

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

Parties to the dispute

Asamura international development Co. Ltd (AID) is a private international development company specializing in crisis relief and development, it was found in 1958 in Tokyo, Japan by Atsuko Asamura later managed by his son Dr. Yugi Asamura, who is married to Fiola Lum Ka Ching, who is also the non-executive director of AID.

Shwe Pwint Thone (SPT) is a local Myanmar company owned by U. Thein Kyaw started with the aim of providing secular and vocational training to students from underprivileged families.

Agreement between AID and SPT

U. Thein Kyaw being unfamiliar with jade exploration and production contacted Dr. Yugi Asamura anticipating a partnership between AID and SPT. SPT although reluctantly yet eventually entered into a non-legal partnership agreement with AID. Under this agreement AID sourced for second hand machinery from Japan, purchased them reconditioned them and were subsequently imported into Myanmar by SPT. SPT handled all visa and accommodation requirements of AID employees. Also, SPT made capital contributions to the venture to bear the operational costs along with AID. SPT also obtained the necessary jade mining and equipment permit from government, which was due to expire. Exploration and extraction and breaking and cutting was done at Hpakant Mines owned by SPT and processing and production was done at SPT studios. Thrice a year, shipments are also made to Japan by Dr. Fiona Lum's in her personal capacity, where friends and contacts will purchase these rough jades from her.

JADEYE software

JADEYE is a process optimization and operations management software developed by Joe Yamashita, a Finance executive at AID. 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 said it will reverse engineer the software. Subsequently, the ownership of JADEYE software became a matter of dispute.

Asian Influencers Magazine interview

In the news interview by Asian Influencers magazine in question Dr. Yugi Asamura and Dr. Fiona Lum were asked about their views on plea of Rohingya minority in the Rakhine state, given their existing business involvement in Myanmar. Fiona Lum gave a statement which implied that the incumbent government was involved in ethnic cleansing, as a result of which many students and workers of SPT were very upset by Fiona Lum’s statement and 102 SPT went for a strike for seven days.

Termination of agreement by SPT

Patrick Green offered to form a new partnership with SPT for jadeite business. U. Thein Kyaw discussed this proposal with U. Soe Myint, his close confidant in AID, who recommended U. Thein Kyaw to end the partnership with AID. U. Thein Kyaw communicated his decision to terminate the partnership to Yugi Asamura since the morale of his employees was at all time low due to since they were unable to look past the statement made by Fiola Lum in the influencers magazine interview and thereby emphasized that it was in the best interest of the company to terminate that partnership. U. Thein Kyaw offered to bear the relocation costs. Yugi Asamura objected the termination and emphasized SPT to compensate AID more than relocation costs in event of such termination.

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 VALID.

AID is liable for the acts of Fiona Lum, being one of its non-executive directors. Conduct of AID i.e. Fiona Lum's statement being violative of clause 11 of the partnership agreement, gives SPT right to validly terminate the agreement. Therefore, SPT will not liable to pay compensation since the event of termination of agreement being a valid termination.

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

AID having purchased the goods by paying consideration on its own holds valid title to the goods. Under the agreement, AID has not transferred title to the goods. Further, the acquiring of permit under the agreement does confer valid title to SPT. Additionally, the bill of lading does not operate to transfer the title in goods under Japanese Law which governs the character of the bill. Subsequently, AID is not estopped from claiming title to the equipment and machinery since SPT has not relied on the representation to change its position.

III. AID HOLDS THE OWNERSHIP RIGHTS IN SOFTWARE AND SPT CANNOT REVERSE ENGINEER THE SOFTWARE.

The law governing the initial title or ownership of the JADEYE software would be Japanese law. The software is created by Joe Yamashita in pursuant to an employment relationship with AID. As such, according to the Japanese Copyright Law, AID is the author of the software. And the law governing the infringement of copyright will be Japanese law. And under the Japanese law, SPT cannot reverse engineer the software.

