

12TH LAWASIA INTERNATIONAL MOOT COMPETITION 2017

held at

TOKYO, JAPAN

Arbitration proceedings in accordance with KLRAC i-Arbitration Rules

ASAMURA INTERNATIONAL CO. LTD.

(Claimant)

Versus

SHWE PWINT THONE CO. LTD.

(Respondent)

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STATEMENT OF JURISDICTION

The parties, Shwe Pwint Thone Co., Ltd. (“SPT”) and Asamura International Development Co., Ltd. (“AID”) have agreed to submit the present dispute to arbitration in accordance with the Kuala Lumpur Regional Centre of Arbitration i-Arbitration Rules (“KLRCA i-Arbitration Rules”).

STATEMENT OF FACTS

Background of AID

Asamura International Development Co., Ltd. (AID) was founded in 1958 in Tokyo, Japan by Atsuko Asamura. AID is a private international development company specializing in crisis relief and development, assisting bilateral donors and the private sector to manage projects in developing countries. Dr. Yugi Asamura is married to Dr. Fiona Lum who is the President of Second Life, a regional organization which champions for human rights.

Agreement between AID and SPT for jade mining

U. Thein Kyaw being unfamiliar with jade exploration and production contacted Dr. Yugi Asamura anticipating a partnership between AID and SPT. Dr. Asamura intending to expand AID's work and impact, entered into negotiations with SPT. Dr. Asamura wanted to draw up an investment agreement drafted by lawyers but U Thein Kyaw rejected the proposition. U Thein Kyaw, although reluctant, eventually drafted a partnership agreement with Dr. Yugi Asamura. Under the agreement, AID would purchase the machinery and equipment from Japan which will be imported by SPT. SPT also obtained the necessary jade mining and equipment permit from government.

JADEYE software

JADEYE is a process optimization and operations management software developed by Joe Yamshita, who was a finance executive in Myanmar, while he was seconded at

Myanmar. JADEYE allows the users to test the quality and viability of jade and also to determine the scalability and economic value of the site. U Thein Kyaw, pleased by JADEYE, presented Joe Yamashita with USD 18,000 in cash. Joe Yamashita declined the cash, and said that JADEYE was “for the benefit of all of us”. Joe Yamashita during exit clearing process, gave the JADEYE software saved in a hard drive together with other documents and handed to the head of finance of AID in Tokyo. After termination of the agreement, AID refused to provide SPT the source code of the software to which SPT threatened it will reverse engineer the software. Subsequently, the ownership of JADEYE software became a matter of dispute.

Asian Influencers Magazine interview

In the interview with Asian Influencers Magazine, Dr. Fiona Lum and Yugi Asamura were asked about their views on the plea of the Rohingya minority, given Dr. Fiona’s position in Second Life. To which she answered saying that the new government should end the problem of ethnic cleansing immediately. This statement led to wide-scale protests and 102 workers went on strike.

Termination of agreement by SPT

After the United States lifted its trade sanctions against Myanmar, the government made an announcement that the existing jade permits will not renewed until legal reforms are implement. Subsequently, U Thein Kyaw was approached by Patrick Green, an American businessman, who expressed his interest in forming a new partnership with SPT in regard to the jade business. U Soe Myint informed U Thein Kyaw that the morale of the employees and

students are at an all-time low, as they have lost respect for their Japanese counterparts after the interview and strongly recommended U Thein Kyaw to end the partnership with AID. Agreeing with him U. Thein Kyaw asserted self-sufficiency of SPT in managing the jade venture and decided to terminate the agreement.

Agreement to resolve dispute through arbitration

As a result of termination differences arose between SPT and AID with regards to the ownership of jade machinery, equipment and in particular JADEYE software further AID alleged that the termination by SPT being a premature one, entitled AID to claim compensation. Being unable to settle their differences the parties went to Farid Zakwan who recommended the parties to go for arbitration at Kuala Lumpur regional Centre for Arbitration. Adhereing to the request made by Yugi Asamura parties agreed to attend Arbitartion in Tokyo using the KLRCA i- Arbitration Rules.

ISSUES PRESENTED

The following questions are presented before the Arbitral Tribunal for its consideration:

1. Whether or not the Partnership Agreement between the AID and SPT was validly terminated?
 2. Whether or not SPT has the title to jade mining equipment and machinery?
 3. Whether the ownership of rights in the JADEYE software vests in AID or SPT and whether SPT can reverse engineer the software?
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SUMMARY OF PLEADINGS

I. THE TERMINATION OF AGREEMENT BY SPT IS INVALID.

The association between AID and SPT by is a joint venture formed for the purpose of Jadeite exploration and manufacture and was supposed to end on expiry of license i.e. when the purpose of the venture was fulfilled. Since AID was incorporated in Japan therefore, Japanese law governs the liability of Fiona Lum. SPT did not acquire the right to terminate the agreement specifically, since AID's act was not in violation of clause 11 of the Partnership Agreement as alleged by SPT. Therefore, it did not give SPT right to terminate the agreement. Since the termination by SPT is invalid, it is liable to pay compensation.

II. SPT HOLDS TITLE TO THE JADE-MINING EQUIPMENT AND MACHINERY

Estoppel in representation in commercial law operates to transfer title in the goods. AID has made a representation in estoppel by not asserting its title to the jade mining equipment and machinery. Further, AID intended for SPT to act on this representation which can be ascertained through the partnership agreement and the relevant facts. Subsequently, SPT changed its position by relying on this representation and will face detriment if AID is allowed to resile from the representation. Thus, AID is estopped from denying title in goods to SPT.

