

THE 12TH LAWASIA INTERNATIONAL MOOT
IN THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

TOKYO, JAPAN

2017

BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT CO., LTD.

(CLAIMANT)

AND

SHWE PWINT THONE CO., LTD.

(RESPONDENT)

MEMORIAL FOR CLAIMANT

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STATEMENT OF JURISDICTION

Asamura International Development CO., LTD. (“CLAIMANT”) and Shwe Pwint Thone CO., LTD. (“RESPONDENT”) have consented to submit the dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules (KLRCA Rules).

STATEMENT OF FACTS

CLAIMANT and RESPONDENT concluded the partnership agreement (the Agreement) on September 9th 2008 since CLAIMANT tried to spread the enterprise in Myanmar and RESPONDENT wanted to make use of the knowledge and know-how about developing jades. Both overtaxed 2.5 billion and 1.5 billion dollars as the investment for the project respectively. CLAIMANT were supposed to procure the machinery and equipment for developing the business to gain both profit. Moreover, CLAIMANT gave the employees from RESPONDENT the know-how and techniques which needed for commanding the equipment.

However, RESPONDENT made one-sided opinion that the Agreement would be terminated since RESPONDENT tried to replace the American company which Patric Green managed to IAD to get more profit such as training languages and the scholarship founding. On the other hand, CLAIMANT believed that the partnership would work on the success of the development of jades and entered into the contract that CLAIMANT would sell jades to HLH at 1.5 million dollars. Although RESPONDENT refused performance of the Agreement on the ground of its employees were upset and loss the motivation to cooperate with CLAIMANT due to the news in newspaper that the Government was involved in 'Ethnic Cleansing', its reason was unwarranted because

‘Ethnic Cleansing’ is that any ethics should be treated as impartial and does not defame.

In addition, RESPONDENT insists that the machinery and equipment are possessed by RESPONDENT. But, CLAIMANT purchased them from the seller and has been their owner. Finally, RESPONDENT says emphatically that the software, ‘JADEYE’ which Joe Yamashita, one of the former Japanese CLAIMANT’s employees, made is belong to RESPONDENT and will convert the technique of utilizing the machinery and equipment to a different aim of the next partnership with the American firm.

SUMMARY OF PLEADINGS

I. THE APPLICABLE LAW IN TERMS OF THE PRESENT ARBITRATION IS JAPANESE LAW

In the present case, the applicable law is Japanese law since Japanese law is the law of the place where is the closest for the case. This is because the seat of arbitration is Japan in the present case in accordance with *lex loci arbitri*. In addition, with regard to the source code of 'JADEYE', the main reasons include the nation where the maker is from is Japan and the aggrieved party is Japanese firm.

II. RESPONDENT CANNOT MAKE THE ARGUMENT THAT IT TERMINATES THE AGREEMENT

RESPONDENT insists that CLAIMANT violated the rule of the Agreement by disrespecting the employees in RESPONDENT in newspaper. However, its statement of ethnic cleansing by Dr. Fiona Lum means that all of the ethics should not be discriminated and given opportunities equally. Thus, the saying in the magazine respects them and CLAIMANT did not harm the workers in RESPONDENT's emotion. Therefore, RESPONDENT's claim is one-sided void argument.

III. CLAIMANT HAS THE TITLE TO HAVE THE OWNERSHIP OF THE EQUIPMENT AND MACHINERY

In the present case, CLAIMANT is an owner of the equipment and machinery for the jades venture. It purchased them from the seller directly and CLAIMANT the place for them. Then, the ownership of the equipment and machinery is transferred from the seller to CLAIMANT. Therefore, CLAIMANT has the title to own the equipment and machinery independently. The partnership cannot justify that both parties are owners. The payment of shipping by RESPONDENT does not mean that RESPONDENT have the right to occupy these machineries.

IV. CLAIMANT HAS THE COPYRIGHT OF JADEYE'S THE SOURCE CODE

CLAIMANT has still been the right holder of the copyright of the source code of 'JADEYE'. The source code of the software is an efficient copyright under the Copyright Act. According to the Copyright Act, three requirements should be established. Besides, RESPONDENT tries to make use of the source code to next venture with another American firm and may harm the profit of CLAIMANT.

Moreover, RESPONDENT tries to get the source code from RESPONDENT. But the source code is important information for the jades business. In the present case, Joe Yamashita conducted the source code by the time he resigned from CLAIMANT. After that, the head of the finance in CLAIMANT conducted its source code. Thus, the source code was safely conducted as secret. RESPONDENT's workers could be aware of the

source code was not opened. Moreover, its software is useful for both parties to test the quality and the value of jades. Hence, the three requirements are met and the source code should be preserved as trade secret.

