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2017

MEMORANDUM FOR CLAIMANT

SHANGHAI UNIVERSITY OF POLITICAL SCIENCE AND LAW



BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT COMPANY

(CLAIMANT)

AND

SHWE PWINT THONE COMPANY

(RESPONDENT)

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STATEMENT OF JURISDICTION

1. To ensure an expeditious resolution of the dispute, the Parties have agreed in writing to submit this dispute to arbitration.
2. The Parties have also agreed to resolve their dispute in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules (“i-Arbitration Rules”) at Tokyo, Japan.

QUESTIONS PRESENTED

- I. What is the applicable law that should be referred to in this dispute.
- II. Whether it is valid that SPT terminate the agreement.
- III. Whether the ownership of mining machinery and equipment belongs to AID.
- IV. Whether AID still hold the subsistence and ownership of right in the JADEYE software.

STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd. ("AID") is a private international development company founded in 1958 in Tokyo, Japan by Atsuko Asamura. Over the years, AID has been involved in various rehabilitation and rebuilding projects in developing countries. Upon the untimely death of Atsuko Asamura in 2005, the leadership of AID was passed on to his only son, Dr. Yugi Asamura. Dr. Yugi is married to Dr. Fiona Lum Ka Ching, who is the President of Second Life, a regional organization which champions for human rights. In May 2008, AID participated in rebuilding a town in Myanmar hit by Cyclone Nargis.

2. Myanmar company runs teashops, jade carving and polishing studios, and training centres in Mandalay and Yangon. In 2007, SPT was gifted 80 acres of land in Hpakant which was believed to contain a huge amount of jade deposits. U Thein Kyaw, the owner of SPT, hoped to provide training, create jobs there and increase the revenue, while ensuring sustainable and safe extraction of jade.
3. Since SPT had zero experience in jade exploration and production, he decided to contact Dr. Yugi to discuss the prospects of a partnership between AID and SPT in the area of jade business. On 9 September 2008, parties signed a Partnership Agreement ("the agreement") in which parties divided tasks and share of profits. But because of U Thein Kyaw's proposal, parties did not get lawyers involved.
4. Under the arrangement of the agreement, AID sourced for second hand machinery and equipment from Japan, purchased them, and reconditioned them. AID's employees operated some of the equipment and trained SPT's employees to operate and maintain the jade-mining equipment and machinery. AID even undertook all the operational costs during early stage.
5. On 11 April 2012, AID's finance executives, Joe Yamashita informed Dr. Yugi that the software "JADEYE" was ready to be used. It is a kind of software which can be used to expedite assessment work, also assisting in the termination of scalability and economic value of the site. Because of Joe Yamashita's resign in 2013, the source code of JADEYE was handed to AID on his last day.
6. During an interview with a magazine in 2016, Dr. Fiona expressed her own opinion on the plea of the Rohingya minority in Myanmar. However, some workers of SPT were upset by her statement. Nevertheless, parties continue their partnership until an American company,

New Ventures Corporation, approached SPT. New Ventures Corporation offered a bigger profit split for SPT. So SPT intended to end partnership with AID.

7. AID cannot understand the decision of SPT. As parties were not able to settle their differences, they eventually agreed to choose to go for arbitration at the Kula Lumpur Regional Centre for Arbitration in Malaysia.

SUMMARY OF PLEADINGS

A The applicable laws to this arbitration are Myanmar laws.

According to parties' consensus, Myanmar laws should be applied to procedural issues and substantive issues.

B It is necessary for parties to continue their partnership.

The relationships between parties are partnership. The reason why SPT want to end partnership is they thought CLAIMENT breached the agreement and should be liable for the statement made by Dr. Fiona. However, CLAIMENT did not make breach of contract. If SPT decide to terminate

partnership agreement, it will cause damages to third party.

C The mining machinery and equipment are AID's personal property.

According to Myanmar law, the mining machinery and equipment are moveable property. When it comes to moveable property, it is appropriate to apply the principle of chain of title. Therefore, the earlier title he earlier title gets stronger validity, AID is entitled the original title which is also the better title.

D The mining machinery and equipment are not partnership property.

According Myanmar investment law, AID is not only a partner but also a foreign investor under the business. Moreover, AID never hold the opinion that the machinery and equipment were invested as partnership property. The machinery and equipment mismatch the condition of being partnership property.

E SPT wasn't entitled the title of owner of the machinery and equipment.