PLEADINGS

1. THE TERMINATION OF AGREEMENT BY SPT IS VALID.

1. The association between AID and SPT is a joint venture formed for the purpose of Jadeite exploration and manufacture as per the partnership agreement and was supposed to end on expiry of license i.e. when the purpose of the venture was fulfilled.¹ [1.1.1] Relevant law which governs the affairs of AID is Myanmar Law, therefore, common law principles and authorities also serve as relevant law for determining the liability, [1.1.2.] Fiona Lum's acts can be attributed to AID upon applying Myanmar Law. Thus, [1.1.] AID is liable for the acts of Fiona Lum.
2. [1.2.1.] Statement made by Fiona Lum is violative of clause 11. [1.2.2] Clause 11 being of the essence gives SPT right to terminate the agreement. [1.2.] Thus, the conduct of AID being violative of partnership agreement, SPT acquires the right to validly terminate the agreement. [1.3] Since the termination being a valid termination therefore, SPT is not liable to pay compensation.

A. AID SHALL BE LIABLE FOR THE ACTS OF FIONA LUM

3. By following the real and closeness test, [1.1.1] Myanmar Law governs the affairs of AID. Myanmar law being insufficient, common law principles and authorities also serve as relevant law to determine the liability of Fiona Lum. [1.1.2.] Since, Fiona Lum acts can be attributed to the AID, Thus, [1.1] AID is liable for the acts of Fiona Lum.

i. Relevant law which governs the affairs of AID is Myanmar Law.

¹ Refer paragraph 18.

4. The relevant law which shall govern the liability of Fiona Lum i.e. a non-executive director in AID is Myanmar Law.
5. A director may owe duties to the company under a contract between himself and the company. Accordingly, the law applicable to such duties falls to be determined in accordance with English common law rules of private international law.² The general rule at common law is that the law applicable to the contract is governed by the expressed or inferred intention of the parties or, in the absence of such intention, by the system of law with which the contract has the closest and most real connection.³ This is also known as real and close connection test in contrast to the *incorporation test*, commonly followed. This test was reiterated and reaffirmed in the case of *Sulamerica Cia Nacional De Seguros S.A. v Enesa Engenharia*.⁴ It follows that duties owed by the director to the company under a contract with the company shall be governed by the law intended by the company to such duties or, failing such intention, the law with which such duties are most closely connected.⁵
6. The facts clearly mention that the business was conducted in Myanmar.⁶ Further the partnership agreement clearly stipulated law of Myanmar to be applicable in deciding any dispute.⁷
7. The business being conducted in Myanmar along with the clause 10 of the agreement between the parties clearly shows that the parties intended the Myanmar law to apply to duties conferred upon the parties by the partnership agreement and in case intention being subjective Myanmar is the Law to govern the dispute following the *real and close connection test*.

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

³ Lawrence Collins, *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell, 2000, 13th Ed) at p1197.

⁴ *Sulamerica Cia Nacional De Seguros S.A. v Enesa Engenharia S.A* [2012] EWHC 42.

⁵ Simon Mortimer, *Company Directors Duties, Liabilities and Remedies* (Oxford University Press, 2013, 2nd Ed) at p1000.

⁶ Refer paragraph 20.

⁷ Refer clause 10 of the partnership agreement.

In the light of the abovementioned reasons and authorities, we submit that the **Relevant law which governs the affairs of AID is Myanmar Law.**

ii. Fiona Lum's acts would be attributable to AID.

8. Fiona Lum is the non-executive director of AID, therefore Fiona Lum's acts would be attributable to AID.
9. Myanmar is a British common law country which became independent in 1948. Its core piece of legislation related to director's liability is Myanmar Companies Act 1914, which was modelled on UK companies act 1908. Today the statutory law related to director's duty and liabilities is similar to common law countries.⁸ Since, Myanmar Law does not contain sufficient provisions therefore, Common Law principles and authorities as well as case laws based on UK companies Act 1908, shall be regarded as authorities having persuasive value in determining director's liability under Myanmar Law.⁹
10. It has been established through a series of cases that a non-executive director shares the same duties and liabilities as a director under British common law.¹⁰ Therefore, Non-executive director's acts can be attributed to the same extent as the acts of a director.
11. In accordance with that principal as enunciated by Lord Denning in *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd*,¹¹ the directors would normally be regarded as the directing mind and will of a company by the virtue of their position under the company's constitution and would be liable where the law requires personal fault as a condition of liability in tort and hence the fault of the manager will be the personal fault of the company.¹² The modern law with regards to attribution is laid down by Lord Hoffman in the case of *Meridian Global*

⁸ Ma Ma Thant, "Directors' Duties and Shareholders' Remedies In Myanmar: A Comparative Approach To Reform", The University Of Nagoya Graduate School Of Law.