PLEADINGS

PART I: THE TERMINATION OF THE AGREEMENT BY RESPONDENT IS

NOT VALID

1. RESPONDENT argues that the Agreement shall be terminated to end the partnership between CLAIMANT and RESPONDENT. However, the argument has no legal basis. Therefore, in CLAIMANT side, the termination by RESPONDENT is not valid and the Agreement should be still valid. In the present case, the Tribunal should apply the Japanese law as the substantive law.

I. THE TERMINATION OF THE AGREEMENT SHOULD BE COVERED BY JAPANESE LAW

2. Firstly, the Tribunal should apply the Japanese law as the governing law in the present case under the KLRCA i-Arbitration Rules (KLRCA Rules) because the Parties agreed to attend arbitration using the KLRCA Rules.¹

A. There is no consent to the applicable substantive law

3. Since CLAIMANT and RESPONDENT ('the Parties') did not choose the applicable substantive applicable law, the Tribunal should choose it on its own discretion under the KLRCA Rules. According to the Art. 35.1 of the KLRCA Rules, the Tribunal should apply the applicable substantive law that it determines to be

¹ Moot Problem, p. 8, para. 47

appropriate when the parties fail to designate.²

4. The Parties, CLAIMANT and RESPONDENT, signed the Agreement on 9 September 2008.³ Article 10 of the Agreement provides that ‘everything will be in accordance with and interpreted under the law of the Golden land of Myanmar’.⁴ RESPONDENT may insist on this fact that the applicable substantive law of this issue should not be the Japanese law. However, this Agreement did not intend to settle the disputes by arbitration at that time for each other because the Parties have not decided the remedies previously. It should be pointed out that a contract for its force on recognition by law.⁵
5. Therefore, even though Dr. Yugi Asamura thought that Myanmar laws would be applied because the Agreement seemed to stipulate, that is not matter in the present case.⁶
6. Thus, the Parties did not have an agreement on the applicable substantive law.

B. The Tribunal should apply the Japanese law to cover the termination problem because the seat of arbitration is Tokyo, Japan

7. The Tribunal should find that to settle this issue by the Japanese law is appropriate.

Under the KLRCA Rules, the Tribunal should choose the applicable substantive law

² KLRCA Rules 35.1

³ Moot Problem, p. 3, para. 15

⁴ Annexure 1, Article 10

⁵ Roy Goode, p. 29

⁶ Moot Problem, p. 8, para. 46

to be appropriate. In the present case, the reason is that the place of arbitration is Japan.

8. The Tribunal should apply the applicable substantive law in international arbitration practice under the KLRCA Rules. Article 35 (1) provides that failing the designation of choice of the applicable law by the parties, the arbitral tribunal shall apply the law that it determines to be appropriate. As mentioned above, the Parties did not designate the applicable substantive law.
9. The theory of territoriality is based on the general principle of international arbitration, including *lex loci fori*.⁷ Actually, the laws of arbitration which is used frequently stipulate the provision that accept the concept of *lex fori loci*, finding that the arbitral tribunal regard the law of the place where the arbitration is taken place as applicable.⁸
10. In the present case, RESPONDENT accepted that this arbitration is taken place in Tokyo, Japan.⁹
11. Therefore, in the present case, the Tribunal should apply Japanese law as the applicable substantive law.

II. THE TERMINATION IS INVALID UNDER THE JAPANESE LAW

⁷ *idem*

⁸ Alastair Henderson, p. 890

⁹ Moot Problem, p. 8, para. 47

12. As explained above, the termination of the Agreement by RESPONDENT should be treated in line with Japanese law. The Tribunal should reject RESPONDENT's request of termination because the requirements under Japanese Civil Code in Japan are not met in the present case.
13. The party cannot terminate the contract unilaterally unless the requirements stipulated under the code are fulfilled.¹⁰ Japanese Civil Code provides the requirements of termination by the party in Articles 541 and 543. When the party claims termination in line with Art. 541, the party must make a formal demand for performance with a reasonable period.¹¹
14. In the present case, however, RESPONDENT did not such a demand. RESPONDENT offered CLAIMANT termination of the Agreement abruptly on January 10 2017.¹²
15. Since RESPONDENT did not have the legal basis for termination under Art. 541, CLAIMANT reviews the validity in line with Art. 543 below.
16. According to Japanese Civil Code Art. 543, 'if performance has become impossible, in whole or in part, the party may cancel the contract; ...this shall not apply if the failure to perform the obligation is due to reasons not attributable to the obligor'.¹³

¹⁰ Japanese Civil Code Art. 540 (1)

¹¹ Shiomi, pp. 38, 39

¹² Moot Problem, p. 7, para. 41

¹³ Japanese Civil Code Art. 543

17. CLAIMANT claim that the two requirements are not met in the present case. The purpose of the Agreement can be still performed (1) and if so, the failure to perform the obligation is not due to CLAIMANT (2).

