⁷Moot Problem, para 21

⁴⁸Moot Problem, para 27

⁴⁹Moot Problem, para 25

⁵⁰Deborah E. Bouchoux, *Protecting your company's intellectual property: A practical guide to Trademarks, Copyrights, Patents and Trade Secrets*, p.107.

⁵¹Deborah, *Intellectual Property: The Law of Trademarks, Copyrights, patents, and Trade Secrets*, 2016, p. 236.

However, it is important to determine whether the creator is an employee or he is an independent contractor. There are some criteria are identified to characterize an employer – employee relation such as control by the employer over the work.⁵²

If the employer determines how the work is done, has the work done at the employer's location and provides equipment and tools to the person to create the work, such tends to show an employer – employee relation.⁵³

In this case, Joe Yamashita informed Dr. Yugi Asamura that he was successful in developing the JADEYE software and it could be ready to use.⁵⁴He was also one of AID's workers assigned to work at Hpakant base, Myanmar and JADEYE was finished in Myanmar.⁵⁵ Thus, JADEYE is created in work with the support of the machine there.

Therefore, there is an employer – employee between Dr. Yugi Yamashita and Joe Yamashita.

Hence, the Claimant has ownership of rights of JADEYE software.

⁵² Supra, note 56. See also *Community for Creative Non-Violence v. Reid*, 490, U.S, 730 (1989).

⁵³ Supra, note 55.

⁵⁴ Moot Problem, para 21.

⁵⁵ Clarifications of Moot Problem 2017

PRAYER FOR RELIEF

For the foregoing reasons, the Applicants respectfully request this Honorable Court to adjudge and declare that:

1. The termination of the agreement by SPT is valid;
2. SPT is the ownership of the jade-mining machinery and equipment;
3. SPT has the ownership of rights in the JADEYE software