III. SPT HAS THE RIGHT TO USE THE SOFTWARE GIVEN TO IT UNDER AN IMPLIED LICENSE BY JOE YAMASHITA. AND SPT CAN REVERSE ENGINEER THE SOFTWARE.

The software is not created in pursuant to an employment relationship between AID and Joe Yamashita and thus Joe Yamashita is the lawful author of the software. The right to use the

software was transferred by Joe Yamashita under an implied license to SPT. Even when SPT has no rights under the software, it can reverse engineer the software.

PLEADINGS

1. THE TERMINATION OF AGREEMENT BY SPT IS INVALID

1. The association between AID and SPT was a joint venture partnership formed for the purpose of Jadeite Exploration. The venture-partnership was bound by the partnership agreement and is governed by relevant legislation and case laws as well as basic inherent principles of partnership and agency. In order to determine the liability of Fiona Lum it is necessary to determine laws applicable in case of apparent conflict. Due to reasons established below **(A)** Japanese law shall govern the liability of Fiona Lum. Japan being a Civil Law country, common law principles and authorities are not applicable. **(B)** SPT did not acquire a right to terminate the agreement. **(C)** Since, SPT terminated the agreement before the expiration of mining license, AID is entitled to get compensation.

A. JAPANESE LAW GOVERNS THE LIABILITY OF FIONA LUM.

2. AID being a Japanese company and was incorporated under the appropriate law of Japan. Therefore, Japanese law governs the internal management of the company and therefore, also governs the liability of Fiona Lum.
3. In contrast to the real seat theory, Incorporation theory, followed by Japan, states that a foreign company created in accordance with a foreign legal system and having its statutory seat (i.e. registered office) in a foreign state is recognized as such by the host state in which such company operates. In other words a company is governed by laws under which it was duly established.¹ In *Grupo Torras SA v. Al-Sabah*, it was held that the law of the place of incorporation determines the composition and powers of the organs of the company and the formalities and procedure laid down for them.² The relevant cases also establish that law of

¹ Simon Mortimer, *Company Directors Duties, Liabilities and Remedies* (Oxford University Press, 2013, 2nd Ed) at p1000.

² *Grupo Torras SA v. Al-Sabah* [1996] 1 Lloyd's Rep 7,15.

place of incorporation determines whether directors have been validly appointed,³ who are corporation's officials authorized to act on its behalf,⁴ extent of an individual member's liability for the debts or engagements of the corporation.⁵

4. Japanese Companies Act states that- "The formation, organization, operation and management of companies shall be governed by the provisions of this Act, except as otherwise provided by other acts."⁶ Further, as per Japan Companies act, "Foreign Company" means such any juridical person incorporated under the law of a foreign country or such other foreign organization that is of the same kind as the Company or is similar to a Company.⁷
5. Asamura International Development Co., Ltd. (AID) was founded in 1958 in Tokyo, Japan by Atsuko Asamura. As clearly mention in the facts, AID being a Japanese company is governed by the provisions of the Japanese Companies Act, 2005 by the virtue of Article 1 of the Companies Act. Further in case of conflict of laws, Incorporation theory will be applicable as held by *Grupo Torras* case and the same is followed by Japan, evident from the language of Article 2(ii).
6. Evident from the aforementioned reasons and authorities, the Japanese law governs the liability of Fiona Lum.

B. SPT DIDN'T ACQUIRE THE RIGHT TO TERMINATE THE PARTNERSHIP.

7. For a party to repudiate a partnership agreement it is important (other than in case of partnership by will) that a term being of essence of the partnership has been breached.⁸

³ *Seirra Leone Telecommunications Co. Ltd. v. Barclays Bank plc* [1998] 2 All E.R. 821.

⁴ *Banco de Bilbao v. Sancha and Rey* [1938] 2 K.B. 176 (C.A.); *Carl Zeiss Stiftung v. Rayner & keeler Ltd* (No. 2) [1967] 1 A.C. 853, 919, 939, 972.

⁵ *Risdon Iron and Locomotive v. Furness* [1906] 1 K.B. 49 (C.A.) ; *Johnson matthey and Wallace Ltd. v. Ahmad Alloush* (1985) 135 N.L.J. 1012 (C.A.) ; *Seirra Leone Telecommunications Co. Ltd. v. Barclays Bank plc* [1998] 2 All E.R. 821; see also, Lawrence Collins, *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell, 2000, 13th Ed) at p1112.

⁶ Article 1, Companies Act, (No. 86 of 2005) (Japan).

⁷ Article 2(ii), Companies Act, (No. 86 of 2005) (Japan).

⁸ *Roderick I'anson Banks, Lindley & Banks on Partnership*, (Sweet & Maxwell, 2010, 19th Ed) at p793. ("Lindley and Banks")

Clause 11 was not breached by AID because [1] Fiona Lum gave the statement in the capacity of the president of Second Life not as the non-executive director of AID. [2] even if clause 11 was breach, clause 11 being an in-nominate term does not confer upon SPT the right to repudiate. Therefore, SPT never acquired a right to repudiate the partnership agreement.

i. Statement made by Fiona Lum is not violative of clause 11 of the partnership agreement

8. Fiona Lum made the statement as the president of Second Life and not in the capacity of the non-executive director of AID.
9. The parties to a partnership apart from the partnership agreement are also bound by the inherent rules of vicarious liability under which a person cannot be made liable for his acts outside the scope of his employment, scope of employment here shall be subject to facts and circumstances of the case.⁹ The relationship between a company and its company representatives is governed in Japan by the principles of agency.¹⁰ As an agent for the company, a company representative has an obligation to conduct the affairs of the company with the care of a ‘good manager’ (the duty of care).
10. As per the facts in the interview with the Asian Influencers Magazine. Yugi Asamura and Dr. Fiona Lum were asked about their views on the plea of the Rohingya minority in the Rakhine state, given their existing business involvement in Myanmar and Dr. Fiona’s position in Second Life. Dr. Fiona Lum answered that “Everyone must work together to end the persecution of the Rohingyas, and the new Myanmar government under the leadership of Daw Su must end the problem immediately. Especially the ethnic cleansing. They should not be deprived of their basic human rights. We will continue to champion for their rights.”