A. Performance along the Agreement still has been possible

18. When the party terminates the contract unilaterally, the condition that performance of the contract has become impossible should be met firstly. According to Article 5 of the Agreement, ‘CLAIMANT will always prioritize the students and employees’.¹⁴

19. The situation where performance has become impossible is the case where performance that could be performed has become impossible after the obligation has been conducted.¹⁵ Whether the situation happens or not is decided in line with the point of view for transaction.¹⁶

20. In the present case, apparently, CLAIMANT breached the Agreement because Dr. Yugi Asamura and Dr. Fiona Lum did not bow down to the workers against their requests. However, U Thein Kyaw succeeded in making them resume their duties.¹⁷

21. Considering this fact, the obligation of CLAIMANT could not be impossible because the operation by the partnership has lasted then.

¹⁴ Annexure 1, Article 5

¹⁵ Commentary, p. 1038

¹⁶ idem

¹⁷ Moot Problem, p. 5, para. 30

22. Moreover, RESPONDENT does not want to terminate not because RESPONDENT could not trust CLAIMANT by the interview, but because RESPONDENT wanted to get more profits by making a new partnership with the American Venture after terminating the Partnership with CLAIMANT.¹⁸
23. Even though U Soe Myint informed U Thein Kyaw that RESPONDENT workers' morale is low, they actually could acquire skills to work with the Japanese counterparts and worked after the Asian Influencers Magazine published.
24. It clearly showed that performance along the Agreement has still been possible even if Dr. Fiona Lum's statement might make their morale low temporarily.
25. Thus, the requirement in line with Japanese Civil Code Art. 543 is not met.

B. If performance has become impossible, it is not due to CLAIMANT

26. As mentioned above, the second requirement of Article 543 of Japanese Civil Code is not fulfilled unless the failure to perform the obligation is due to the obligor (CLAIMANT). 'Due to the obligor' means that the obligor does it by design or by accident.
27. RESPONDENT's claim for unilateral termination on the legal basis should be rejected. The reason is that she does not have substantial power in CLAIMANT (1), that the workers misunderstood her statement (2).

¹⁸ Moot Problem, pp. 6, 7, paras. 36-39

**(1). IN THE INTERVIEW, Dr. FIONA LUM MADE A STATEMENT AS JUST
A COUPLE**

28. RESPONDENT may argue that RESPONDENT workers cannot work with trust because the couple, Dr. Yugi Asamura and Dr. Fiona Lum, did not apologize to them for the statement that the new Myanmar government should end the persecution of Rohingyas by the ethnic cleansing.¹⁹ Finally, RESPONDENT's workers were very upset and struck for a week against the statement. This may seem to conflict with the Agreement.

29. However, she made the statement as not the representative of CLAIMANT but just a spouse, especially her position in Second Life.²⁰ Moreover, she is just a non-executive director in CLAIMANT.²¹

30. Considering these facts, the upset of the workers was not up to CLAIMANT at least.

(2). THE WORKERS MISUNDERSTOOD HER STATEMENT

31. RESPONDENT's workers become upset and angry by Dr. Fiona Lum's statement in the interview because it implied that the government was involved in the ethnic cleansing. In CLAIMANT side, this statement has been misunderstood. She

¹⁹ Moot Problem, p. 5, para. 29

²⁰ Moot Problem, p. 5, para. 28

²¹ Additional Clarification, p. 1, Q. 3

intended to end the persecution for the ethnic, not expelling with ethnic cleansing.

32. In the interview, Dr. Fiona Lum stated that ‘everyone must work together to end the persecution of the Rohingyas...they should not be deprived of their basic human rights’.²²

33. This statement shows that Dr. Fiona Lum claimed idealistically that everyone, including the Rohingyas, should have human rights. On the other hand, ‘the ethnic cleansing’ generally means the mass expulsion or killing of members of one ethnic or religious group in an area by those of another.²³

34. Judging from this context and the fact that Dr. Fiona Lum was the President of Second Life, human rights organization, Dr. Fiona Lum did not grasp the genuine meaning ‘ethnic cleansing’ precisely, or did not understand the background as Burmese people.