Since SPT argued that they are the owner of the machinery and equipment because they did the registration. However, SPT is not the owner for these reasons: firstly, whether the instruments are registered, the validity of ownership to the payer is superior to the title of registration. The registration did not have absolute credibility. Secondly, there was no consensus of transfer ownership under delivery.

F The ownership of rights in JADEYE software should be protected by Myanmar as copyright.

G The copyright of JADEYE should belong to AID.

In this case, there is no agreement to the contrary and the work is created by an employee during the course of employment. And under the Burma Copyright Act, the copyright of JADEYE belongs to AID.

PLEADINGS

I. THE APPLICABLE LAWS TO THIS ARBITRATION ARE MYANMAR LAWS

1. Parties expressly agreed to use Myanmar laws to as the available laws according to Partnership Agreement¹.
2. Firstly, It is generally recognized that parties to an international commercial agreement are free to choose for themselves the law (or the legal rules) applicable to that agreement.²
3. Secondly, parties agreed using the KLRCA i-Arbitration Rules, and according to Art.35 (1) of the rules³, the arbitral tribunal shall apply the rules of law designated by the

¹ Partnership Agreement Art 10.

² Redfern and Hunter on International Arbitration, ¶3.64.

³ KLRCA i-Arbitration Rules, Article 35 Applicable Law, Amiable Compositeur (1). The arbitral tribunal shall

parties as applicable to the substance of the dispute.

4. It may be confused that the word “everything” seems to be ambiguous, but it has a reasonable construction. In *Rainy Sky S.A. and others v. Kookmin Bank*, the Supreme Court adopts a purposive approach to the construction of a commercial contract⁴. When a term of a contract could have more than one interpretation, the Supreme Court held that it is appropriate to adopt a purposive over a literal approach. If it is difficult for us to know the meaning of the word literal, because in this case, even the word “everything” cannot be all-inclusive, but it is possible to have more than one interpretation.
5. When we adopt a purposive approach to construct this word, the partnership was based on a jade business, and the purpose of parties is to become partners in jade business. So “everything” means everything related to this partnership in jade business. Things related with procedural and substantive issues also counts a lot in this business.
6. Hence, everything related to the partnership should be interpreted under the laws of Myanmar. Both procedural issues and substantive issues should be govern by Myanmar laws.

II. THE TERMINATION OF AGREEMENT MADE BY SPT IS INVALID

A. It is necessary for parties to continue their partnership

(1) The relation between parties is partnership

apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

⁴ *Rainy Sky S.A. and others v. Kookmin Bank* [2011] UKSC 50.

7. According to Myanmar Partnership Act Art4⁵, the relation between parties is partnership for these reasons:
8. Firstly, parties are legal persons;
9. Secondly, parties agreed to share the profits of their business according to Art 7 of partnership agreement;
10. Thirdly, the jade business was carried on by all of them because according to Art 6, their business has clear division. It is also possible for any of them acting for all.
11. Therefore, parties have already formed partnership even without the involvement of lawyers⁶.

(2) If SPT decide to terminate partnership agreement, it will cause damages to third party

12. When HCL sourced for good quality jades, it decided to contact with AID. Then HCL and AID entered into the jades-supply contract.
13. According to Myanmar Partnership Act Art18⁷, although HCL did not directly sign the contract with SPT, AID can totally represent the partnership.
14. Firstly, the reason why HCL did not directly contact with SPT is that HCL is more familiar with AID, they did not have a lot of confidence in business environment of Myanmar⁸. HCL is more familiar with AID.

⁵ Myanmar Partnership Act Art4: “Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

⁶ Moot Problem, ¶15.

⁷ Myanmar Partnership Act Art.18: a partner is the agent of the firm for the purposes of the business of the firm.

⁸ Moot Problem ¶34.

15. Secondly, the purpose for AID signing agreement with HCL is to provide good quality jades, which is one of the purposes of partnership. It takes advantages of resources brought by partnership.
16. Moreover, before AID signed contract with HCL, it ask opinion from SPT because they are partners. SPT even encouraged this deal with HCL⁹.

(3) RESPONDENT may argue that AID should be responsible for the statement made by Dr. Fiona

17. SPT may argue that it because of the statement of Dr. Fiona that their workers went on strike. The statement of Dr. Fiona even made it impossible for parties to continue their partnership. However, AID should not be responsible for the consequence caused by statement of Dr. Fiona:
18. Firstly, Dr. Fiona’s statement was based on her position in Second Life which is a regional organization championing for human rights¹⁰. Some workers of SPT went on strike for several days because of Dr. Fiona’s statement¹¹. SPT cannot continue the partnership with AID because the performance of AID hurt their feeling. And they want a new partner who can bring bigger profits for them¹².
19. However, the first thing is that Dr. Fiona’s statement was based on her position in Second Life¹³. In her statement, she mentioned “human rights”, and said “we will

⁹ *Id.* ¶35.