⁹*Ibid.*

¹⁰ Stephen D. Bohrer, Yuko Inoue and Hiroko Jimbo, “Legal Developments for Directors and Officers in Japan”, Executive Risks – A boardroom guide 2010/2011.

11. It is important to note that Fiona Lum in furtherance of the Philanthropic pursuits became the President of Second Life, a regional organization which champions for human rights.¹¹ Therefore, the statement made by Fiona Lum must be construed as a statement made by her in the capacity of the president of second life also evident by asserting “we will continue to campaign for their rights”, in the statement she made. The question asked in the interview, given Fiona Lum’s and Yugi Asamura’s existing business involvement in Myanmar can be understood to be referring to Fiona Lum position in second life which can be drawn from her statement made in furtherance of the question. It is also to be noted that Fiona Lum is a non-executive director of AID, which means that she by virtue of her position does not have much involvement in day to day business and affairs of the venture, thus balance of probabilities supports the contention that she made the statement in the capacity of president of second life thus, outside the scope of duty of the non-executive director of AID.
12. Since it has been established that Fiona Lum gave the statement in the capacity of the president of Second Life and not as the non-executive director of AID therefore, she did not violate the clause 11 of the Partnership Agreement as she was not bound by clause 11 at the first place, it being outside the scope of duty.

ii. Clause 11 is an in-nominate term of the agreement

13. Even if it is presumed that clause 11 of the partnership agreement was breached by AID, it still does not give SPT the right to repudiate for it being an innominate term of the agreement.
14. The innominate term approach was established in the case of *Hong Kong Fir Shipping*.¹² Rather than classifying the terms themselves as conditions or warranties, the innominate term approach looks to the effect of the breach and questions whether the innocent party to the breach was deprived of substantially the whole benefit of the contract. Only where the

¹¹ Refer paragraph 5.

¹² *Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha* [1962] 2 QB 26.

innocent party was substantially deprived of the whole benefit, will they be able to treat the contract as at an end.¹³

15. As the facts suggest that U. Thein Kyaw being reluctant to form a formal agreement eventually agreed to enter into one after request by Yugi Asamura.¹⁴ U Thein Kyaw was later approached by Patrick Green, an American businessman, who made him a lucrative offer which included a profit split of 85% for SPT, and 15% for his company. Green also promised to provide a team of qualified English teachers from the United States to teach English at SPT's training centres. He also promised a scholarship to a deserving student at one of SPT's training centres. U Soe Myint, one of his closest confidantes of U. Thein Kyaw informed him that the morale of the employees and students are at an all-time low, as they have lost respect for their Japanese counterparts and strongly recommended U Thein Kyaw to end the partnership. Agreeing with him U. Thein Kyaw also asserted self-sufficiency his company having ample equipment and skills and futility of control and involvement by AID.

16. The abovementioned facts show that U. Thein Kyaw terminated the agreement to avail the lucrative offer proposed by Patrick Green and not due to the statement of Fiona Lum. As conduct of parties while forming the agreement show that the parties intended the terms in the agreement to be innominate terms. Thus, the alleged breach of clause 11 was not substantive enough to entitle a party to repudiate the agreement and therefore, clause 11 being an innominate term, does not give SPT the right to terminate in the instant case.

**C. SINCE THE TERMINATION BY SPT WAS INVALID TERMINATION THEREFORE, SPT IS
LIABLE TO PAY COMPENSATION.**

¹³ *Lindley and Banks* at p 407.

¹⁴ Factsheet, para 15.

17. Since SPT did not acquire the right to repudiate the partnership agreement therefore, the termination of partner agreement being a premature termination entitles AID to claim for damages.
18. Facts mention that SPT obtained the necessary jade mining and equipment permit from the government to ensure the smooth flow of works at the jade field. The granted permit was due to expire on 31 March 2019. On 10 January 2017, U Thein Kyaw made up his mind to end the partnership between AID and SPT where Dr. Yugi Asamura was informed of U Thein Kyaw's decision to end the partnership.
19. There can be no doubt that the innocent partner's right to damages in respect of a repudiatory breach is not affected by his acceptance of repudiation and the consequent dissolution of the firm, as the court of appeal and house of lords recognized in *Hurst v. Byke*.¹⁵
20. As per the facts of this case the repudiation at most precipitated a premature dissolution, Brown L.J. in his judgement adverted to the fact that any additional expenses arising out of termination would be recoverable, as well as would damages with respect of acceleration of such expenses.¹⁶
21. In this case the association was a joint venture partnership and was supposed to end on the expiry of mining permit however it was terminated before the expiry of the permit, hence was a premature termination and would result to losses to AID, on the account of their contract with HCL for manufacture of Jadeite Souvenirs.¹⁷ Further, as established above that SPT didn't have a right to terminate the agreement. Due to all these reasons interpreted in the light of the abovementioned authorities, we can conclude that, the **Termination by SPT was an invalid termination thus entitling AID to claim compensation.**

2. AID HOLDS ABSOLUTE TITLE TO THE JADE-MINING MACHINERY AND EQUIPMENT

¹⁵ *Hurst v. Byke*, [2002] 1 A.C. 185 (HL).

