

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 RESPONDENT

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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 Agreement to cooperate the development of jades on 9 September 2008.

In order to accomplish their goal, RESPONDENT received the machinery and equipment in the port in January 2009 by paying the shipment and took the proceeding including the registration of the machinery for the investment and the jade development.

Besides, the workers in RESPONDENT learned the technique and know-how about the operation of the machinery so as they could excavate jades. Joe Yamashita invented 'JADEYE', the software which is used for checking the quality of jade in Myanmar for both profit. RESPONDENT also utilized the resource code of 'JADEYE'.

RESPONDENT believed CLAIMANT as a trust partner who did help the recovery of Myanmar in the past. RESPONDENT willingly accepted CLAIMANT's desire that both made capital contribution of 1.5 and 2.5 million dollars respectively. However, Dr. Fiona Lum in the newspaper described that the 'ethnic cleansing', which seems to be a discriminatory word, should be promoted. Its statement made the employees in RESPONDENT get angry as it hurt their dignity and pride. The workers went on strike in workplace due to faithlessness of CLAIMANT.

Thus, the continuation of the Partnership is almost impossible for them.

SUMMARY OF PLEADINGS

I. THE APPLICABLE LAW IS JAPANESE LAW

In the present case, the applicable law is Myanmar law with regard to each question. This is because Myanmar law is the law of place is the closest for the case. Firstly, the applicable law in terms of termination of the Agreement is Myanmar law since the Partnership Agreement was concluded by U Thein Kyaw and Yugi Asamura in the bar in Myanmar. Second, the governing law with regard to the conveyance of the equipment and machinery is Myanmar law because they are in located in Myanmar. It can be said that the nation where the goods are in have the most interest.

II. RESPONDENT CAN TERMINATE THE AGREEMENT

Fiona, a non-executive director of CLAIMANT states that the Government was involved with 'Ethics Cleansing', meaning the discrimination toward the workers in RESPONDENT. This statement is infringement of the obligation of the Agreement and made us impossible to continue the partnership after this since the workers have been upset and cannot trust CLAIMANT as a partner. Actually, the employees in RESPONDENT who worked in the jade factories were so upset that went on strike. They could not think CLAIMANT as untrustworthy company which disrespect the diversity of ethics. the Agreement Art. 5 stipulates that both have to respect each other

for the view point of ethics. Therefore, Fiona's act means the illegal one in accordance with the Agreement.

III. RESPONDENT IS AN OWNER OF THE MACHINERY AND EQUIPMENT

In the present case, RESPONDENT received the equipment and machinery for use because RESPONDENT accepted them from the seller and registered. In addition, RESPONDENT took the permit from the Government in Myanmar so as to start the enterprise legally. These proceedings included the registration of the equipment and machinery. In the present case, RESPONDENT was registered as their owner.

IV. RESPONDENT CAN OBTAIN THE SOFTWARE FOR TESTING THE QUALITY OF JADES, 'JAYEDE'

RESPONDENT has the copyright of software which is used for securing jades, 'JAYEDE'. Copyright is governed in the place where the worker invented the object. According to TRIPs Art. 5 (2), the law of the nation which protection of copyright of the object should be the applicable law. This rule reflects on the nation where parties request have the most concern about the belongingness. JAYEDE was invented by Joe Yamashita in Myanmar. Myanmar has strong interest in judging where the software belongs. Thus, the copyright is protected in the Myanmar copyright act.

PLEADINGS

PART I: THE TERMINATION OF THE AGREEMENT BY RESPONDENT IS

VALID

I. MYANMAR LAW IS THE APPLICABLE LAW TO THE DISPUTE IN THE PRESENT CASE

1. The Parties intended to arbitrate the dispute in accordance with the KLRCA i-Arbitration Rules (KLRCA Rules), and designated Tokyo as the place of arbitration.¹ The Tribunal is authorized to engage in a choice-of-law analysis and prioritize the object of the arbitration while determining rule on its own jurisdiction.