35. Probably she considered the word ‘ethnic cleansing ’ a way of achievement for peace. Dr. Fiona Lum stated that in the interview, purely thinking of Rohingyas working together.

36. In Myanmar, ‘ethnic cleansing ’ is used with a negative image, including the complex background. However, Dr. Fiona Lum is not Burmese person. Even

²² Moot Problem, p. 5, para. 28

²³ Oxford Dictionaries

though she was a representative of human rights organization, it is natural for her not to know the meaning. The statement does not seem to imply that the government was involved in the ethnic cleansing in the real sense.

37. Therefore, even if performance has been impossible, the failure to perform the obligation is not due to her, CLAIMANT.

38. Thus, performance along the Agreement can still perform (1) and if impossible, that is not due to CLAIMANT (2).

39. In conclusion, RESPONDENT cannot claim the termination of the Agreement unilaterally under Japanese Civil Code because the requirements are not met.

PART II: THE OWNERSHIP OF THE JADE-MINING MACHINERY AND EQUIPMENT IS OF RESPONDENT

40. RESPONDENT argues that the ownership of the jade-mining machinery and equipment belongs to them. However, the argument has no reasonableness. In this case, firstly, Japanese law shall cover the dispute of the ownership of the jade-mining machinery and equipment. Secondly, CLAIMANT owns the jade-mining machinery and equipment.

I. JAPANESE LAW IS THE APPLICABLE LAW TO THIS DISPUTE

41. In the present case, the arbitration agreement is separated from the Agreement and

has no agreement about the governing law. As mentioned below, Japanese law should cover the dispute of the ownership because it is the appropriate law under the KLRCA i-Arbitration Rules.

A. THE AGREEMENT TO ARBITRATE IS SEPARATE FROM THE AGREEMENT

42. Firstly, from the form of arbitration agreement, it is separate from the Agreement since an agreement to arbitrate achieved by the parties after the disputes have arisen. Also, there is no arbitration clause in the Agreement nor did parties think of insert such clause into the Agreement.

43. Secondly, from the content of arbitration agreement, it is separate from the Agreement since there is no agreement to arbitrate in the Agreement. According to the Art. 10 in the Agreement, it says, “everything will be in accordance with and interpreted under the law of the Golden Land of Myanmar”. However, the meaning of “everything” does not include an agreement to arbitrate. At the point of signing the Agreement, two parties did not have any concern or aware of dispute resolution. And only after the disputes really has arisen did they start to negotiate and agree to attend arbitration in Tokyo using the KLRCA i-Arbitration Rules. Therefore, the Agreement to arbitrate is separate from the Agreement.

**B. THERE IS NO AGREEMENT ABOUT THE GOVERNING LAW IN
ARBITRATION**

44. In the present case, as claimed above, the Agreement to arbitrate did not exist when CLAIMANT and RESPONDENT negotiated and signed the Agreement and only after the disputes really arose did they make an agreement to arbitrate as a submission agreement. Since the arbitration agreement is separate from the Agreement, the determination of the law that governs the Agreement and that which governs the Agreement must be separate otherwise the Agreement to arbitrate would be pointless and useless.

45. According to the Agreement that CLAIMANT and RESPONDENT eventually achieved, the contents of it only include the issues to be decided in the arbitration in Tokyo, a separate hearing of the determination of damages in the future and the date of hearing. There is no agreement made by parties about the governing law in arbitration.

C. JAPANESE LAW IS THE APPROPRIATE LAW

46. Since there is no agreement about the governing law in arbitration, not did parties designate the rules of law as applicable to the substance of the dispute, according to the KLRCA Rules Article 35.1 of, the arbitral tribunal shall apply the law which it

determines to be appropriate when the parties fail to designate.

47. The law of the seat of arbitration, which is Japanese law, shall be the appropriate law in the present case. Firstly, since there is no express choice of the law governing the Agreement and the arbitration agreement as a whole, a presumption may arise the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement.²⁴ In the present case, CLAIMANT and RESPONDENT made no agreement about the governing law in the arbitration agreement, it is reasonable to include the law of the seat of arbitration into the consideration of the appropriate law.

48. Secondly, the appropriate law should be the law of the seat of arbitration since CLAIMANT and RESPONDENT chose to have arbitration in Tokyo instead of in Myanmar. If the parties haven chosen a seat of arbitration that is outside the place of the substantive law, the parties could be considered to have indicated an intention to separate their substantive obligations under the Agreement from their obligations in relation to arbitration.²⁵ In the present case, CLAIMANT and RESPONDENT agreed to attend arbitration in Tokyo because Dr. Yugi Asamura felt that “since the Agreement stipulated by Myanmar laws, having the matter heard in Japan would

²⁴ *Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd* [2005] 7 SCC 234, at 268-269.