¹⁰ Moot Problem, ¶5.

¹¹ *Id.* ¶29.

¹² *Id.* ¶41.

¹³ *Id.* ¶27.

continue to champion for their rights”¹⁴. In this situation, Dr. Fiona represented Second Life but not AID. Moreover, since it is not the position of AID, there is no need for Dr. Yugi to apologize for it.

20. Secondly, SPT’s decision was made several months after the workers’ strike.
21. If SPT really think that parties cannot be partners, they should end this relationship as soon as possible but not after 5 months.

B. SPT is just for pursuing bigger profits

22. SPT did not end the partnership immediately after the strike of workers. However, they chose to end it after 5 months¹⁵. Before SPT made this decision, an American company called New Ventures Corporation came to SPT to discuss the partnership between it and SPT. One thing which should be strengthened is that the American company offers a bigger profit shares than AID¹⁶.
23. The conclusion is that SPT’s decision was not based on good faith, and it is unfair for AID because AID always accomplish their tasks well. And it will also be a lost for SPT to give up this nice partner.

C. AID abided by partnership agreement completely

24. SPT may argue that CLAIMENT disobeyed article11 of partnership agreement. It may be one of the reasons why they decide to end partnership.

¹⁴ *Id.* ¶28.

¹⁵ *Id.* ¶29 ¶40.

¹⁶ Moot Problem, ¶36, ¶37.

25 Firstly, as stated above, the statement of Dr. Fiona cannot represent RESPONDENT's
position.

26 Secondly, even tribunal considered it as the position of CLAIMANT, the statement itself
is not harmful to the national interest and solidarity of Myanmar¹⁷.

27 When it comes to the construction of national interest, societies are binding forces
which keep society from disintegrating into antagonistic groups and individuals¹⁸.

28 The statement of Dr. Fiona was about human right. Promoting protection of basic
human right is not contrary to "keeping society from disintegrating into antagonistic
groups and individuals". Moreover, governments or nations who need to solve similar
dispute should base the protection of human right.

D. The way that SPT inform AID is invalid

29 Since there are no provisions about duration of parties' partnership, according to
Myanmar Partnership Act¹⁹, the partnership is "partnership at will".

30 Moreover, when the partnership is "partnership at will", if any partner decide to end
partnership, it should give notice in writing²⁰. However, U Thein Kyaw did not inform
Dr. Yugi by writing about his decision to end the partnership²¹. So the way of SPT
informing its decision is invalid.

¹⁷ Partnership Agreement Art 11.

¹⁸ The National Interest in International Relations Theory, S. Burchill.

¹⁹ Myanmar Partnership Act, Art7 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".

²⁰ Myanmar Partnership Act 43.(1) 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.

²¹ Clarification Question 13.

III AID IS TITLED THE OWNER OF MINING MACHINERY AND EQUIPMENT BELONG

A. *Mining machinery and equipment are movable property*

31 Relative to immovable property, the feature of movable property is movable, it may be not in the state of moving but it could be moved. The mining machinery and equipment were purchased by AID in Japan, then were imported to Myanmar. As the investment capital of AID, they are moveable.

32 Under Registration Act of Myanmar, “immoveable property” includes things attached to the earth or permanently fastened to anything which is attached to the earth, “moveable property” includes property of every other description, except immovable property.²² It may be confused that these machinery and equipment are immoveable property for which are attached to the earth. In Art.3 of The Transfer of property Act, “attached to the earth” means imbedded in the earth, as in the case of walls or buildings; or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.²³ The mining machinery and equipment like dump trucks, excavators, and drilling machines²⁴ are not fixtures imbedded in the land, even some fixtures or fittings installed in land, they are detachable and temporary.

33 Therefore, the mining machinery and equipment are moveable property under Myanmar law.

²² Registration Act (1909, Myanmar), Art. 2.

²³ The Transfer of Property [INDIA ACT IV, 1882] (1 July 1882), Art.3.

²⁴ Moot Problem, ¶16.

B. The mining machinery and equipment are AID's personal property

(1) AID is entitled the original ownership of the mining machinery and equipment as a purchaser

34 In the chain of title in moveable property, AID obtain the original acquisition of ownership of the machinery and equipment by AID's purchase. It was only AID who paid for the mining machinery and equipment, and kept the invoices and receipts. As the buyer of the mining machinery and equipment, AID obtained the prior title of possession.