A. MYANMAR LAW IS THE APPLICABLE LAW TO THE DISPUTE OF THE TERMINATION OF THE AGREEMENT

(1). There is an implied agreement of the governing law

2. There was no agreement on the applicable law, albeit it implies to be interpreted under the law of the Golden Land of Myanmar.²

B. MYANMAR LAW IS THE APPLICABLE LAW UNDER THE KLRCA RULES

¹ Moot Problem, p. 8, para. 47

² Annexure 1, Art. 10

3. In the present case, the Parties have agreed to attend arbitration using the KLRCA Rules.
4. Even if the Parties fail to designate the applicable law, according to KLRCA Rules, when the agreement is silent about it, the arbitral tribunal is given the authority to determine the most appropriate law to the dispute.³ In any cases, the arbitral tribunal has the authority to decide the applicable law, and the most valid approach is to use the close connection to the performance of the contract.⁴ The performance of the contract was taken place in Myanmar, and main task was done in Myanmar.
5. In the case, Myanmar law is the most appropriate law under the close connection test.
6. The courts generally applied the system of law with which the transaction has its closest connection or real connection to be considered for proper law as applicable law.

(1). The place where the Parties negotiated and signed the contract is in Myanmar

7. Under the doctrine of *lex loci contractus*, when there is no clause of specifying the state that will decide any issues relating to the contract, it is the basic rule of contracts that the law of the place where a contract is entered into will govern any

³ The KLRCA Rules Art. 35

⁴ Private International Law in Myanmar, p. 95

issues arising out of the contract.⁵ It says that a contract will be governed by the law of the state “where the last act necessary to complete the contract is done”.⁶

8. In the present case, after three rounds of discussion, U Thein Kyaw and Yugi Asamura entered into partnership in Yangon, Myanmar on 9th September 2008 and they drafted their own contract there.⁷

(2). The place of performance of the contract is Myanmar

9. In the absence of choice of governing law, *lex loci solution* is to be considered while determining the system of law with which the contract has closest connection. The place where the contract was to be performed is the pre-dominant factor that needs to be looked into under *lex loci solution*.
10. The characteristic performer of jadeite venture, which was the main project and the aim of the partnership, was RESPONDENT. In the case of business, one has the argument that the law of the country in which the contract is to be performed is the law binding the contract. If a contract is to be performed contrary to the laws of the performance, it would be peculiar. Hence, *lex loci solution* becomes a predominant factor in determining the applicable law of the contract. In the present case, where all main four business activities (exploration and extraction, breaking and cutting,

⁵ Northland Cas Co. v. HBE Corp., 1311(M.D.Fla.2001)

⁶ *idem*

⁷ Moot Problem, p. 3, para. 14

processing and mining, and distribution and sales) were involved in was Myanmar.

Therefore, the place of the performance is Myanmar.

II. THE ORDER OF RESPONDENT IS VALID

A. THE STATEMENT BY DR. FIONA LUM WOULD BE REGARDED AS DELINQUENCY ON THE DEBT

11. Due to the Dr. Fiona Lum's statement on the plea of the Rohingya minority in the Rakhine state, which she made during an interview with the Asian Influencers Magazine for its 2016 edition of "Asia's Top 20 Power Couples", the employees and students of RESPONDENT do not trust and lost esteem for their Japanese counterparts. The cause their low morale, then an inefficiency of jade mining in Myanmar and the loss to RESPONDENT. Then, RESPONDENT suggests that RESPONDENT and CLAIMANT terminate the Agreement. The Partnership Act in Myanmar says that the firm could be dissolved by one partner giving notice in writing of his intention to dissolve the firm.⁸

B. DR. FIONA LUM WAS CONCERNING IN THE PARTNERSHIP OF THE PARTIES

⁸ The Partnership Act in Myanmar, Chapter 6, Art. 43 1

12. Dr. Fiona Lum is a husband of Yugi Asamura, who is the leadership of CLAIMANT, so she is in the close term with the administer of CLAIMANT.⁹ Besides, she had a big impact on the business of RESPONDENT and CLAIMANT. The rough jade of the Hpakant jade mines, which was extracted under the partnership of the Parties, was personally traded by Dr. Fiona Lum with her friends and contacts. Therefore, she was in the special position in the jadeite-venture business and be involved in the performance of the contract.
13. Dr. Fiona Lum's controversial statement was made in public, so it could be regarded to be official. Moreover, she made a statement given the existing business of CLAIMANT in Myanmar. Hence, what she CLAIMANT as a respond in the interview with the Asian Influence Magazine for its 2016 edition should be thought as the opinion as one of the people concerned with CLAIMANT.¹⁰
14. According to The Law of Contract in Myanmar 6-3, the promisor or his representatives may employ a competent person to perform the contract.¹¹ Thus, Dr. Fiona Lum, even if she was not a member of the company, has responsibility of conform the contract between CLAIMANT and RESPONDENT in this interview.¹²