²⁵ *Philippines v. Philippine International Air Terminals Co Inc* [2007] 1 SLR 278 at 283.

confer upon him some sense of familiarity”. It shows that the parties intended to separate their substantive obligations under the Agreement from their obligations under the arbitration. Therefore, it is appropriate for the Tribunal to apply the law of the seat of arbitration, which is Japanese law, as the appropriate law in the present case.

II. CLAIMANT OWNS THE JADE-MINING MACHINERY AND EQUIPMENT

49. In this case, CLAIMANT owns the jade-mining machinery and equipment. The reasons are as follows: firstly, CLAIMANT purchased the jade-mining machinery and equipment so that the ownership of these transferred from the seller from Japan to CLAIMANT. Secondly, RESPONDENT has aware that it is CLAIMANT who purchased all the machinery and equipment.

A. CLAIMANT OWNS THE JADE-MINING MACHINERY AND EQUIPMENT

50. According to Japanese Civil Code Art.176: the creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties. In the present case, under the arrangement between CLAIMANT and RESPONDENT, “CLAIMANT sourced for second hand machinery and equipment from Japan, purchased and reconditioned them”. CLAIMANT is the only one who spent money

on purchasing the machinery and equipment²⁶. From the moment that CLAIMANT and the seller from Japan made an agreement and signed the Agreement for sale, the ownership of the jade-mining machinery and equipment transferred from the seller to CLAIMANT. CLAIMANT owns the jade-mining machinery and equipment.

B. RESPONDENT HAS AWARE THAT IT IS CLAIMANT WHO PURCHASED ALL THE MONEY FOR JADE-MINING MACHINERY AND EQUIPMENT

51. Firstly, as claimed above, the creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties. In the present case, according to the Agreement Art. 4, “CLAIMANT will buy and provide all equipment required, and provide technical expertise for the term of the Agreement”. This tells that only CLAIMANT is the relevant party who deal with machinery sellers and RESPONDENT has aware himself not participated in the Agreement for sale at all. Therefore, from the Agreement, it can be told that there is an implied agreement that only CLAIMANT is the relevant party to the Agreement for sale and CLAIMANT has the ownership of the jade-mining machinery and equipment.

C. CLAIMANT OWNS THE PARTNERSHIP SHARES, WHICH IS EQUAL

²⁶ See Moot problem 2017 para.16, Clarifications to the Moot Problem 2017 Question 6, and Additional Clarifications to the Moot Problem 2017 Question 9.

TO THE VALUE OF JADE-MINING MACHINERY AND EQUIPMENT

52. If the Tribunal did not agree with the claim above, another claim can be achieved as below.

(1). The jade-mining machinery and equipment is the subject of contribution of CLAIMANT in this partnership

53. According to Japanese Civil Code Art.667, “A partnership contract shall become effective when each of the parties promises to engage in joint business by making a contribution.” In the present case, CLAIMANT and RESPONDENT made an agreement to become business partners for the jade business in Hpakant, Kachin state on 9 September 2006²⁷, and the Agreement they set up is the Agreement. According to the Agreement Art. 4, CLAIMANT shall buy and provide all equipment required. Therefore, the jade-mining machinery and equipment that CLAIMANT purchased are the contribution to the partnership.

(2). There is no agreement about transferring the ownership of jade-mining machinery and equipment to RESPONDENT

54. The basic rule for exclude property from the partnership property is to make an express or implied content in the Agreement. In the present case, CLAIMANT and RESPONDENT only agreed that the land will continue to belong to the owner of

²⁷ See Moot Problem 2017, Annexure 1.

RESPONDENT and made no agreement about transferring the ownership of the machinery and equipment.

55. In Showa 31 No.583²⁸, the Supreme Court stated that although it is appellant who spent money to purchase the land, since appellant and RESPONDENT made an express agreement which admits the sole ownership of the land belongs to RESPONDENT, it owns the land. In the present case, according to art.4 of the Agreement, it is CLAIMANT who purchased the machinery and equipment. However, between the two parties, CLAIMANT and RESPONDENT, there is no agreement about transferring the ownership from the partnership to RESPONDENT. Therefore, unlike the case above, in the present case, RESPONDENT does not own the jade-mining machinery and equipment solely.