⁹ *Ibid.*

¹⁰ *Dorchester Finance Co v Stebbing* [1989] BCLC 498, no distinction should be drawn in principle between an executive and a non-executive director; *Re Wimbledon Village Restaurant Ltd* [1994] BCC 753.

¹¹ *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd*, [1957] 1 QB 159, 172, CA.

¹² *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd*, [1957] 1 QB 159, 172, CA.

Funds Management Asia Ltd v. Securities Commission,¹³ he identified three rules of attribution applicable to companies: (i) the primary rules; (ii) the general rules; and (iii) the special rules. The special rules of attribution apply to cases where the duties arise from the rules and clauses under an agreement between companies. In such instances, the courts must interpret the rules to determine which act can be attributed to the company, provided that the rule was intended by the companies to apply to themselves.¹⁴ Cases where the question of attribution is raised are now regarded as cases for the application of special rules of attribution.

12. Dr. Fiona Lum is the non- executive director of AID,¹⁵ and thrice a year, AID's jade shipments are made to Japan by Dr. Fiona Lum's in her personal capacity.
13. This shows that she had considerable influence in AID so as to be regarded as a "directing mind" enshrined under the *H.L Bolton* case. Therefore, following the Special rule of attribution under the *Meridian Global Funds Management Asia Ltd* case, Dr. Fiona Lum's action will be attributable to AID in case of breach of any duty conferred upon her under the Partnership agreement. Thus, AID is liable for the acts of Fiona Lum.

**B. SINCE THE CONDUCT OF AID BEING VIOLATIVE OF CLAUSE 11 THEREFORE,
SPT ACQUIRES THE RIGHT TO VALIDLY TERMINATE THE AGREEMENT**

14. The statement made by Fiona Lum being contradictory to the duties conferred upon AID and SPT by clause 11 is Violative of Clause 11 of the Partnership agreement. Since the intention of the parties show that the Clause11 was of the essence i.e. a condition therefore violation of it allowed SPT to validly repudiate the agreement.

i. Statement made by Fiona Lum is Violative of clause 11.

¹³ *Meridian Global Funds Management Asia Ltd v. Securities Commission*, [1995] 2 AC 500, 506-12, PC. Lord Hoffman's analysis has been approved and applied on many occasions, including by the house of lords in *Stone & Rolls ltd v. Moore Stephens* [2009] AC 1391 at paras 39-42 of the speech of Lord Phillips.

¹⁴ [1995] 2 AC 500, 507B-G.

¹⁵ Refer Q.3. Additional Clarifications.

15. Statement made by Fiona Lum imputed incumbent Myanmar government to be involved in Ethnic cleansing therefore it is directly violative of clause 11 of the partnership agreement.
16. Clause 11 of the agreement imposes the duty on AID to respect the country of Myanmar and not to say anything harmful to the national interest and solidarity of the country of Myanmar.¹⁶
17. In the news interview in question, answering a question about the Rohingya minorities in the Rakhine State, Dr. Fiona Lum gave a statement implying that the incumbent government was involved in ethnic cleansing of the minority group, which was a direct attack on the national interest and solidarity of the country of Myanmar.
18. Therefore, it is submitted that the Statement made by Fiona Lum was violative of clause 11.

ii. SPT acquires right to validly terminate the agreement

19. Clause 11 being an essential term of the Partnership Agreement confers upon the innocent party i.e. SPT to validly repudiate the agreement.
20. Harman. J in *Hitchman v. Crouch Butler Savage Associates*,¹⁷ held that the doctrine of repudiation applies to partnership agreements the same way as to other contracts, same was also affirmed by Nourse J. in *Fulwell v. Bragg*.¹⁸ Notwithstanding its similarity with a partnership a joint venture agreement can clearly be repudiated.¹⁹
21. As shown in the previous submission, the statement made by Dr. Fiona Lum violated the clause 11 of the Partnership agreement.²⁰
22. The duty imposed on the parties by clause 11 are usually implied by the conduct, the fact that the parties expressed such duty in writing in their agreement shows that they intended to regard it as the essence of contract, further here the agreement i.e. the partnership agreement

¹⁶ Refer to Clause 11 of the Partnership Agreement.

¹⁷ *Hitchman v. Crouch Butler Savage Associates*, (1983) L.S. Gaz. 550.

¹⁸ *Fulwell v. Bragg*, (1983) 127 S.J. 171.