⁹ Moot Problem, p. 1, para. 5

¹⁰ Moot Problem, p. 5, paras. 28, 29

¹¹ The Law of Contract in Myanmar, pp. 155, 156

¹² idem

C. THE ATTITUDE OF DR. YUGI ASAMURA AND DR. FIONA LUM AFTER THE STROKE BY RESPONDENT'S EMPLOYEES AND STUDENTS WAS THE BREACH OF THE CONTRACT

15. The Parties agreed to always prioritize the employees and students.¹³ Yugi Asamura and Dr. Fiona Lum did not apology or retract the statement, and did not meet the plea of them, even though they were depressed and upset by the couple's statement.¹⁴ It means that the couple did not respect the principle and they violated the Agreement.

D. THE SUGGESTION OF THE DISSOLUTION OF RESPONDENT IS VALID

16. CLAIMANT violated the contract and RESPONDENT can put the contract to end under Myanmar Contract Act 64. The Contract Act in Myanmar allowed a party to put an end to the obligations of performance which were created by the contract if the other party has dug in his heels and refused, and still refuses, to perform.¹⁵ Section39 clearly mentions that the decision to put an end to the contract is taken by the party who is not in breached.

(1). The Partnership Act in Myanmar was not used in this case

¹³ Annexure 1, Art. 1-5

¹⁴ Moot Problem, p. 5, para. 30

¹⁵ Pannalal Rangalal v Tin Tin U 1954 BLR 19 (SC)

17. The both companies did not register the partnership, so they cannot be treated as partnership in official.¹⁶ Also, in Myanmar, the Partnership Act is not used practically.

III. THE VALIDITY OF THE INVESTMENT OF CLAIMANT

18. When this dispute on the annulment of the contract occurred, the dubious that the contract between RESPONDENT and CLAIMANT were voidable because CLAIMANT failed to get permission of the investment from Myanmar Investment Committee.

A. THE APPLICABLE LAW TO THE INVESTMENT OF CLAIMANT

19. The Foreign Investment Law in Myanmar which promulgated on 18th October 2016 is applied to the investment and disputes that arise after the date.¹⁷ In the present case, the investment from CLAIMANT, Japanese company, was already done and the performance still continued on 18th October 2016. The proposal of the annulment of the contract come to issue in 2017. Consequently, the Foreign Investment Law passed at Pyidaungsu Hluttaw in 2016 was effective to this case.

B. THE PARTIES MISSED THE PERMISSION ON THE JADEITE VENTURE

¹⁶ Clarification, p. 1, Q. 2

¹⁷ Myanmar Investment Law 2016, Chapter 3, Art. 4

20. According to the Foreign Investment Law 2016 in Myanmar, when people invest on the business which may have big influence on the environment or a local community, the investors need permit from the Myanmar Foreign Investment Commission.¹⁸ The jadeite venture was involved in exploration and extraction, and those business activities are thought to applicable to what the MIC needs endorsement. CLAIMANT invested without permission from Myanmar Investment Commission. However, in line with the law, any investments are silently allowed unless MIC judges and alarm that the investment is illegal. Therefore, the investment from CLAIMANT is not punished or void.
21. The Foreign Investment Law specifies that the inventor have to respect and obey the habit, tradition and culture of Myanmar people.¹⁹

Part II: THE OWNERSHIP OF JADE-MINING MACHINERY AND EQUIPMENT

22. CLAIMANT argues that they owe the jade-mining machinery and equipment. However, the argument is not reasonable. The ownership is covered by Myanmar

¹⁸ Myanmar foreign investment law 2016 Chapter 6, Art. 25 (c)

¹⁹ Myanmar foreign investment law 2016 Chapter 16, Art. 65 (a)

law (I). Under Myanmar law, RESPONDENT has the ownership of the jade-mining machinery and equipment (II).

I. THE OWNERSHIP IS COVERED BY MYANMAR LAW

23. Firstly, in the present case, the Tribunal should apply Myanmar law because the Parties agreed to use Myanmar law implicitly (A). Also, even if there is no implied agreement of the governing law, the issue of the ownership should be covered by the law of the place where the subject property is situated (B).