35 In the case *Howe Coal. V. Prairie Coal Co.*, 362 F Supp, 1117(1973), the title and ownership of the machinery and equipment was vested in plaintiff, then took place in defendant's land without the payment. The court obtained that no sale of machinery and equipment had taken place and that corporation was entitled to immediate possession of it.²⁵ Even the machinery and equipment was affixed in defendant's land, the delivery of ownership was failed for no payment. The plaintiff still held the title of ownership, which has a strong validity than the title of possession in defendant.

36 Therefore, linking to the principle of chain of title, the earlier title gets stronger validity, AID is entitled the original title which is also the better title.

(2) The mining machinery and equipment are not partnership property

37 AID is not only a partner but also a foreign investor under the business, for it set up the branch office in Myanmar and invest such capital under the Myanmar investment law.

²⁵ *Howe Coal. V. Prairie Coal Co.*, 362 F Sup, 1117(1973).

- 38 Accord to Art.2 in Myanmar Investment Law²⁶, the only form of foreign investment is direct investment, it entitles foreign investor the right of control, influence and possession to their investment.
- 39 Their partnership wasn't registered in anywhere, moreover there is no list of partnership property. AID exported the machinery and equipment based on a premise that investment capital still is the property of AID. Therefore, there never comes an expression from AID that the machinery and equipment were invested as partnership property.
- 40 It may come queries that AID and SPT both made capital contribution to the fund, but it just for the operation and maintenance, which can't convincingly demonstrate the machinery and equipment are partnership property. But Partnership use and possession of property does not necessarily establish partnership ownership of the property.²⁷ See *Strother v. Strother*, 436 So. 2d 847 (Ala. 1983),*Rooney v. Rooney*, 158 Vt. 643, 605 A.2d 520 (1992)²⁸
- 41 As a result, the machinery and equipment mismatch the condition of being partnership property.

(1) SPT wasn't entitled the title of owner of the machinery and equipment.

²⁶ Myanmar Investment law (The Pyidaungsu Hluttaw Law No. 40/2016) The 2nd, Waning of Thadingyut, 1378 M.E. (18, October, 2016) , Art. 2.

²⁷ *Strother v. Strother*, 436 So. 2d 847 (Ala. 1983).

²⁸ *Rooney v. Rooney*, 158 Vt. 643, 605 A.2d 520 (1992).

i. The registration did not have absolute credibility.

42 Generally, the registration of movable property is not compulsory, and do not have
absolute credibility. Under the Art. 18.(b) in Registration Act²⁹, The registration is
optional to instruments acknowledging the receipt or payment of any consideration on
account of the creation, declaration, assignment, limitation or extinction of any such
right, title or interest.

43 If the property is titled in a partner's name this does not necessarily mean that the property
belongs to that partner.

44 It is clear that both parties divide their their job in partnership agreement, which SPT
shall get all permission relative to the mining business. So the registration is just the job
for a domestic company may more convenient to get permission. SPT was registered as
the importer of machinery and equipment instead of owner, which the registration didn't
grant SPT the title of ownership. See *Twin Disc, Inc. v. Twindisc.cc*, Not Reported in
F.Supp.3d (2014)³⁰

45 Thus, whether the instruments are registered, the validity of ownership to the payer is
superior to the title of registration. The registration did not have absolute credibility.

ii. There was no consensus of transfer ownership under delivery.

46 If a partner uses property, this fact alone will not establish that the partner owns the
property.³¹ And also ownership not determined by legal title, but by parties' intent. See

²⁹ Registration Act (1909), Art. 18.

³⁰ *Twin Disc, Inc. v. Twindisc, Not Reported in F. Supp. 3d (2014)*.

³¹ *Stafford v. McCarthy*, 825 S.W.2d 650 (Mo. Ct. App. S.D. 1992).

Stafford v. McCarthy, 825 S.W.2d 650 (Mo. Ct. App. S.D. 1992).

47 While bare consent in some cases may ordinarily be sufficient to effectuate delivery, the courts finds that the holder of the product is a party that must provide consent.³²See

Reeves v. G & G Pumping Co., 151 So. 679 (La.App. 2d Cir.1934)

48 AID delivered the machinery and equipment for producing, but never expressed to transferred the ownership to SPT. Therefore, SPT only has the right to use during partnership, but the title of ownership didn't transfer to SPT.