¹⁹ *Dymocks Franchise Systems (NSW) Pty Ltd. v. Todd*, [2002] 2 All E.R. (Comm) 849 (PC); *Donnelly v. Weybridge Construction Ltd.* (No. 2) [2007] 111 Con. L.R. 112 (TCC).

²⁰ Refer para 15.

is essentially a joint venture agreement governing partnership contract, thus it attracts the doctrine of repudiation due reasons established by abovementioned authorities.

23. It is submitted that the breach of clause 11 by Dr. Fiona Lum conferred upon SPT, the right to validly terminate the Partnership.

**C. SINCE THE TERMINATION BEING A VALID TERMINATION THEREFORE, SPT NOT
LIABLE TO PAY COMPENSATION.**

24. Since the agreement had been validly terminated therefore SPT is not liable to pay compensation as demanded by AID.

25. The partnership between SPT and AID was for jadeite exploration and was supposed to end when the license to conduct would expire. However, the alleging a premature termination of the agreement by SPT, AID demanded compensation for the same.

26. The right to claim damages in respect of a repudiatory breach can only arise if the party claiming the damages is innocent in its own conduct. This position was taken by the Court of Appeal and the House of Lords in the case of *Hurst v. Byke*.²¹

27. In the given situation, AID breached the partnership agreement as proved above therefore it cannot be deemed as innocent partner as required under *Hurst v. Byke* entitled to claim damages.

28. It is hence established that the termination of partnership agreement is valid and well-founded therefore **SPT shall not be liable to pay compensation.**

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

29. AID's representation of SPT being the owner of goods and subsequent reliance by SPT on this representation estops AID from denying SPT's title to goods.

²¹ *Hurst v. Byke*, [2002] 1 A.C. 185 (HL).

30. The Tribunal is respectfully requested to find that, law of Myanmar governs the equitable principles [A] and AID is estopped from denying SPT'S title to the goods [B].

A. LAW OF MYANMAR GOVERNS THE EQUITABLE PRINCIPLES

31. The applicable law in the following dispute is the law of Myanmar since it is the *lex situs* of the jade-mining machinery and equipment. The law of the *situs* governs the equitable principles in movable property.²² In the instant case, the jade-mining machinery and equipment is situated in Myanmar and thus, the law of Myanmar will govern the equitable principles relating to the rights to the movable property.

B. AID IS ESTOPPED FROM DENYING SPT'S TITLE TO GOODS

32. Estoppel by representation confers title to goods in commercial law and operates when following 4 elements are met viz. representation, intention, reliance and detriment. In the instant case, AID fulfills all these criteria as (A) AID has represented that SPT is the owner of the goods (B) with an intention to be acted upon by SPT, and (C) SPT has suffered detriment by relying on this representation.

i. Estoppel by representation transfers title to goods

33. Estoppel by representation is a mechanism of transferring title to goods in commercial law. Estoppel, though a vague doctrine incapable of juridical formulation, is a principle used in international trade.²³ Estoppel by representation in commercial law is an exception to the *nemo dat* principle to ensure commercial expediency.²⁴ This type of 'estoppel' is different from general estoppel by representation as it allows for good title to be created in the

²² *Glencore International AG v. Metro Trading Inc (No 2)* [2001] 1 Lloyd's Rep 284 at paras 147-149

²³ Sean Wilken, *Wilken and Villiers on The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2002, 2nd Edition) at p 477. ("Wilken")

²⁴ *Ibid.*

representee.²⁵ Yet, the requirements to be complied with are same as that of the original principle of estoppel.²⁶

ii. AID has represented SPT as the owner of goods

34. AID has made a representation by passive conduct that SPT holds title to the goods.
35. Representation in estoppel includes silence or inaction involving a breach of legal duty to make some disclosure or take some action.²⁷ In the case of property, the title holder has a duty to assert an inconsistent legal right.²⁸ For silence to constitute representation, the circumstances of the case should show that silence of the representor amounts to a positive statement.²⁹ Additionally, estoppel in representation must be a representation in law which is a representation of existing facts or some fact alleged to be in existence.³⁰
36. In the instant case, AID was aware that SPT was being recorded as the owner and importer of machinery on the permits.³¹ AID, though holding title to the goods, has conveniently ignored its obligation to assert legal rights over the goods. As a consequence, decisions taken by SPT will be recognized by the government while AID cannot assert its ownership rights in Myanmar.
37. AID had a duty to assert the inconsistent legal right of SPT but it has failed to fulfill it. AID's silence amounts to a positive statement, since it actively chose to remain silent on this fact (with a duty to speak) despite being aware of the consequences. This choice so exercised constitutes a positive statement through silence. As for the nature of representation; since it is with respect to the mining permits, this silence was a representation of existing facts and constitutes a valid representation in law.