A. THERE IS AN IMPLIED AGREEMENT OF THE GOVERNING LAW

24. Generally, the governing law is chosen by the agreement of the parties. However, when there is no agreement of the governing law in the contract, the intention of the parties as to the applicable law may be implied. The arbitral tribunal presumes the implied agreement of the applicable law through the circumstances of the case, the parties' action, the surrounding facts and other objective factors.²⁰

25. In the present case, the Article 10 of the Agreement between CLAIMANT and RESPONDENT provide that 'everything will be in accordance with and interpreted under the law of the Golden land of Myanmar'. This article may only be used to interpret the terms of the Agreement. However, according to the Moot problem

²⁰ Comparative International Commercial Arbitration, P. 415, Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll

paragraph 46, Yugi Asamura expressed his wish to have the arbitration in Tokyo because he thought Myanmar law would be applied to the present case.²¹ According to this fact, the Parties agreed that the governing law is Myanmar law implicitly. Therefore, Myanmar law should be applied to the present case.

B. THE OWNERSHIP SHOULD BE COVERED BY THE LAW OF THE PLACE WHERE THE SUBJECT PROPERTY IS SITUATED

26. Generally, the arbitrator determines the governing law by looking for which law has the closest connection to the case.²² Generally, when the ownership is disputed, the most connected city is the place where the property is situated.

27. For example, in New York state law, the ownership is covered by the law of the State where the property is. Also, this is true of Japanese law. This is because the most closely connected place is where the subject property is, and the arbitration award has the biggest influence in that place.

28. In the present case, the disputed machinery and equipment are in Myanmar. Therefore, the most closely connected place is Myanmar. As mentioned above, Myanmar law should be applied.

²¹ Moot Problem, p. 8, para. 46

²² Conflict of Laws in International Arbitration, P.376

II. UNDER MYANMAR LAW, RESPONDENT HAS THE OWNERSHIP OF THE JADE MINING MACHINERY AND EQUIPMENT

29. Firstly, CLAIMANT bought the machinery and equipment for the benefit of RESPONDENT (A). Secondly, under the Sale of Goods Act, RESPONDENT owes the disputed machinery and equipment (B). Finally, RESPONDENT bore the cost of shipping, and this shows the transfer of the ownership (C).

A. CLAIMANT BOUGHT THE MACHINERY AND EQUIPMENT FOR THE BENEFIT OF RESPONDENT

30. First, in order to establish the third party beneficially contract, it is necessary that at least one of the original parties to the contract meant to affect the non-contracting party by establishing the contract (Business Law: Principles and Cases in the Legal Environment p.301).²³ Therefore, all parties need not to intend that they affect the third party by the contract. Also, generally, in third party beneficially contract, the problem of who can be affected by the contract is treated by depending on the doctrine of privity. According to the doctrine of privity, only the parties to the contract can enforce the promises contained in the contract. However, Myanmar law does not adopt this view.²⁴ In *Ma E Tin v Ma Byaw* AIR (1930) case²⁵, the

²³ Business Law: Principles and Cases in the Legal Environment, p. 301

²⁴ The law of contract in Myanmar, p. 173

²⁵ *Ma E Tin v Ma Byaw* AIR 1930 Ran 172, (1930) ILR 8 Ran 266

High Court refused to apply the doctrine of privity, holding that a non-party in the position of third party could herself directly enforce the promise contained in the contract.

31. In the present case, CLAIMANT agreed that they offer the necessary equipment.²⁶

Therefore, when CLAIMANT bought the disputed equipment, CLAIMANT must intend that they would benefit RESPONDENT. This means that the contract to buy the jade-mining machinery and equipment is meant to affect RESPONDENT.

Therefore, the contract between CLAIMANT and the seller of the equipment was the third party beneficially contract for RESPONDENT. Under this contract, RESPONDENT can enforce to transfer the jade-mining equipment and machinery on CLAIMANT. This means that RESPONDENT has the ownership of the jade-mining equipment and machinery.