¹⁶ *Ibid.*

¹⁷ Factsheet, para 35.

22. AID has purchased the jade-mining machinery and equipment by paying the purchase price in its individual capacity. The purchased machinery and equipment was merely AID's contribution to the joint venture along with the technical expertise. SPT only had the right to use the machinery and equipment whereas AID had effective control over it.
23. We submit before the tribunal that, AID has title to the goods (A) and AID has not transferred the title to the goods to SPT (B).

A. AID HAS TITLE TO THE JADE-MINING EQUIPMENT AND MACHINERY

24. It is contended that, even if the partnership agreement does not conclusively ascertain ownership of the jade-mining equipment and machinery; the title to the goods can be ascertained from the fact that AID sourced and purchased the goods for consideration on its own.

i. The title to the goods will be determined by the Japanese Law

25. The title to the goods will be ascertained by the Japanese law since the equipment and machinery were purchased from Japan and is thus, the situs of the goods.
26. In private international law, the lex situs of the goods determines the title in goods.¹⁸ Law of the situs determines the creation of original acquisition of title to tangible movable property.¹⁹ The validity of interest is to be assessed with reference to the law of situs as opposed to the law governing the agreement. ²⁰In the instant case, AID sourced and purchased for the jade-mining equipment and machinery from Japan. Since, the lex situs of the goods is Japan, Japanese law will govern the ownership of the goods.

ii. AID has acquired title to goods by purchase of the goods

¹⁸ *Winkworth v. Christie, Manson and Woods Ltd.* [1980] Ch. 496.

¹⁹ *Glencore International AG v. Metro Trading International Inc.* [2001] 1 Lloyd's Rep 284 at 296.

²⁰ JH Dalhuisen, *Dalhuisen on International and Comparative Commercial, Financial and Trade Law* (Hart Publishing, 2007, 3rd Edition) ("Dalhuisen") at p 702.

27. AID purchased the machinery and equipment, reconditioned it and then supplied the goods for use in the jadeite venture, all of which was done by AID in its individual capacity. Further, it also held the receipts and invoices for the purchase of these goods in which SPT did not contribute.
28. Under Article 555 of the Japanese Civil Code, sale of goods take place when one of the parties promises to transfer real rights to the party in lieu of promise to pay the purchase money. Further, Article 178 stipulates perfection of ownership against third parties through delivery of goods.
29. In the following factual scenario, AID, in its individual capacity, has paid consideration in money for purchasing the jade-machinery and equipment and the goods were also delivered to it.²¹ This clearly affirms their position as the owner of the goods as per the Japanese Law and no alternative inference can be drawn. To further evidence this contention, AID also holds the receipts and invoices for the purchase of the machinery and equipment.²²
30. Thus, AID, as per the Japanese Law, has acquired ownership of goods and consequently, is conferred with an absolute interest in the goods against third parties.

B. AID HAS NOT TRANSFERRED TITLE IN THE GOODS TO SPT

AID has not transferred title in the goods since **(i)** there is no transfer of title in the goods under the agreement and **(ii)** the acquiring of permit does not confer a valid title to goods and **(iii)** there is no transfer of title to goods by transferring the bill of lading to SPT.

i. Under the agreement, there is no transfer of title by AID

a) The construction of the agreement does not contemplate a transfer of goods

²¹ Additional Clarifications, Question 8.

²² Additional Clarifications, Question 27.

31. The partnership agreement cannot be interpreted to contemplate a transfer of title in goods and consequently, SPT's claim of ownership in goods is unreasonable.
32. The joint venture between AID and SPT being a partnership joint venture, the agreement will be construed according to the ordinary rules of construction of commercial documents.²³ General principles of partnership law (here, of Myanmar) apply to every partnership agreement unless these have been expressly excluded in the agreement.²⁴ A commercial document is interpreted by ascertaining of meaning which will be understood by a reasonable man aware of all the background knowledge available to the parties.²⁵ Anything which might affect the understanding of the language of the document by a reasonable man is background knowledge as mentioned above²⁶.
33. In the instant case, Clause 4 of the partnership agreement stipulates that AID will "buy and provide" the equipment for the "term of the agreement".²⁷ In pursuance of this contractual obligation, AID sourced for second hand machinery, purchased them and reconditioned them for use at Hpkant mine.²⁸ Since, AID was in-charge of the part of the venture which involved extracting and cutting the jade, the equipment and machinery was under its effective control and was only being operated by SPT employees. SPT only supplied man-power for this activity of the venture. SPT entered into a JV with AID for the very purpose of using its experience in jade exploration and production. AID's role was to facilitate jade-mining and not supplying machinery and equipment for the jade-mining.
34. By the application of the ordinary rules of construction to the aforementioned clause, it can be reasonably understood that the machinery would be bought by AID and provided to SPT as long as the agreement subsists, thus conferring SPT a mere right to use. It is unreasonable

²³ *Lindley and Banks* at p 137.

²⁴ *Re White* [2001] Ch 393 at 401H.

²⁵ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All E.R. 98.

²⁶ *Ibid.*

²⁷ Annexure I, Clause 4.

²⁸ Factsheet, para 16.

for SPT to claim ownership over the goods which essentially belong to AID. There is nothing indicating an intended transfer in the document governing their commercial relationship. Further, AID has purchased and reconditioned the machinery which should be understood with it being in charge of cutting and extracting the jade and its role in the joint venture. A reasonable man, from the background provided, would clearly identify that the goods were given to SPT for mere usage without conferring title to them.