(3). CLAIMANT owns the partnership shares, which is equal to the value of jade-mining machinery and equipment

56. Therefore, combining the fact that CLAIMANT purchased the machinery and equipment and there is no agreement about transferring the ownership to RESPONDENT, CLAIMANT owns the partnership shares which equals the value of the machinery and equipment.

²⁸ Case (o) No.583(1956).

57. In conclusion, in the Agreement, the jade-mining machinery and equipment is the subject of contribution of CLAIMANT to this joint business. CLAIMANT owns the partnerships shares equal to the value of these jade-mining machinery and equipment.

PART III: CLAIMANT HAS THE OWNERSHIP OF THE SOURCE CODE OF

‘JADEYE’

I. THE APPLICABLE LAW IN COPYRIGHT OF THE SOFTWARE IS JAPANESE LAW

A. TRIPS SHOULD BE REFERRED TO DECIDE THE APPLICABLE LAW

58. RESPONDENT and CLAIMANT have claimed the ownership of the software for testing jades, ‘JADEYE’. But they did not include the governing law to apply to possession of copyrights on the Agreement. Then, the Arbitrator have to measure the applicable law to solve the belongingness of copyrights individually in accordance with KLRCA rules Art.35(1)(a).

59. In the present case, the governing law with regard to the software’s copyright is intellectual property law of Japanese law in the CLAIMANT’s position.

60. The applicable law of copyright should be decided in accordance with TRIPs.

61. According to TRIPs Art. 3(1)(a) , the copyright of the person whose nation is the

party of TRIPs is covered by the Berne Convention. The maker of 'JADEYE' is Joe Yamashita, which is a Japanese employee in CLAIMANT. Japan is the party of the Berne Convention. Thus, the software, 'JADEYE' is applied to the Berne Convention in accordance with the Berne Convention Art. 3 (1)(a).

B. MYANMAR LAW IS THE APPLICABLE LAW AS THE LAW OF ORIGIN OF NATION

62. According to the Berne Convention Art. 5 (4)(c), when the nation where the copyright is invented is not the party of the Berne Convention, the law whose nation of people who made the copyright is applicable.

63. Myanmar, where the software, 'JADEYE' was invented does not become the party of the Berne Convention. Thus, Japanese law as the nation law whose Joe Ymashita is from is the applicable law.

C. THE GOVERNING LAW WITH REGARD TO WORK FOR HIRE IS ONE ABOUT THE HIRE CONTRACT BETWEEN THE WORKER WHO INVENTED AND THE COMPANY

64. The applicable law regarding work for hire is one of the employ contract of the worker.²⁹ Work for hire have strong relationship with the hire contract, so this connect is the closest for parties in the case.

²⁹ J.J. Forrcet Torremans, p. 512-513.

65. Some might argue that the applicable law about the belonging of copyright is one of nations where the claim will be made. However, if the arbitrator apply a nation where parties insist on protecting, some copyrights will be occurred since each country try to give rights to makers individually³⁰. Thus, the legal relationship about the belongingness of copyrights will be complex. The nation's law where a protection is claimed is inappropriate as governing law. In the present case, Joe Yamashita developed the software to test the quality of jades, 'JAYEDE' in 2012.³¹ He was an employee of CLAIMANT by January in 2012.³² Thus, the employment contract had continued when 'JADEYE' was innovated. The labor contract between Joe Yamashita and CLAIMANT was governed in Japanese law. Therefore, the applicable law is Japanese law in terms of work for hire.

66. Therefore, according to Art. 5.2 and 5.3 of Berne Treaty, Japanese law is the applicable law.

II. THE SOFTWARE'S COPYRIGHT EXISTS AND IS GOTTEN BY CLAIMANT UNDER COPYRIGHT ACT

67. In the present case, the belongingness of the source code of 'JADEYE' is a main problem. RESPONDENT concerts that it can use the course code and reverse a new

³⁰ Komada Yasushi, p.34

³¹ Moot Problem, p. 4, para. 22.

³² Moot Problem, p. 4, para. 22.

one to CLAIMANT.³³ However, in the CLAIMANT's position, the source code is belonged to CLAIMANT. The source code of software is included in one of types of copyright under the Copyright Act.

68. The requirements that CLAIMANT have copyright of 'JADEYE' are the three following ones:(I)the worker during the tenure made its good, (II)its invention was based on the intent of the firm and (III)he or she would invent as her or his work , (IV) the good would be disclosed as the company's one.

69. The first requirement about the tenure is satisfied. The time when Joe Yamashita made its software is 2012. On the other hand, the time when he resigned from CLAIMANT is January in 2013.³⁴ So, 'JADEYE' was invented by the time Joe Yamashita left.