B. THE REQUIREMENT OF THE TRANSFER OF THE OWNERSHIP IS MET, AND THE REGISTRATION IS THE PERFECTION OF THE TRANSFER

32. First, according to the sale of goods act, the requirement of the transfer of the ownership is the intention to transfer the property (1). Second, because of the registration of the machinery and equipment, CLAIMANT's claims cannot affect the ownership of Respondent (2).

²⁶ Moot Problem, p. 3, para. 16

(1). The requirement of the transfer of the ownership is met

33. According to the Sale of Goods Act article 19. (1), where there is a contract for the sale of specific or ascertained, goods the property in them is transferred to the buyer as the parties to the contract intend it to be transferred. This means that the ownership of property passes to the other when it is intended to pass. Also, Art. 19 (2) says that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Therefore, in order to ascertain the intention to pass the property, we have to consider the terms of the contract and the conduct of parties.

34. In the present case, there is no explicit intention to pass the property to RESPONDENT. Therefore, we have to consider the conduct of the Parties. First, RESPONDENT is registered as the owner of the machinery and equipment.²⁷ CLAIMANT was aware that RESPONDENT was recorded as the owner and operator of the jade-mining machinery and equipment on the permits required to operate them.²⁸ However, CLAIMANT has never say anything against this. Moreover, according to clarification question 25 and the answer, there is the Bill of Lading that addresses RESPONDENT as a consignee for the machineries and

²⁷ Moot Problem, p. 7, para. 43

²⁸ Clarification, p. 3, Q. 14

equipment.²⁹ CLAIMANT did no opposite action to this. Therefore, there was the intention to pass the disputed machinery and equipment to RESPONDENT. As above, RESPONDENT has the ownership of the jade-mining machinery and the equipment.

(2). The registration is the perfection of the transfer

35. Registration act (1909) Art. 40 says that “All non-testamentary documents duly registered under this Act, and relating to any property, whether moveable or immovable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force.”

36. Therefore, if one of the parties declares the ownership of property without registration, their claims cannot take effect against the ownership of the other party who is registered as the owner.

37. In the present case, RESPONDENT is registered as the owner of the jade-mining machinery and equipment in Myanmar³⁰, and CLAIMANT was aware that RESPONDENT was recorded as the owner and operator of the jade-mining

²⁹ Additional Clarification, p. 5, Q. 25

³⁰ Moot Problem, p. 7, para. 43

machinery and equipment on the permits required to operate them.³¹ However, CLAIMANT has never done anything against this. Therefore, CLAIMANT's claim about ownership cannot be asserted against RESPONDENT.

C. RESPONDENT BORE THE COST OF SHIPPING, AND THIS SHOWS THE TRANSFER OF THE OWNERSHIP

38. According to F.O.B. shipping, the customer pays for the shipping charges and has the title of ownership of the merchandize belongs to him. Therefore, under the F.O.B shipping, it is the customer that pays for the shipping charges as he assumes the title to the goods. At the same time, the bill of lading is passed over to him or to his driver. When the bill of lading is transferred to the customer, the customer takes the legal possession of the merchandize, and becomes responsible for the merchandize.³²

39. In the present case, RESPONDENT is not customer of the equipment and machinery. However, RESPONDENT paid the shipping cost of the equipment from Japan to Myanmar.³³ Moreover, there is a bill of lading that addresses RESPONDENT as a consignee.³⁴ The circumstances in this case is similar to the case demonstrated in F.O.B. shipping. Therefore, considering the ownership of the

³¹ Clarification, p. 3, Q. 14

³² A Reference Book on Credit and Collection

³³ Moot Problem, p. 3 para. 16

³⁴ Additional Clarification, p. 5, Q. 25

machinery and equipment, the Tribunal should refer to F.O.B. shipping. As explained above, under F.O.B. shipping, the ownership is already transferred to RESPONDENT, and the bill of lading explicitly shows that. Therefore, RESPONDENT owes the jade-mining machinery and equipment.

PART III: COPYRIGHT OF THE SOFTWARE 'JADEYE' IS NOT

SUBSISTENT, AND THE 'JADEYE' BELONGS TO THE PARTNERSHIP

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE BETWEEN CLAIMANT AND RESPONDENT

A. THE OFFICE OF THE ARBITRATION TRIBUNAL HAS JURISDICTION ON THIS CASE

40. The Parties eventually agreed to attend arbitration in Tokyo using the KLRCA i-Arbitration Rules. The decision is final and binding on the Parties. Thus, the Office of the Arbitration Tribunal attached to Tokyo has the jurisdiction on this case.