35. In conclusion, it can be reasonably inferred from Clause 4 as understood with the factual background, that AID holds title to the goods and were provided to SPT for use until the partnership agreement subsists.

b) There is no contract of sale between AID and SPT

36. The agreement between AID and SPT does not fulfill the essential requisites to constitute a contract of sale and consequently, there cannot be a transfer of title to SPT by the means of sale under the partnership agreement.

37. Indian decisions interpreting the codes shared by Myanmar and India, along with English decisions interpreting English Law are extremely persuasive authority.²⁹ In the instant case, SOGA being a shared legislation, decisions of Indian courts will have a high persuasive value.

38. Section 4 of the Sale of Goods Act, 1930 (“SOGA”) of Myanmar states that,

“A contract of sale of goods is a contract whereby the seller *transfers or agrees to transfer* the property in goods to the buyer for a *price*” (emphasis added)

²⁹ Alec Christie, “The Rule of Law and Commercial Litigation in Myanmar, Pacific Rim Law and Policy Journal” Vol. 10 No. 1 (2000) at p 50.

39. For an agreement to constitute a contract of sale the pre-requisites are (a) an agreement between parties to transfer title to goods (b) which is supported by consideration in money and (c) the actual passing of property in goods to the buyer.³⁰
40. In the instant case, the partnership agreement between parties does not constitute a contract of sale. This is because the agreement does not indicate that title in the goods was to be transferred to SPT.³¹ Subsequently, there is no payment in money made by SPT to AID in respect of the jade-mining machinery and equipment.³² None of the requirements prescribed by the SOGA is fulfilled in this case and thus, the partnership agreement does not constitute a contract of sale.
41. To conclude, since there is no contract of sale between parties there is no transfer of title to SPT through sale.

ii. Importing and acquiring permits for operating the machinery and equipment does not transfer title to goods

42. SPT being recorded as the importer and having acquired permit to operate the machinery and equipment does not hold a better title to the goods than AID, which is the owner of the goods.
43. A license, as held by Indian courts, does not create interest in the property and merely permits its use. There is no parting with possession as the legal possession continues with that of owner.³³ A permit is also a license.³⁴ Further, in *State of Andhra Pradesh v. M/S Rashtriya Ispat Nigam Ltd.*,³⁵ the Supreme Court of India was deciding on possessory right of a contractor vis-à-vis effective control of the owner respondent company. It held that since the

³⁰ *Hindustan Aeronautics Limited v. State of Karnataka* AIR 1984 SC 744 at p 750.

³¹ Refer 2.1.

³² Clarifications, Question 5.

³³ *The Indian Hotels Company Ltd. v. New Delhi Municipal Council*, 2016 SCC OnLine Del 5006.

³⁴ Bryan A. Garner, *Black's Law Dictionary* (8th Edition, 2004).

³⁵ *State of Andhra Pradesh v. M/S Rashtriya Ispat Nigam Ltd.*, (2002) 3 SCC 314.

contractor was not free to make use of machinery other than the project work, the effective control of the machinery remained with the owner-company. Additionally, court negated the contention that the condition of responsibility of contractor while in custody of machinery, affects the effective control of the owner.

44. In the instant case, SPT has acquired the jade-mining and equipment permit from the government.³⁶ The objective of entering in a joint venture was to utilize the jadeite resources available on the land belonging to U Thein Kyaw with AID's experience in jade exploration and production.³⁷ AID was in charge of the extracting and cutting activities of the venture³⁸, for which the jade-mining equipment and machinery were used.³⁹ AID placed its 25 employees at Hpkant base for the purpose of operating some machinery, to take charge of geological survey and prospecting and also to train SPT employees and student in operating the machinery and imparting technical knowledge to them.

45. It is contended that, the acquiring of permit for the jade-mining equipment and machinery by SPT does not confer any title to the goods. The permit is merely a certificate evidencing permission by the government for the enabling jade production and importing machinery in Myanmar. The joint venture grants SPT effective access to AID's technical skills and experience in lieu of SPT providing AID entry in Myanmar.

46. AID is in charge of activities of involving extracting and cutting jade. The machinery and equipment is also used in these activities indicating that AID has effective control of the machinery. Though SPT's employees were trained in operating and maintaining the machinery, it simply goes on to mean that SPT employed the man-force for mining purposes. This is in consonance with its primary objective of entering into the joint venture for creating

³⁶ Factsheet, para 19.

³⁷ Factsheet, para 12.

³⁸ Annexure I, Clause 6.

³⁹ Additional Clarifications, Question 11.

jobs and imparting new skills in its students. This fact does not militate against AID's ownership of the goods.

47. If the tribunal decides in favor of SPT, the decision will have far reaching adverse impact on commercial dealings between companies. This is because by entering into a joint venture, company in host country would effectively gain title to goods (simply by acquiring permits) owned by foreign company which will for all practical purpose acts as detriment for the foreign companies to enter into such partnership.

48. In conclusion, SPT, merely by importing and acquiring permits for the machinery and equipment, does not acquire title to the property in the goods and hence, does not have ownership of the goods.

iii. Transfer of bill of lading to SPT does not pass title to the goods

49. The bill of lading addressing SPT as consignee for the goods does not transfer property in goods to SPT.

50. The status of a bill of lading as a document of title is determined by the law of the country of origin of the bill.⁴⁰ In a bill of lading, matters of procedure will be governed by the domestic law of the land whereas the foreign law governs the fundamental or substantive rights of the parties to a suit which is an entrenched precept of the conflict of laws.⁴¹ Domestic law would operate to determine if rights under a bill of lading had been transferred and any foreign choice of law clause contained in the bill of lading will not operate to override the domestic law in relation to establishing this.⁴² Consequently, Japanese Law will apply in determining the character of the bill of lading.

