

THE 12th LAWASIA
INTERNATIONAL MOOT COMPETITION 2017
TOKYO, JAPAN
2017

MEMORANDUM FOR RESPONDENT

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 SPT is entitled the ownership of mining machinery and equipment.
- IV. Whether SPT is entitled 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 managing in developing countries. The company was founded by Atsuko Asamura in 1958 in Tokyo, Japan. After the death of Atsuko Asamura in 2005, the leadership was passed to Dr. Yugi Asamura. His wife, Dr. Fiona Lum, is the President of Second Life, a regional organization.

2. The Respondent, Shwe Pwint Thone Co., Ltd. (“SPT”), is a local Myanmar company started in purpose of providing secular and vocational training to students from underprivileged families. SPT runs teashops, jade carving and polishing studios, and training centres in Mandalay and Yangon. Half of the revenues of it are used to fund training centres. U Thein Kyaw, the owner of SPT, was gifted 80 acres of land in Hpakant, located in the Kachin State, where considered to contain a huge amount of jade deposits. U Thein Kyaw also hoped to provide training and create jobs in Hpakant.
3. Because U Thein Kyaw had no experience in jade business, he contacted Dr. Yugi to discuss the prospects of a partnership between SPT and AID (each a “Party” and collectively, “the Parties”). On 9 September, the parties entered into a partnership agreement (“the agreement”) without the engagement of lawyers. Parties also allocated the tasks of jade business to each other in the agreement. Then they regulated that everything should be constructed by Myanmar laws. In the end, the parties highlighted the obligation that they cannot say or do anything harmful to the national interest and solidarity of each other’s country.
4. In summer of 2016, Dr. Yugi and Dr. Fiona were accepted an interview about the plea of

the Rohingya minority in the Rakhine state. However, the opinion of Dr. Fiona caused 102 workers' strike. And the couple refused to apologize for it. So even for the interest of SPT itself, U Thein Kyaw had to coax the workers to go back to work.

5. Nevertheless, the morale of the employees and students in SPT are at an all-time low, as they have lost respect for their Japanese counterparts. That is the reason why SPT need to seeking to a new partner. So when an American company named New Ventures Corporation approached SPT, it considered the possibility to end the partnership with AID.
6. After informed the decision of termination, Dr. Yugi Asamura protested, saying that SPT cannot end the partnership like that. AID even claimed that they are the owner of the jade-mining machinery and equipment, as well as the subsistence and ownership of rights in the JADEYE software.
7. Thus, parties agreed to choose arbitration to solve their disputes. They chose Kuala Lumpur Regional Centre for Arbitration in Malaysia using the KLRCA i-Arbitration Rules.

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 RESPONDENT is entitled to end the partnership.

CLAIMANT breached the partnership agreement. According to Partnership Agreement, AID cannot say or do anything harmful to the Myanmar's interest and solidarity of it. However, In September 2016, many of SPT's employees and students were very upset by Dr. Fiona's statement and even contributed a strike.

C The registration of jade-mining machinery and equipment has absolute credibility.

Under the article of Art. 17. (b) of Registration Act, the registration of immovable property is compulsory and has the absolute credibility, which the registrant's ownership against everyone. The mining machinery and equipment were not registered as AID in anywhere but as the name of SPT, which SPT is entitled the title of legal ownership of these instruments.

D. SPT is entitled the title of possession of machinery and equipment.

SPT is entitled the title of legal ownership of machinery for its registration, and set up the contractual relationship with freighter, paid the shipment as a consignor. Hence, when the machinery and equipment are transferred successfully, SPT obtained the title of possession.

E. It should conform to the doctrine of make best use of everything.

Base on the benefit allocation ratios and types of business in AID, it would be unprofitable to AID if the ownership of machinery and equipment belong to them but would cause serious damage to SPT. Since AID would no longer to use the machinery and equipment after the termination of partnership, but SPT will. So SPT still has the ownership interest.

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

G. Software is not the work for hire and its copyright does not belong to AID.

Under the article 5 of The Burma Copyright Act, there is an essential element that the work was made in the course of his employment when the work belongs to the employer. In this case, if SPT can prove that the JADEYE software was not made in the course of his employment, then AID cannot claim this is the work for hire and the copyright belong to AID.

H. AID has no right to interfere the use of JADEYE software of SPT.

SPT can continue using the software because the owner of software approved this behavior.

As a matter of fact, AID is not the owner of the software, it has no right to interfere SPT for the use of JADEYE software.

PLEADINGS

I. THE APPLICABLE PROCEDURAL LAW TO THIS ARBITRATION IS MYANMAR LAW

1 Since parties cannot solve disputes by themselves, they decided to choose arbitration.¹ Hence, parties eventually chose Kuala Lumpur Regional Centre for Arbitration as arbitration institution.²

2 Furthermore, Parties sometimes include choice-of-law provisions that designate the procedural law applicable to arbitration proceedings.³

3 It is also said that International arbitration law embodies the principle of party autonomy, according to which the parties may agree on the applicable procedural law (*lex arbitri*) for their proceedings⁴.