B. MYANMAR LAW IS THE APPLICABLE LAW

41. Myanmar law is the applicable law based on the consent of the Parties. In the present case, the Parties chose to apply the KLRCA Rules, and the premise of

designating Tokyo as the seat of arbitration, they chose Myanmar law as the applicable law. Even if there is no clear choice of the applicable law, Myanmar law should also be the applicable law to the disputes of subsistence and ownership of rights in the software JADEYE.

II. MYANMAR LAW IS THE APPLICABLE LAW

A. MYANMAR LAW IS THE APPLICABLE LAW UNDER THE KLRCA RULES (THE LAW DESIGNATED BY THE PARTIES TO THE SUBSTANCE OF THIS DISPUTE)

42. Pursuant to the KLRCA Rules, Myanmar law is the applicable law as Myanmar law is the rules of law designated by the Parties as applicable to the substance of the dispute.

43. CLAIMANT's representative, Yugi Asamura, expressed his wish to have the arbitration held in Tokyo because that Myanmar law is applied to the Agreement which he is rather unfamiliar with.³⁵

B. EVEN IF THE AGREEMENT ON APPLICABLE LAW IS REGARDED AS UNCLEAR, MYANMAR LAW SHOULD ALSO BE THE APPLICABLE LAW UNDER BERNE CONVENTION

(1). Myanmar should comply with parts of Berne Convention's rules

³⁵ Moot Problem, p.8 para. 46

44. Myanmar is not currently a signatory of the Berne Convention or any other treaty protecting copyright. However, Japan and Myanmar are the contracting parties of TRIPs.³⁶ In accordance with TRIPs, to which it has acceded, Myanmar is required to implement and comply with Articles 1-12, Article 19 of the Paris Convention and the terms of TRIPs by no later than 1st July 2021.

45. TRIPs Agreement Art. 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them.

(2). Japan should also comply with the Berne Convention

46. Japan is the contracting part of the Berne Convention, the issues about copyright should be applied to the rules of the Berne Convention.

(3). Based on the Berne Convention, the extent of protection shall be governed by the laws of the country where protection is claimed

(a). The laws of the country where protection is claimed should be explained as the country for which protection is claimed

³⁶ WIPO. July 30. 2017. Contracting Parties/Signatories. http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22 August 30. 2017

47. According to Berne Convention Art. 5 (2), the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

48. The predominant opinion is that the phrase “country where protection is claimed” is to be understood as “country for which protection is claimed” rather than *lex fori*.³⁷

(b). “For which protection is claimed” is also adopted by other rules

49. What’s more, this interpretation has been endorsed in the proposal for a European Community Regulation on the law applicable to non- contractual obligations (known as Rome II) 10 which lays down the principle that “the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is sought”.

50. Thus, Myanmar law should be the applicable law even if the Agreement is ineffective, because both Japan and Myanmar should comply with Berne Convention, and Myanmar is the country for which protection is claimed.

C. JAPAN LAW SHOULD NOT BE THE APPLICABLE LAW

51. In the present case, although the creator of software is Japanese and the seat of arbitration is in Tokyo, Myanmar law rather than Japanese law should be the

³⁷ André Lucas. 2005. Applicable law in copyright infringement cases in the digital environment. <http://unesdoc.unesco.org/images/0014/001436/143657e.pdf> July 30, 2017.

applicable law. Where a foreigner is allowed to enforce his or her copyright in a foreign country, only that country's domestic law shall be applied. Due to the varying levels of wealth, economic structures, technological capabilities, political systems and cultural traditions, different countries need different copyright laws.

III. COPYRIGHT IN THE JADEYE SOFTWARE IS NOT SUBSISTENT

A. MYANMAR'S THE COPYRIGHT ACT OF 1914 IS APPLICABLE LAW

52. Copyright in Myanmar is currently protected under the Copyright Act of 1914 (CA 1914). The CA 1914 contains only basic provisions related to the term of copyright and civil remedies for infringement.

B. BASED ON THE COPYRIGHT ACT OF 1914, THE JADEYE SOFTWARE IS NOT PROTECTED AS COPYRIGHT

53. The Copyright Act of 1914 only regulates domestic copyright issues providing copyright of original literature and dramatic and artistic work if: (a) in the case of a published work, the work was first published within Myanmar; and (b) in the case of an unpublished work, the author was a citizen of Myanmar or "within" Myanmar when the work was created.