⁴⁰ Dalhuisen at p 757.

⁴¹ Sumitra Woodull, "The Implications of Conflict of Law upon International Trade and Transactions and as observed from a Malaysian Context – An Overview" at p 39.

⁴² Nick Francis, "Transferring Rights Of Suit Under Bills Of Lading : The Conflict Of Laws Implications".

51. Under Articles 575 of the Commercial Code, transfer of a bill of lading operates merely as a transfer of possession of goods and is representative of indirect possession.⁴³ The concept of ‘document of title’ in bills of lading is not present in Japanese law.⁴⁴
52. In the instant case, SPT being endorsed as the consignee on the bill of lading⁴⁵ is merely indicative of indirect possession of goods. Thus, the character of the bill of lading is not one of document of title (since Japanese Law does not recognize it as such).
53. To conclude, there is no transfer of title to SPT by transferring bill of lading since Japanese Law does not recognize bill of lading as a document of title.

C. AID IS NOT ESTOPPED FROM DENYING SPT’S TITLE TO THE GOODS

54. AID is not estopped from denying SPT’s title to the goods since SPT has not relied on the representation made by AID viz. SPT is the owner of machinery and equipment on the permits.
55. For estoppel to operate there must be a change in position of the representee based on the representation made.⁴⁶The representee should act in such a way as she would not have done had the representation was not made.⁴⁷A causative link should be established between the representation made and the actions which may lead to detriment.⁴⁸Conduct following representation is not proof of causation.⁴⁹
56. In the instant case, though AID was aware of SPT being recorded as the owner and importer of the machinery⁵⁰, nothing in the facts indicate that SPT has changed its position based on this representation. The proposal by Patrick Green was never accepted by SPT and thus, it

⁴³ Alexander von Ziegler, Charles Debattista, Audile B.K. Plegat and Jesper Windhal, *Transfer of Ownership in International Trade* (Kluwer Law International, 2011, 2nd Edition) at p 268.

⁴⁴ *Ibid.*

⁴⁵ Additional Clarifications, Question 25.

⁴⁶ *H Clark (Doncaster) Ltd. v. Wilkinson* [1965] Ch 694 CA at 702.

⁴⁷ *Bell v. Marsh* [1903] 1 Ch 528 CA at 541 and 543.

⁴⁸ Sean Wilken, *Wilken and Villiers on The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2002, 2nd Edition) at [9.78].

⁴⁹ *Lowe v. Lombank* [1960] 1 WLR 196 CA at 207

⁵⁰ Clarifications, Question 14

involved no change of position. Additionally, the hiring of 250 new workers and engaging 50 students, was simply incidental to SPT acquiring permit. In any case, SPT hiring workers and engaging students is not consequential to it being the owner of the machinery and equipment.

57. In conclusion, SPT has not relied on AID's statement to change its position and thus, AID cannot be estopped from denying title in goods to SPT.

3. AID HAS OWNERSHIP RIGHTS IN THE JADEYE SOFTWARE

58. Joe Yamashita is an employee who works for AID. In his course of employment he makes a software which is installed on the computers and equipment in Myanmar. Because Japanese law governs the employment relationship between AID and Joe Yamashita, it governs the initial title and ownership of rights issue. AID is thus the lawful author of the software. The Japanese law prohibits reverse engineering which the SPT is threatening to do if ownership of rights is not provided to them.

59. We submit before the tribunal that, the applicable procedural law to the arbitration is Japanese law and the law governing the initial ownership of the software would be Japanese law (A). According to the Japanese law, AID is the author of the software as it is created in pursuant to an employment relationship by Joe Yamashita (B). Applicable law in the matter of infringement would again be Japanese Law (C) and according to it SPT cannot reverse engineer the software (D).

A. THE APPLICABLE PROCEDURAL LAW TO THE ARBITRATION IS JAPANESE LAW.

60. The Claimant, the Asamura International Development Co. Ltd. ("AID") and the Respondent, the Shwe Pwint Thone Co., Ltd. (SPT) have agreed that Japan is the seat of the present arbitration (i). As such, the procedural laws of Japan shall apply (ii).

i. Japan is the seat of present arbitration.

61. The place of arbitration bears the same meaning as seat of arbitration in letter and spirit.⁵¹
62. The Parties have decided to have their arbitration held in Tokyo, Japan and that the KLRCA Rules shall apply⁵². This is equivalent to specifying the seat of arbitration. Accordingly, the seat of the arbitration is Japan.

ii. The procedural laws of Japan apply to this dispute.

63. Since the arbitration is seated in Japan, the procedural laws of Japan apply to this dispute. The seat governs not merely the venue of the arbitration, but also serves as the connection between the arbitration and the procedural laws of that country.⁵³
64. Thus, the procedural laws of Japan will govern the dispute since the parties have chosen Japan as the seat of the arbitration.

B. JAPANESE LAW WILL GOVERN THE INITIAL OWNERSHIP OF THE RIGHTS IN SOFTWARE

65. The initial ownership of rights in the software will be governed by the Japanese Law which is in accordance with the widely accepted international principles on conflict of laws (on intellectual property).
66. The Arbitral Tribunal refers to the conflict of law system prevailing at the place of arbitration (lex arbitri) in this case Japan⁵⁴. The Private International Law of Japan does not contain specific provisions governing the initial ownership of rights in the intellectual

⁵¹ *Redfern and Hunter on International Arbitration* (Oxford/New York: Oxford University Press, 2009, 5th Ed) (“*Redfern and Hunter*”) at [1.21].