²⁵ *Ibid.*

²⁶ *In re Goldcorp*, [1995] 1 AC 74 at 93E-F.

²⁷ *Greenwood v Martins Bank Ltd.* [1933] AC 51 at 57; *Chadwick v Manning* [1896] AC 231 at 238.

²⁸ *Spiro v. Lintern* [1973] 1 WLR 1002 CA at 1010.

²⁹ *Orion Finance Limited v JD Williams and Company Limited* [1997] EWCA Civ 1 at 8.

³⁰ *George Whitechurch Ltd. v. Cavanagh* [1902] AC 117 at 130.

³¹ Clarifications, Question 14.

38. Applying the above reasoning, AID had a duty to speak and having failed to do so, its silence tantamount to representation.

iii. Representation of AID was intended to be acted on

39. The circumstances in which the representation was made clearly show that AID had requisite intention for SPT to act on the representation.

40. Estoppel arises when the representor intended for the representee to act on his representations.³²It suffices to show that based on the representations made a reasonable man would be convinced that the representor had the requisite intention.³³It is also sufficient to indicate that the representor knew that a reasonable person would act by relying on the representation.³⁴The principle underlying this rule is to prevent informal or casual statements from forming basis of estoppel.³⁵

41. Now to ascertain intention of the parties from an agreement, the factual matrix in which it was executed should be given due consideration.³⁶Also, the objective of the agreement must be given primacy and other articles should be construed so as to advance and not defeat those objects.³⁷

42. AID, in the instant case, was aware of SPT being recorded as the owner when it held valid title to the goods yet there were no objections raised. This is because permits are granted only to a Myanmar company formed under the Myanmar Companies Act (Company wholly owned by Myanmar citizen³⁸) or a company comprising of only Myanmar citizens.³⁹ Foreign

³² *Sidney Bolsom Investment Trust Ltd. v. E Karmios & Co. Ltd.* [1956] 1 QB 529 CA at 540; *Trane (UK) Ltd. v. Provident Mutual Life Assurance* [1995] EGLR 33 at 38-9.

³³ *Sidney Bolsom Investment Trust Ltd. v. E Karmios & Co. Ltd.* [1956] 1 QB 529 CA at 541.

³⁴ *Dixon v Kennaway & Co.* [1990] 1 Ch 833 at 837.

³⁵ Wilken at p 178.

³⁶ *Reardon Smith Line Ltd. v. Hansen Tangen* [1976] 1 W.L.R. 989 at 997.

³⁷ Roderick P Anson Banks, *Lindley & Banks on Partnership* (Sweet and Maxwell, 2010, 19th Edition) at p 192 citing *Collyer on Partnership* (2nd Edition) p 137; *Equitable Life Assurance Society v. Hyman* [2002] 1 A.C. 408 (HL).

³⁸ The Burma Companies Act, 1914 [India Act VII, 1913] (Myanmar), Section 2A.

³⁹ The Myanmar Gemstone Law, 1995 (The State and Order Restoration Council Law No. 8/95), Section 2(h) read with Section 12.

companies are wholly excluded from the gemstone sector.⁴⁰ Since SPT is the only one which can acquire permits, it is only reasonable to record them as owner so as to promote commercial expediency.

43. As for the construction of the agreement goes, the object of the agreement was to help the local Myanmar people and the parties were to prioritize the employees and students.⁴¹ Regard must also be had to the fact that the parties did not get the lawyers involved while signing the agreement and consequently, the agreement cannot be treated at par with ordinary commercial contracts. Taking into consideration the objective of the parties and the non-involvement of the lawyers, it can be ascertained from Clause 4 of the partnership agreement that AID's intention was primarily to "provide" the machinery and equipment. The adverse interpretation viz. 'AID did not intend to transfer title to goods' will go against the object of the agreement. The determination of the parties' relationship would mean that AID can take away the jade-mining equipment and machinery. This will lead to stoppage of the jade mining at Hpakant and consequently, would render the workers unemployed. This is clearly contravening the objective of the agreement and thus, such reading cannot be supported.