49 In a summary, AID held the prior title of these machinery, the ownership belongs to AID.

IV. AID IS TITLED THE SUBSISTENCE AND OWNERSHIP OF RIGHT

C. The ownership of rights in the JADEYE software should be copyright and it belongs to

AID

(1) The ownership of rights in JADEYE software should be protected by Myanmar as copyright

50. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).³³ It is a generally accepted principle that computer programs should be protected by copyright.

51. The JADEYE software is a computer program that can test the quality and viability of

³² *Reeves v. G & G Pumping Co., 151 So. 679 (La.App. 2d Cir.1934).*

³³ Agreement on Trade-Related Aspects on Intellectual Property Rights, 1 January 1995, Art.10 1869 UNTS 299, [TRIPS].

the jade at 99% accuracy³⁴. This software should be protected as literary works.

52. Therefore, the ownership of rights existed on the JADEYE software should be copyright.
53. Myanmar has the obligation to protect³⁵ the computer program of other WTO Member States as a signatory to The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).
54. Moreover, copyright protection is formality-free in countries party³⁶ to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), which means that protection does not depend on compliance with any formalities such as registration or deposit of copies.
55. Myanmar should comply with³⁷ this article as a member of WTO. JADEYE software did not register copyrights/other IP rights under Myanmar laws³⁸ but it still enjoys copyrights in Myanmar.
56. Above all, the ownership of rights in JADEYE software should be protected by Myanmar as copyright.

(2) The copyright of JADEYE should belongs to AID

57. Under article 5 of The Burma Copyright Act, three preconditions³⁹ for copyright to rest with an employer. They are:

³⁴ Moot Problem, ¶2.

³⁵ Agreement on Trade-Related Aspects on Intellectual Property Rights, 1 January 1995, Art.3 1869 UNTS 299, [TRIPS].

³⁶ Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), 24 July 1971, Art.5.

³⁷ Agreement on Trade-Related Aspects on Intellectual Property Rights, 1 January 1995, Art.9 1869 UNTS 299, [TRIPS].

³⁸ Clarifications. ¶9.

³⁹ The Burma Copyright Act. [INDIA ACT III, 1914.] (24th February 1914.), Art.5.

(1) *the author was in the employment of some other person, under a contract of service,*

(2) *the work was made in the course of employment,*

(3) *there is no agreement that says the employee is the first owner of copyright.*

58. Joe Yamashita, was one of AID's finance executives⁴⁰ when he invented the software. He was an important staff of AID and his work was done as an integral part of the business⁴¹.

59. Therefore, Joe was an employee of AID under a contract of service during the invention.

60. The term "course of employment", which was described as meaning much the same as "normal duties"⁴². Joe Yamashita was one of AID's finance executives, it was his duty and his own mind to improve the efficiency of their operations for financial efficacy.⁴³

61. In such a situation, there is no agreement to the contrary and the work is created by an employee during the course of employment, then the employer is the first owner of copyright⁴⁴. The copyright of JADEYE should belong to AID.

D. It is a breach of Myanmar Copyright Act if SPT insist to reverse engineer or create their own version of JADEYE.

62. The term 'computer program' is defined in (A), which including source or object code. SPT did not have access to JADEYE original source code, but instead of reversing engineer or creating the same version which performed the same function.

63. SPT's action of reversing engineer or creating another version should be deemed as

⁴⁰ Moot Problem, ¶21.

⁴¹ *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101.

⁴² *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101.

⁴³ Additional Clarifications, ¶26.

⁴⁴ *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir.1986).

infringe⁴⁵ AID' copyright in its original source code as the source code was held to be a "literary work" as defined in (A).

64. AID shall be deemed to be infringed by SPT if SPT does anything to the sole right without the consent of the owner of the JADEYE⁴⁶.
65. In addition, SPT plans to reverse engineered or create another version is for commercial purpose. It cannot apply to the exceptions of infringement of copyright.
66. It is a breach of The Burma Copyright Act if SPT insists to infringe the copyright of AID.
67. Above all, applying to Myanmar Copyright Act, the copyright in JADEYE software should be protected as the property of AID and SPT cannot reverse engineered or create another version.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests the Tribunal to declare that:

1. The applicable laws to this arbitration are Myanmar laws.
2. The termination of agreement made by SPT is invalid.
3. AID is entitled the owner of mining machinery and equipment.
4. AID is titled the subsistence and ownership of rights of JADEYE software.

Respectfully submitted,

Counsel for the Claimant.

⁴⁵ Data Access Corporation v Powerflex Services Pty Ltd (1999) 202 CLR 1.

⁴⁶ The Burma Copyright Act. [INDIA ACT III, 1914.] (24th February 1914.), Art.2.