⁵² Factsheet, para 46.

⁵³ *Redfern and Hunter* at [3.56], citing Claude Reymond, “Where is an Arbitral Award Made?” (1992) 106 LQR 1 at 3.

⁵⁴ Filip De Ly, “The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning”, 12 Nw. J. Int’l L. & Bus. 48 (1991-1992).

property⁵⁵. Therefore, widely accepted international principles are to be referred for determining the applicable conflict of law rules to the initial ownership of software.

67. The American Law Institute (ALI) Principles,⁵⁶ states that initial title to rights not arising out of registration is governed by the law of the creator's residence at the time the subject matter was created.⁵⁷ Also, if the subject matter is created pursuant to an employment relationship, the law of the state that governs the relationship will govern the initial title.⁵⁸ The "residence at the time of the work's creation" is not the same criterion as "place of creation."⁵⁹ The residence is to be made out on the basis of circumstances of a personal or professional nature that show durable connection to that residence or indicate the will to create such connections. Additionally, Article 6 of the Rome Convention, 1980⁶⁰ stipulates that "in the absence of a choice of law by the parties, the law of the place where the employee habitually carries out his work is applicable to the contract of employment, even if he is temporarily employed in another country."

68. In the instant case, 25 AID employees were placed in Myanmar on secondment from Japan.⁶¹ The creation of the JADEYE software took place mainly in Myanmar.⁶² Joe Yamashita, creator of the JADEYE, was one of those 25 employees on secondment⁶³, whose salary was being paid by AID.⁶⁴

⁵⁵ Horei, Act on the Application of Laws (No. 10 of 1898) (Japan), Translation by Kent Anderson and Yasuhiro Okuda.

⁵⁶ Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, The American Law Institute. ("ALI Principles")

⁵⁷ Section 313(1) (a), ALI Principles.

⁵⁸ Section 313(1) (c), ALI Principles.

⁵⁹ Comments under Section 313(1) (a), ALI Principles.

⁶⁰ Convention on the Law Applicable to Contractual Obligations (1980), Official Journal of the European Communities, (98/C 27/02). ("Rome Convention, 1980")

⁶¹ Factsheet, para 16

⁶² Additional Clarifications, Question 15.

⁶³ Additional Clarifications, Question 17

⁶⁴ Additional Clarifications, Question 14

69. Though Joe Yamashita had mainly created the software in Myanmar, his place of residence will be Japan since he was an employee of AID merely deputed to Myanmar for the purpose of the venture. Further, AID, a company incorporated in Japan, was paying his salary. Also, the fact that he gave the source code of the JADEYE along with other documents to Head of Finance indicates that he reported for his duties to AID. Also, if the JADEYE software was created in pursuant to the employment relationship, Japanese law would govern the initial ownership since it governs the relationship between AID and its employee.
70. To conclude, Japanese law would govern the initial ownership to the software since the creator's residence at the time of the creation is Japan.

C. AID IS THE AUTHOR OF JADEYE SOFTWARE AS THE SOFTWARE IS CREATED UNDER AN EMPLOYMENT RELATIONSHIP.

71. Article 15(2) of the Copyright Law of Japan, 1970⁶⁵, states that the authorship of the work (computer program) rests with the employer if:

- 1) The work was created on the initiative of the legal person etc.
- 2) It was created by an employee of the legal person in the course of his duties and
- 3) It is not otherwise stipulated in the internal rules or work regulations of the legal person.

72. Besides patents, employers generally own intellectual property stemming from employee creative output related to the employer's work—meeting employer expectations. Typically, this includes output protectable through copyright, trademark, and trade secret laws,

⁶⁵ Article 15(2), Copyright Act (No.48 of 1970) (Japan).

regardless of the type of inventive role of the employee.⁶⁶ Thus, it can be ascertained that an employee need not belong to the technical department for him/her to develop software and subsequently come under the ‘course of duty’.

73. In the instant case, Joe Yamashita, a finance executive employed by AID, was developing process optimisation and operations management software.⁶⁷ Dr. Yugi Asamura, head of AID, was informed about the same.⁶⁸ Subsequently, on successful completion of the trial tests the software was installed in all the computers and equipment used on the mining sites.⁶⁹ On tendering his resignation, he handed over the source code of JADEYE along with other documents to the Head of Finance in Tokyo.⁷⁰

74. Though the idea of the software came independently in the mind of Joe Yamashita⁷¹ but he nevertheless informed Dr. Yugi Asamura of his idea and took approval from him before completing it.⁷² Not only this but also the trial tests were conducted after its completion and it was ordered to be installed in all the equipment and computers in Myanmar after the trial results were positive. Thus, AID has control over development of software and the actions of employee. It implies that the whole process was an assignment. Thus, it was being developed on the initiative of AID because had AID been not involved in it the idea of the software wouldn’t have been executed.

75. It is also not necessary for him to be of any technical or inventive department to invent a software so that it comes under his ‘course of his duties’.

⁶⁶ Parker A. Howell, “Whose invention is it anyway? Employee Invention-Assignment Agreements and their Limits”, 8 Washington Journal of Law, Technology & Arts, 79 (2012), p 85.

⁶⁷ Factsheet, para 21.

⁶⁸ *Ibid.*

⁶⁹ Factsheet, para 23.

⁷⁰ Factsheet, para 25.

⁷¹ Additional Clarifications, Question 26.

⁷² Factsheet, para 21.