44. Additionally, AID could not have intended to retain title to the machinery since it specializes in "*assisting private sector to manage projects in developing countries*" (emphasis added). Their objective was to aid SPT in jade-mining and thus help the local population by generating employment. Since AID is involved in managing projects in developing countries, they could not have intended to incur liabilities and expenses in maintaining goods that are practically of no use to them besides this venture.

45. Now, since the permit is granted only to a Myanmar company and AID always intended to transfer title to the goods to SPT, a reasonable person would rely on AID's representation with an intention to act on it. It is also highly unreasonable to assume that the statement

⁴⁰ Paul Shortell and Maw Htun Aung, "Mineral and Gemstone Licensing in Myanmar" (April, 2016), Natural Resource Governing Institute at p 6.

⁴¹ Annexure I, Clause 5.

dealing with something as important as ownership of machinery and equipment which are the lifelines of a mining venture, will be a casual or informal statement.

46. In conclusion, representation made by AID was intended to be acted upon which can be reasonably understood from the commercial advantage which SPT would accrue from this representation.

iv. SPT has relied on the representation made by AID

47. SPT has changed its position by relying on the representation made by AID.

48. For estoppel by representation, the representee should act by relying on the representation.⁴²

By relying on the representation, representee must have changed its position.⁴³ A causative link needs to be established between the representee's act and his belief on the representation⁴⁴. A belief already held by the representee if strengthened by representation may prove a causative link.⁴⁵

49. In the instant case, SPT had acquired the necessary permits from the government and was recorded as the owner on the permits. It is only after SPT was recorded as the owner of the machinery and equipment (which is January 2009 as the venture could not have started operations without the permit), that SPT made capital contributions to bear the operational costs with AID in March 2009. Also, SPT had assigned 50 students to work at the Hpakant base and hired 250 new workers after procuring the jade-mining and equipment permit.⁴⁶

50. SPT believed that the jade-mining equipment and machinery will be transferred to them. This can be ascertained through Clause 4 of the partnership agreement read in consonance with the objective of the agreement as has been discussed in Part 2(II)(C). Additionally, the fact that

⁴² *Dixon v. Kennaway & Co.* [1990] 1 Ch 833 at 838; *H Clark (Doncaster) Ltd. v. Wilkinson* [1965] Ch 694 CA at 702.

⁴³ Wilken at p 184.

⁴⁴ *Ibid.*

⁴⁵ *Dixon v. Kennaway & Co.* [1990] 1 Ch 833.

⁴⁶ Factsheet, para 18.

AID is a company specializing in crisis relief and management; it would not intend to incur expenses and liabilities for chattels which have no practical use to them.

51. It is only after the representation was made, SPT employed 250 workers, assigned 50 students to work Hpakant base, paid costs for importing the goods and made capital contributions to bear the operational costs with AID. The representation made by AID has strengthened SPT's belief that it holds title to the jade mining machinery and equipment. SPT would not have changed its position to this extent had it not been for them being recognized as the owner on the permits. It would be unreasonable for SPT to share operational costs, without any strong assurance by AID to fulfill its long-term objectives.

52. Applying the above reasoning, a causative link exists between the representation made by AID and the change of position by SPT since SPT's belief of it being the owner was strengthened by the representation. Thus, SPT has relied on AID's representation to change its position.

*v. SPT will suffer detriment if AID is allowed to deny its
representation*

53. SPT has changed its position by relying on the representation made by AID. Now, if AID resiles from this assumption, the result will be both inequitable and detrimental.

54. Detriment, which the law intends to protect, is a consequence of change in position of the representee by relying on the assumption of the representor.⁴⁷ The representee needs to establish that the representor if resiles from the assumption, would cause detriment to it. Additionally, estoppel by representation includes the concept of inequity.⁴⁸ Inequity also has been understood as a detriment suffered by the representee by relying on the

⁴⁷ *Grundt v Great Boulder Pty Gold Mines Ltd.*, [1937] HCA 58.

⁴⁸ Wilken at p 188.

representations.⁴⁹ Estoppel by representation should not yield a result which is fairly unconscionable.⁵⁰

55. In the instant case, SPT has relied on the representation made by AID by employing 250 workers, paying import costs and bearing operational costs. If AID resiles from its representation, SPT will have to bear additional costs to import new machinery and equipment since they are not locally available. Also, due to unavailability of the equipment and machinery, the mining activity will stop, rendering the workers unemployed which would be an inequitable result.