4 So the procedural laws applicable to this arbitration can be stipulated in parties' agreement. Parties agreed in their partnership agreement that everything should be governed by Myanmar laws⁵. Hence, the applicable procedural law is Myanmar law.

II. THE LAWS GOVERN THE SUBSTANTIVE ISSUES ARE MYANMAR LAWS

5 As mentioned above, parties consented to apply Myanmar laws to everything which

¹ Moot Problem, ¶7.

² Moot Problem, ¶45.

³ 11.05[B][2]; G. Born, international arbitration and forum selection agreements: drafting and enforcing 161 (4th ed. 2013).

⁴ Judgment of 12 November 2010, 2010 NJA 57, ¶2 (Swedish S.Ct.).

⁵ Partnership Agreement, Art 10.

also includes substantive issues.

- 6 According to KLRCA i-Arbitration Rules which parties agreed to use⁶, the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute⁷.

III RESPONDENT is entitled to end the partnership

A. CLAIMENT breached the partnership agreement

- 7 CLAIMENT breached the partnership agreement. According to Partnership Agreement, AID cannot say or do anything harmful to the Myanmar's interest and solidarity of it⁸. However, Dr. Fiona did say something disrespectful to Myanmar. In September 2016, many of SPT's employees and students were very upset by Dr. Fiona's statement and even contributed a strike.⁹

- 8 RESPONDENT may argue that Dr. Fiona's statement cannot represent AID's opinion.

- 9 However, Dr. Fiona is a non-executive director in AID¹⁰. Her position counts a lot in AID. When Dr. Fiona were asked about her opinion on plea of the plea of the

⁶ Moot Problem, ¶47.

⁷ KLRCA i-Arbitration Rules, Art35(1) The arbitral tribunal shall 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.

⁸ Partnership Agreement Art.11: To show the respect towards the Golden Land, AID cannot do or say anything harmful to the national interest and solidarity of Myanmar, and vice versa.

⁹ Moot Problem, ¶29.

¹⁰ Additional clarification, ¶3.

Rohingya minority¹¹, she should also take her position if AID into account.

B. RESPONDENT is entitled to end the contract because CLAIMENT breached the contract.

10 Myanmar Contract Act is applicable to Partnership Agreement between parties.¹²

11 Furthermore, according to Myanmar contract Act, the decision to put an end to the contract is taken by the party who is not in breach¹³. Contrary to AID's breach of contract, RESPONDENT did not break the contract, so our client had the right to terminate the contract.

C. IT IS NECESSARY FOR RESPONDENT TO EXERCISE THE RIGHT TO END THE PARTNERSHIP.

(1) It is impossible for parties to continue their partnership.

i. AID had a fundamental breach of the contract.

12 RESPONDENT had to end the agreement because AID had a fundamental breach of

¹¹ Moot Problem, ¶27.

¹² Myanmar Contract Act, Art 1: "Every promise and every set of promises, forming the consideration for each other, is an agreement...An agreement enforceable by law is a contract."

¹³ Myanmar Contract Act, Art 39: When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

the contract.

13 Fundamental breach of contract is “a breach which affects the very substance of a contract or it makes further performance of a contract impossible. In other words, as a result of the breach the whole or substantial benefit of a contract to an innocent party is denied.”¹⁴

14 Just as mentioned before, it is obvious that AID disobeyed the contract. Furthermore, this failure of performance was curial because it affected the basement of partnership. And the basement of partnership is mutual trust. In current situation, the basement of partnership was seriously harmed.¹⁵ Although it may not be a breach of the whole contract, it is a breach of substantial benefit of the contract.

ii. It needed some time when SPT made the determination to end partnership

15 AID may argue that RESPONDENT coaxed their employees to go back to work¹⁶, and it means that RESPONDENT acquiesced in continuing partnership. And they may also argue that if their behavior really breached the contract, RESPONDENT must terminate the contract immediately. However, it is impossible for our client to end the agreement at once since our client needed to wait and see how serious the effect will be.

16 After RESPONDENT coaxed the workers to work, he still cannot make sure that

¹⁴ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474, 2 QB 26 (CA).

¹⁵ Moot Problem, ¶38.

¹⁶ Moot Problem, ¶30.

whether the workers truly forgive the behavior of AID. Contrarily, if situation continues like that, it will not do harm to not only partnership but also SPT itself. According to what U Soe Myint said, the mental state of the employees and students are at an all-time low, as they have lost respect for their Japanese counterparts¹⁷.

(2) The partnership has been existed for about 10 years which is a reasonable time.