**D. THE APPLICABLE LAW REGARDING THE INFRINGEMENT OF COPYRIGHT WOULD BE
JAPANESE LAW.**

76. Private International Law of Japan contains no specific provisions on choice of law relating to copyright issues.⁷³ This means that the Japanese private international law rules of ‘general application’ have to be applied to the specific area of infringement.⁷⁴ The Intellectual Property is connected to the general principle of tort where it’s infringement is same as Conversion or Trespass to Goods, Negligence etc.⁷⁵ The general principle of tort in Japan’s Private International Law is the ‘*lex loci delicti*’ principle, contained in Article 11⁷⁶ which states that the governing law will be the place where the tort was committed.

77. There are limited restrictions applied on the applicable law so that it is bona fide and not contrary to the public policy⁷⁷ . In *Soleimany v Soleimany*,⁷⁸ the English Court of Appeal refused to enforce an award where the transaction was not illegal under the applicable law, but was illegal under English law.

78. Also Article 33⁷⁹ of the Japan’s Private International law rules states that:

“Where a case shall be governed by a foreign law but application of those rules would be contrary to public policy (ordre public), those rules shall not apply.”

79. The test for violating public policy, as laid down in *Loucks vs. Standard Oil Co.*, is that the law should “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁸⁰

⁷³ *Supra* n 56.

⁷⁴ James J. Fawcett & Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 1998) at p597.

⁷⁵ Garg, Richa, “Tort in Intellectual Property” (September 5, 2010).

⁷⁶ *Supra* n 1 at Article 11[1].

⁷⁷ *Redfern and Hunter on International Arbitration* (Oxford/New York: Oxford University Press, 2009, 5th Ed) at [3.105].

⁷⁸ *Soleimany v Soleimany*, [1999] QB 785.

⁷⁹ *Supra* n 56.

80. The JADEYE software in question was used in Myanmar and that is the place where the infringement will happen if SPT is allowed to reverse engineer the software (*lex loci delicti*)
Therefore, Myanmar law should be applied.
81. However, Myanmar does not have adequate intellectual property rights protection. Patent, trademark, industrial design, and copyright laws and regulations are antiquated and deficient, and there is minimal regulation and enforcement of existing statutes⁸¹. The registration of patents and designs in Myanmar is still governed by the Indian Patents and Designs Act of 1911, enacted under British colonial rule. Myanmar has Copyright Act of 1914 as its copyright law legislation, which is a colonial era law. **Consequently, there is no legal protection in Myanmar for foreign copyrights.** AID's ownership of copyright in the software will be invalid as per Myanmar Law because of absence of provisions protecting the foreign copyright.
82. Choosing Myanmar law would thus be against the fundamental principle of justice and the deep-rooted principles in the field of copyright.
83. Therefore, instead of Myanmar law, the tribunal is requested to change the applicable law to that of Japan, law which granted the rights, in public policy considerations.

E. SPT DOES NOT HAVE THE RIGHT TO REVERSE ENGINEER THE SOFTWARE.

84. code into a readable source code right up to the development of a new program based on the ideas revealed by decompiling. Decompiling is only a part of reverse engineering but is the key process as it reveals the ideas behind the computer program.⁸²
85. Under Japanese Copyright law, Article 30 – 47 deals with the matter of 'fair uses'. These are the exceptions to the copyright infringement and allowance of reverse engineering as 'fair

⁸⁰ Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

⁸¹ Burma - Protection of Property Rights, <https://www.export.gov/article?id=Burma-protection-of-property-rights> (Last accessed 11.08.2017).

⁸² Gerald Dworkin, "The Concept of Reverse Engineering in Intellectual Property Law and its Application to Computer Programs," (1990) 1 The Intellectual Property Law Journal p. 164.

use' or exception to infringement is to be identified according to the provisions of these articles in the act.

86. Article 47ter⁸³ allows the owner of a program to make a legitimate use of his program in a particular set of circumstances, even if this use may involve acts that might technically be considered restricted acts. It allows only the owner of the program to do such an adaptation and not the users. Hence reverse engineering or adaptation of the software by others is not permitted in the Copyright law of Japan.

87. In the case of Microsoft Corp. v. Shuuwa System Trading K. K.⁸⁴, decided by Tokyo District Court, the defendant decompiled the plaintiff's BASIC Interpreter into a form of source code, added his own labels and explanatory comments and then published the results in a book that was commercially distributed. The court stated that this constituted infringement of the plaintiff's copyright. Defendants decompiled the object code into source code and reverse engineered the software which was held illegal by the Japanese court. The defendants argument that there was an added creativity in the adapted software was rejected by the court which said "whether or not something newly created based on a pre-existing work possesses creativity or individuality should have no bearing on whether or not the copyright in the pre-existing work has been infringed."

88. Thus, SPT has no right to reverse engineer the software as it is not legal under the Japanese law.

⁸³ Article 47ter, Copyright Act (No. of 1970) (Japan).

⁸⁴ Microsoft Corp. v. Shuuwa System Trading K. K., 1219 Hanrei Jiho 48, (Tokyo District Court, January 30,1987).

PRAYER

In the light of arguments advanced and authorities cited, the Claimant humbly submits that the Arbitral Tribunal may be pleased to adjudge and declare that:

1. The termination of Partnership Agreement by SPT is invalid and it is liable to pay compensation to AID.
2. AID holds absolute title to the jade mining machinery and equipment and it has not transferred the title in the equipment and machinery to SPT.
3. The ownership of rights under the JADEYE software vests in AID.
4. SPT cannot reverse engineer the software.

Any other order as it deems fit in the interest of equity, justice and good conscience.

For This Act of Kindness, the Appellant Shall Duty Bound Forever Pray.

Sd/-

(Counsel for the Claimant)