56. To conclude, AID by denying the truth of its representation would cause detriment in value to SPT and lead to an inequitable result.

3. SPT HAS RIGHT TO USE THE JADEYE SOFTWARE.

57. We submit before the tribunal that, the ownership of the rights in JADEYE vests in Joe Yamashita and not AID (**A**). Further, the right to use the software was transferred under an implied license (**B**). Also, SPT has got the right to reverse engineer the software (**C**).

A. THE OWNERSHIP OF THE RIGHTS IN JADEYE VESTS IN JOE YAMASHITA AND NOT AID

58. Article 15(2) of the Copyright Law of Japan⁵¹ states that:

“The authorship of a program work which, on the *initiative of a legal person*, etc. is made by his employee in the *course of his duties*, shall be attributed to that legal person, etc., unless otherwise stipulated in a contract, work regulation or the like in force at the time of the making of the work.” (emphasis added)

⁴⁹ *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

⁵⁰ *National Westminster Bank v. Somer International* [2002] 1 All ER 198 (“Westminster Bank”)

⁵¹ Article 15(2), Copyright Act (No.48 of 1970) (Japan).

59. In the instant case, Mr. Joe Yamashita, a finance executive of AID, independently came with the idea of JADEYE while thinking of improving production efficiency.⁵² Further, Joe Yamashita was employed as a finance executive in AID.
60. Joe Yamashita did not create the software on the initiative of AID. AID merely implemented the idea which was exclusive of the developer. Further, Joe Yamashita being a finance executive was a non – inventive, non-technical employee of AID to develop the JADEYE software. Clearly, creation of software is not within the purview of his ‘course of duties’ as a finance executive.
61. In conclusion, the creation of software is not pursuant to the employment relationship between AID and Joe Yamashita as it does not qualify the criteria laid down in the Japanese Copyright law. Thus, AID cannot claim ownership of right in JADEYE over Joe Yamashita.

**B. THE RIGHT TO USE THE SOFTWARE WAS TRANSFERRED TO SPT BY JOE
YAMASHITA UNDER AN IMPLIED LICENSE.**

62. The applicable law in the matter of transferability will be governed by Myanmar law (i) and under the law of Myanmar, the right to use the software was transferred by Joe Yamashita under an implied license. (ii)

*i. The applicable law in the matter of transferability will be governed
by Myanmar law.*

63. The issue of transferability should be governed by the law which governs the creation and scope of the right.⁵³ The choice of law rule should thus result in the application of the law of protecting country.⁵⁴

⁵² Additional Clarifications, Question 26.

⁵³ Rule 120(2), Dicey and Morris on the Conflict of Laws (Collins ed., Sweet and Maxwell 2000), at 979.

⁵⁴ James J. Fawcett & Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 1998) at p 516.

64. Myanmar is the country of which the protection is sought and it would govern the aspect of ‘transferability’ of copyright matters.

ii. The right to use the software was transferred by Joe Yamashita under an implied license.

65. A license is a legal interest created by the titleholder of some property that gives some non-title holder a privilege to make designated uses of the property that would otherwise violate the titleholder’s property rights.⁵⁵ An implied license is an unwritten license which permits a party (the licensee) to do something that would normally require the express permission of another party (the licensor).⁵⁶

66. Article 10 of the Science and Technology Development Law of Myanmar, 1994⁵⁷ states that:

“Any person or organization may transfer Technology which they have developed successfully in one of the ways mentioned:

- a.) Allowing the right to use the Technology to any person free of charge;
- b.) Selling or allowing the right to use the Technology, upon payment of fee for a contracted period of time within the country under a contract.

67. Article 10 (a) is an example of implied license which does not require an express contract in writing to transfer the right to use the technology.

68. In the instant case, the JADEYE software was installed in the computers and machineries in Myanmar. U Thein Kyaw, pleased by the JADEYE software, presented Joe Yamashita with

⁵⁵ *Infra* n 61.

⁵⁶ Orit Afori, “Implied License: An Emerging New Standard in Copyright Law”, 25 Santa Clara High Tech. L.J. 275 (2008).