70. Second, In order to say that the worker invented by the intent of the company, the case that the worker renovated the good as his or her task.³⁵ While Joe Yamashita had worked as a member of the press optimization and operations management software, he developed the software, 'JADEYE'.³⁶ 'JADEYE' is invented as a course of work in operation management software and the press optimization, therefore, it can be said that he made 'JADEYE' as his work.

³³ Moot Problem, p. 8, para. 44

³⁴ Moot Problem, p. 5, para. 25

³⁵ Moriyuki Kato, p. 144.

³⁶ Moot Problem p. 4, para. 21

71. Third, the employee have to make the copyright as his or her role. Even though the boss makes he or she invent the good, the case where the worker makes the good as a course of the charge.³⁷ In the present case, ‘JADEYE’ is invented as a course of the work in the press optimization and operations management software. In fact, when Joe Yamashita resigned CLAIMANT, he deposited the source code in a hard disk drive and gave it with other documents to the head of finance of CLAIMANT.³⁸ These behaviors express that the source code of ‘JADEYE’ belongs to CLAMANT and Joe Yamashita invented the software as work. Finally, CLAIMANT should establish that the work objectly appears to be the company’s equipment.³⁹ The reason why the good needs to be seen as the company’s is to clear the legal relationship between the firm and other parties.⁴⁰ in the present case, Joe Yamashita refused the Their’s present, a cash of 18,000 dollars since its software was for ‘all of us’.⁴¹ Its word means that CLAIMANT utilized ‘JADEYE’ as its own tool for the partnership. Therefore, ‘JADEYE’ was treated as CLAIMANT’s one in front of RESPONDENT, satisfying the fourth requirement.

72. The problem is whether CLAIMANT can obtain the right of the source code since the former worker, Joe Yamashita developed it. In CLAIMANT’s position, even

³⁷ Moriyuki Kato, p. 145.

³⁸ Moot Problem p. 5, para. 25

³⁹ Hisao Shiomi, P 165-170

⁴⁰ Akio Monya, p.109

⁴¹ Moot Problem p.5, para. 24

though the employee invented by himself, the firm would have the ownership of the code. According to Art. 15(2) of Copyright Act, the copyright of goods is belonging to the company if the company and the employee did not conclude the special contract.

73. In the present case, the special agreement that Joe Yamashita was able to gain the ownership of copyright does not exist. In principle, CLAIMANT can possess the second code of the software and request RESPONDENT to return it.

III. JAPANESE LAW SHOULD BE THE APPLICABLE LAW REGARDING THE REALM OF UNFAIR COMPETENCE

A. TRADE SECRET IS ONE OF REALMS OF TORT ACT

74. In the present case, CLAIMANT's trade secret under the partnership relation is going to be illegally used by RRSPONDENT. Then, CLAIMANT will claim that RESPONDENT stop acting disclosing the trade secret by request for relief. However, the Agreement have not included in the rule regarding the Unfair Competence Prevention Act. The arbitrators should decide which law is reasonable for governing law to apply to RESPONDENT's act.

75. I the unfair competition act is among tort act.⁴²

76. In the CLAIMANT's position, the robbing of trade secret should be understood as

⁴² Yusuke Tanemura, p.6

one of types of tort law. Some countries do not take unfair competition act as an independent law discipline.

B. LAWS IN THE PLACES WHICH PARTIES ARE DAMAGED SHOULD BE CHOSEN AS GOVERNING LAW

77. According to cases law, the place where the result are occurred is the closest place for parties in the case of tort.⁴³ When the damage by tort act is possibly damaged in many places, the law of the nation where the claimant is should be chosen as the choice of law. ⁴⁴This is because you cannot expect which law is chosen by the criteria of the place that the damage is occurred when the damage may be happened.⁴⁵ Moreover, the claimant has the most concern about the loss, thus its nation' s law should be applied.

78. In the present case, the source code of 'JADEYE' is helpful to explore, extract, beak, cut and process.⁴⁶ So, 'JADEYE's source code has broad versatility to other industries but jades exploration. If the source code, which is the key for the mechanism of software, is disclosed and used by others, it may be imitated everywhere. Many laws have the possibility to be chosen as choice of law in the

⁴³ Ibid, Yusuke Tanemura, p. 6

⁴⁴ Such as the county of origin (or country of establishment) rule as implemented in art. 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

⁴⁵ Ryu Kojima, P. 14

⁴⁶ Additional Clarification, p. 3 Q. 16.

view of point of the place of occurrence of damage. Then, the place where CLAIMANT is Japan, so Japanese law is applicable law. Therefore, the governing law in terms of trade secret is Japanese law.