54. In the present case, Myanmar law is the applicable law. According to Myanmar law, software is not protected as copyright in Myanmar.

C. THE JADEYE SOFTWARE IS NOT UNDISCLOSED INFORMATION

55. Although the copyright of JADEYE software is not subsistent, the answer to the question, whether, the software can be considered as undisclosed information or not, would be no, because the JADEYE software is not protected as undisclosed information.
56. Generally speaking, an undisclosed information should be commercially valuable because it is secret, be known only to a limited group of persons, and be subject to reasonable steps taken by the rightful holder of the information to keep it secret, including the use of confidentiality agreements for business partners and employees.
57. In the present case, the JADEYE software has commercial value and be known to a limited number of people, but it is not protected as undisclosed information in CLAIMANT, or in the partnership, because the source code of JADEYE is just held by Head of Finance of CLAIMANT without other protection, and there are no other reasonable steps like signing confidentiality agreements to keep the JADEYE secret in CLAIMANT or in the partnership.

IV. THE JADEYE SOFTWARE BELONGS TO THE PARTNERSHIP

A. BEFORE TRANSFERRED TO THE PARTNERSHIP, THE JADEYE SOFTWARE BELONGS TO THE CREATOR, JOE YAMASHITA

(1). Joe Yamashita is the only author of the JADEYE software

58. The idea of making the software is not ordered by CLAIMANT, and the JADEYE is made by Joe Yamashita on his own.³⁸

(2). Making JADEYE is not Joe Yamashita's duties in CLAIMANT

59. Even though Joe Yamashita start working on JADEYE after RESPONDENT contacted CLAIMANT to discuss the partnership between CLAIMANT and RESPONDENT³⁹, making the JADEYE software is not a work made in the course of Joe Yamashita's duties, because Joe Yamashita is CLAIMANT's finance executives⁴⁰ not an engineer. Considering the JADEYE software is mainly used for exploration and extraction, also for breaking and cutting, and some processing work⁴¹, creating a software like this is clearly not a duty as a finance executive.

(3). Joe Yamashita has the right to manage the JADEYE software

60. By asking Joe Yamashita, CLAIMANT ordered the software to be installed in all the computers and equipment used on the sites.⁴² Moreover, RESPONDENT has

³⁸ Clarification, p. 2, Q. 8

³⁹ Additional Clarification, p. 4, Q.18

⁴⁰ Moot Problem, p. 4, para. 21

⁴¹ Additional Clarification, p. 3, Q. 16

⁴² Additional Clarification, p. 6, Q. 32

tried to give money to Joe Yamashita rather than CLAIMANT to thanks for the function of the JADEYE software.⁴³ From these facts, we can see that Joe Yamashita has the right to manage the JADEYE software.

B. THE JADEYE SOFTWARE IS TRANSFERRED TO THE PARTNERSHIP

(1). Joe Yamashita permitted the partnership to use the software for free.

61. When RESPONDENT tried to give money to thanks for using the JADEYE software, Joe Yamashita declined the cash, and CLAIMANT that JADEYE was “for the benefit of all of us”.⁴⁴ From this fact, it can be concluded that as the creator and owner of the JADEYE software, Joe Yamashita permit the partnership to use the software for free.

(2). Joe Yamashita gave the JADEYE software to the partnership

62. When Joe Yamashita resigned from CLAIMANT on 4 January 2013, he handed the source code of JADEYE which was saved in a hard disk drive together with other documents to Head of Finance of CLAIMANT in Tokyo on his last day. This fact combined with Joe Yamashita’s permit that allows the partnership to use the software, can be concluded that Joe Yamashita give the JADEYE software to the partnership.

⁴³ Moot problem, p. 5, para. 24

⁴⁴ Moot problem, p. 5, para. 24

PLAYER FOR RELIEF

On the basis of the foregoing arguments, RESPONDENT respectfully requests the

Tribunal to:

- 1) decide that RESPONDENT can terminate the Agreement
- 2) confirm that RESPONDENT has the ownership of the jade-mining machinery
equipment
- 3) verify RESPONDENT's ownership of rights in the JADEYE software.