17 Parties agreed that their partnership and brotherhood will be for the long term. But they did not specify the duration¹⁸. “It is true that it does not require very much to induce a court to read in to an agreement of a commercial character, either by construction or by implication, a provision that the arrangements between the parties, whatever, they may be, shall be terminable only upon reasonable notice.”¹⁹ It means that when the contract does not expressly specify the expiration or termination, the court or arbitral tribunal may make a fact that the contract expires at a reasonable expiry by making a reasonable notice.

18 Although parties use the word “long term”, they should be aware of that their partnership cannot exist forever. Just as mentioned before, it is impossible for RESPONDENT find a new partner immediately. And several months later, a new partner appeared. So RESPONDENT made this decision.

¹⁷ Moot Problem, ¶38.

¹⁸ Partnership Agreement, Ar. 8.

¹⁹ *Australia Blue Metal Ltd v Hughes (1963) AC 74.*

III SPT IS ENTITLED THE OWNERSHIP OF MACHINERY AND EQUIPMENT

A. The mining machinery and equipment are real property

19 It is significant to classify the character of property, for it is the essential factor to determine the title of ownership. Under the Art.2. (6) of Registration Act, the immovable property includes things attached to the earth or permanently fastened to anything which is attached to the earth. ²⁰The machinery and equipment include dump trucks, excavators, and drilling machines are large-scale component attached to the earth and some other may even installed in land.

20 In the case *Mining Equipment Inc. v. Leadville Corp.*, 856 P.2d 81 (1993)²¹, it determined the machinery and equipment of large-scale or fixtures as real property.

21 Therefore, the mining machinery and equipment are real property under the Myanmar law.

B. The registration has absolute credibility

19 It stipulates in Art. 17. (b) Transfer of Property, the registration is compulsory to the non-testamentary instruments which purport or operate to create, declare, assign,

²⁰ Registration Act (1809, Myanmar), Art. 2.

²¹ *Mining Equipment Inc. v. Leadville Corp.*, 856 P.2d 81 (1993).

limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property.²² Under Art.17(b), the registration of machinery is compulsory.

20 On account of the history of Myanmar, the law system of Myanmar is continued developing based on the the law system of the British, so do the property right.

21 Generally, the registration of immovable property is compulsory and has the absolute credibility, which the registrant's ownership against everyone. The mining machinery and equipment were not registered as AID in anywhere but as the name of SPT, which SPT is entitled the title of legal ownership of these instruments.

C. SPT obtain the title of possession

22 SPT is entitled the title of legal ownership of machinery for its registration, and also set up the contractual relationship with freighter, paid the shipment as a consignor. Hence, when the machinery and equipment are transferred successfully, SPT obtained the title of possession.

23 The instruments were mostly operated and maintained by SPT's employee, SPT paid shipment, most of the maintenance cost and the fund was in SPT's account, it took control of all the machinery and equipment. See John N. John, JR., inc. v. Brahma

²²The Transfer of Property. [INDIA ACT IV, 1882] (1 July 1882), Art. 17.

Petroleum Corporation.²³ While AID made no serious effort to demonstrate that they did in fact own the equipment to the exclusion of any other interest.

24 In order for ownership to have transferred against third persons, delivery must occur.²⁴ See *Le Gardeur International, Inc. v. Ascension Construction Corp.*, 504 So.2d 587 (La.App. 4 Cir.1987)

D. It has consensus for ownership of mining machinery and equipment

25 In partnership agreement, it said that AID will provide second mining machinery and equipment for jade-mining business. As a mature company, AID should have known that registration or delivery can be the determinative factor to the ownership but never registered in anywhere.

26 Besides, when AID registered as importer and was also aware that SPT was recorded as the owner and operator of the jade-mining machinery and equipment on the permits required to operate them but never raise an objection to it.

27 While bare consent in some cases may ordinarily be sufficient to effectuate delivery, this court finds that the holder of the product is a party that must provide consent.

²⁵See *Reeves v. G & G Pumping Co.*, 151 So. 679 (La.App. 2d Cir.1934)

28 Under this provision, AID defaulted the ownership of machinery and equipment belong to SPT. So the registration and delivery were under both parties' consensus.

²³ *John N. John, JR., inc. v. Brahma Petroleum Corporation.*

²⁴ *Le Gardeur International, Inc. v. Ascension Construction Corp.*, 504 So.2d 587 (La.App. 4 Cir.1987).

²⁵ *Reeves v. G & G Pumping Co.*, 151 So. 679 (La.App. 2d Cir.1934).

E. It should conform to the doctrine of make best use of everything

29 Base on the benefit allocation ratios and types of business in AID, it would be unprofitable to AID if the ownership of machinery and equipment belong to them but would cause serious damage to SPT. Since AID would no longer to use the machinery and equipment after the termination of partnership, but SPT will. So SPT still has the ownership interest.