⁵⁷ Article 10, Science and Technology Development Law, 1994 (State Law and Order Council Law No. 5/94)

USD 18,000 in cash.⁵⁸ Joe Yamashita declined the cash, and said that JADEYE was “for the benefit of all of us”⁵⁹

69. The declining of cash for JADEYE and the subsequent statement of Joe Yamashita conferred SPT with the right to use the software to the SPT in accordance with the Article 10(a) of the Science and Technology Development Act.⁶⁰ The representation amounted to an assignment of license which was implied.

70. The phrase “for the benefit of all of us” granted an implied non – exclusive license where the licensor can still exploit the same IPRs and can allow other licensees to exploit the same intellectual property.⁶¹ So, AID is not the sole owner of the rights in the software but can at best be a non – exclusive licensee as SPT is.

71. Applying the above reasoning, SPT has the right to use the software because it was transferred to it under an implied non - exclusive license/assignment and thus the source code of the software must be shared with SPT.

C. SPT HAS THE RIGHT TO REVERSE ENGINEER THE SOFTWARE

72. Reverse engineering is described as "...the industry's term for the analysis of a competitor's program by examining its coding and structure in order to develop programs which either competes with the program which has been analyzed or interface with that program."⁶²

73. The general principle regarding reverse engineering in the Berne Convention can be made out by Article 9(1) read with an exception mentioned in clause 2⁶³. Making a copy of the object code constitutes a breach of the exclusive rights of the copyright holder under Article 9(1). However, Article 9(2) states that reproduction can occur in "certain special cases, provided

⁵⁸ Factsheet, para 24.

⁵⁹ *Ibid.*

⁶⁰ *Supra* n 56.

⁶¹ Bryan A. Garner, *Black's Law Dictionary* (8th Edition, 2004).

⁶² 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.

⁶³ Article 9(1) and Article 9(2), Berne Convention for the Protection of Literary and Artistic Works. (“Berne Convention”)

that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." To get a monopoly on ideas and functional aspects of the software, the creator needs to seek patent protection.⁶⁴

74. Since copyright is about the protection of an expression of an idea as opposed to the idea itself, and de-compilation is necessary to gain access to these non-protected elements in the programme, copying of the object code is regarded as a "special case".

75. As to the second element, the term "normal exploitation" in regard to de-compilation refers to the copyright holder's right to supply copies of the program. De-compilation does not conflict with this right as the process is an examination which will only be used to create an independent program.

76. Finally, the Berne Convention's element of not unreasonably prejudicing the rights of the author could be seen as an extension of the second element. For example the moral rights of the author should not be jeopardised. Again, since we are only dealing with examination of the pattern, de-compilation will not conflict with this element of article.

77. Consequently, SPT can always copy the functional or idea part of the software as the software is not registered for patents.⁶⁵

78. In *System Science K.K v. Toyo Sokuki K.*⁶⁶ decided by Tokyo High Court, the court held that the program adaptation by the defendant is not the case of infringement. It further held that the defendant's program was not an adaptation because it was not sufficiently similar to the creative aspects of the plaintiff's program. The only similarities were in simple and common routines, in routines that had to be similar because of hardware constraints, in the algorithm used, or in design choices that were dictated by the court.

⁶⁴ Pamela Samuelson and Suzanne Scotchmer, "The Law and Economics of Reverse Engineering", *Yale Law Journal*, Vol. 111, No. 7 (May, 2002), p 1611.

⁶⁵ Additional Clarifications, Question 29.

⁶⁶ Judgment of June 20, 1989, Kosai (High Court), Tokyo, *System Science K.K v. Toyo Sokuki K. K.*, 1322 Hanji 138.

79. Article 47ter of the Japan Copyright Law, allows reverse engineering by analogy. Article 47ter allows the owner of a program to make legitimate use of his program in a particular set of circumstances even if this use might technically be considered restricted use. To deny the user this right would severely limit the usefulness of the program, since the user would have to turn to the copyright owner every time he wanted to make even simple modifications and corrections. On the other hand, allowing reverse engineering has little, if any, impact on the copyright owner's rights to the extent that it is done only to extract un-protectable ideas and principles from a program, not to copy expression. Therefore, Article 47ter justifies reverse engineering by analogy.

80. Applying the above reasoning, SPT can reverse engineer the JADEYE software.

PRAYER

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

1. The termination of the agreement by SPT is valid.
2. AID is estopped from denying the title to SPT of jade mining equipment and machinery.
3. SPT has got the right to use the JADEYE software under an implied license by the author Joe Yamashita.
4. SPT can 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)