IV. CLAIMANT CAN CLAIM THAT RESPONDENT SHOULD REFRAIN FROM DISCLOSING THE TRADE SECRET

79. In the present case, RESPONDENT tried to use the know-how which it had realized under the partnership between the Parties, so CLAIMANT's profit in business will be harmed due to the infringement. In the CLAIMANT's side, it is going to request the arbitrators to let RESPONDNET stop disclosing or using the information with regard to the partnership.

80. According to Art. 2(7), Art. 3 and Art. 15 of the Unfair Competition Prevention Act, the aggrieved party can request that the invader stop infringing the trade secret. The claimant have to proof the two following requirements: (I) the information is trade secret, (II) the other party use or disclose the trade secret for making profit or harming the owner and (III) the infringement can be harmful to or has harmed business profit.

A. THE INFORMATION ACCESSED BY CONCLUDING THE PARTNER AGREEMENT FALLS UNDER 'TRADE SECRET'

81. According to Art. 2 (6) of the Unfair Competition Prevention Act, ‘business secret’ means the business information which (I) it is managed as secret, (II) useful for business and (III) is unknown to public.
82. First, the claimant should establish that the information is recognizable that it is conducted as secret. Concretely it contains two facts that the subject that can access information is specified and that it can realize it is secret.⁴⁷ The judgement of the two factors is held by the points such as the existence of pass word, the security, the restriction of use the technique.⁴⁸
83. In the present case, the source code of ‘JADEYE’ was conducted by Joe Yamashita and he gave it the head of finance in CLAIMANT, who is an important position⁴⁹. The software was treated as the one which only a few people can access. The RESPONDENT’s employees could realize that its software is a momentous resource in CLAIMANT. Therefore, the first requirement is satisfied.
84. Second, ‘usefulness’ means that the information is clearly helpful for business.
85. In the present case, the software, ‘JADEYE’ can testify the quality and the value of jades at 99 % to treat as merchandise. It can promote the jade venture and the export of jades. Thus, its software can be sCLAIMANT to be a useful for business

⁴⁷ Tokyo district court September 28th 2000, p. 104

⁴⁸ Sho Tsumama, p.195

⁴⁹ Moot Problem p.5 para. 25

clearly.

86. Finally, ‘non-public information’ is that people generally cannot access by anyone but administrator.⁵⁰

87. In the present case, ‘JADEYE’ was conducted by Joe Yamashita, who invented as work till the time he resigned and then saved in hard disk in CLAIMANT and given to the Head of finance in CLAIMANT. ⁵¹‘JADEYE’ is treated so as not to be touched by others as secret. Hence, ‘JADEYE’ is not accessible for others except for owners.

B. RESPONDENT TRIED TO DISCLOSE OR UTILIZE THE INFORMATION ABOUT KNOW-HOW UNDER THE AGREEMENT WHILE IT INTENDS TO GAIN ADVANTAGE OR MAKE CLAIMANT HARM

88. According to the Unfair Competition Prevention Act Art. 2(4), 2(5) and 2(6), the unjustified way to use trade secret is stipulated as banned unfair competition act.

89. In the present case, RESPONDENT replace CLAIMANT to the American company as the partner of the jades venture.⁵² In that case, it wanted to make use of its source code to proceed in the enterprise.

C. CLAIMANT CAN BE HARMED SINCE RESPONDENT ILLEGALLY

⁵⁰ Ministry of Trade and Industry.

⁵¹ Moot Problem p. 5 ,para. 25

⁵² Moot Problem, p. 6, para. 37.

UTILIZE OR DISCLOSE THE INFORMATION UNDER THE CONTRACT

90. This subjective requirements need that infringer recognize the owner's benefits will be lost or that it tried to get its interest illegally.

91. In the present case, CLAIMANT would lost its profit if the source code is disclosed to others. This is because its source code can deprive CLAIMANT of the opportunity to start up the jade venture. Thus, its disclose of the source code can damage its profit of CLAIMANT.

92. Therefore, the request relief will be admitted since all of the requirements under the Unfair Competition Prevention Act are met.

PLAYER FOR RELIEF

On the basis of the foregoing arguments, CLAIMANT respectfully requests the Tribunal

to:

- 1) decide that the termination of the Agreement by RESPONDENT is invalid
- 2) confirm that CLAIMANT has the ownership of the jade-mining machinery equipment
- 3) verify CLAIMANT's ownership of rights in the JADEYE software