30 Besides, the machinery and equipment were second hand and used for almost seven years which may hard to sell. But the jade exploration in Myanmar would unable to keep going and make profits to training center or SPT's employees, since the government will not issue any permission to SPT.

31 In the case *Olson v. United States*, 292 U.S. 246 (1934), determining market value of land taken for public use, all uses for which land is suitable must be considered, including highest and most profitable use for which the land is likely to be needed in the reasonably near future.²⁶ See also *U.S. v. Consolidated Mayflower Mines, Inc.*, 60 F.3d 1470 (1995).²⁷

32 Hence, accord to the doctrine of make best use of everything, it is lawful and logical that the ownership of machinery and equipment belong to AID, and. The interest loss of both parties

33 In the conclusion, the ownership of machinery and equipment belong to SPT.

²⁶ *Olson v. United States*, 292 U.S. 246 (1934).

²⁷ *U.S. v. Consolidated Mayflower Mines, Inc.*, 60 F.3d 1470 (1995).

**V SPT IS TITLED THE SUBSISTENCE AND OWNERSHIP OF RIGHTS IN
JADEYE SOFTWARE**

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

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

34. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).²⁸ It is a generally accepted principle that computer programs should be protected by copyright.
35. The JADEYE software is a computer program that can test the quality and viability of the jade at 99% accuracy²⁹. This software should be protected as literary works.
36. Therefore, the ownership of rights existed on the JADEYE software should be copyright.
37. Myanmar has the obligation to protect³⁰ the computer program of other WTO Member States as a signatory to The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

²⁸ Agreement on Trade-Related Aspects on Intellectual Property Rights, 1 January 1995, Art.10 1869 UNTS 299, [TRIPS].

²⁹ Moot Problem, ¶2.

³⁰ Agreement on Trade-Related Aspects on Intellectual Property Rights, 1 January 1995, Art. 3 1869 UNTS 299, [TRIPS].

38. Moreover, copyright protection is formality-free in countries party³¹ 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.
39. Myanmar should comply with³² this article as a member of WTO. JADEYE software did not register copyrights/other IP rights under Myanmar laws³³ but it still enjoys copyrights in Myanmar.
40. Above all, the ownership of rights in JADEYE software should be protected by Myanmar as copyright.

(2) JADEYE software is not the work for hire and its copyright does not belong to

AID.

41. Under article 5 of The Burma Copyright Act, the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright.
42. In this article, there is an essential element that the work was made in the course of

³¹ Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), 24 July 1971, Art.5.

³² Agreement on Trade-Related Aspects on Intellectual Property Rights, 1 January 1995, 1869 UNTS 299, [TRIPS], Art.9.

³³ Clarifications, ¶9.

his employment when the work belongs to the employer.

43. In this case, if SPT can prove that the JADEYE software was not made in the course of his employment, then AID cannot claim this is the work for hire and the copyright belong to AID.
44. The term "course of employment", which was described as meaning much the same as "normal duties"³⁴
45. In this case, the idea that created the software completely came from Joe Yamashita's own mind rather than follow the orders³⁵. U Thein Kyaw wanted to paid Mr. Joe with USD 18,000 in cash also shows that created the software is not the normal duties of finance executive.
46. The copyright of the software should belong to Mr. Joe because creating it was not within the scope of the finance executive's duties as an employee.³⁶
47. Furthermore, Mr. Joe's colleagues at present who presumably are under similar obligations without the creation of the software. The software cannot be deemed as the work for hire.
48. Above all, JADEYE software should not apply to article 5 of The Burma Copyright Act as a work for hire. The owner of the copyright should be the author, Joe Yamashita.

³⁴ Additional Clarification, ¶26.

³⁵ *Id.*

³⁶ *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd [2013] FCAFC 62.*

B. AID has no right to interfere the use of JADEYE software of SPT.

49. As explained in (B), the copyright of software belongs to Mr. Joe.
50. In this case, Mr. Joe did approve SPT to use this software for jade-mining business³⁷.
Even after his resignation, Mr. Joe did not show any protest to SPT for continuing using the software.
51. For now, Mr. Joe did not participate the arbitration to against the SPT. Therefore, SPT can continue using the software because the owner of software approved this behavior.
52. As a matter of fact, AID is not the owner of the software, it has no right to interfere SPT for the use of JADEYE software.
53. Above all, applying to Myanmar Copyright Act, the copyright in JADEYE software should be protected as the property of SPT and AID has no right to interfere SPT to use this software.

³⁷ Moot Problem, ¶24.

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 valid.
3. SPT is entitled the title of ownership of mining machinery and equipment.
4. SPT is titled the subsistence and ownership of rights of JADEYE software.

Respectfully submitted,

Counsel for the Respondent.