T1715 -C

THE 12th LAWASIA INTERNATIONAL MOOT COMPETITION, 2017

TOKYO, JAPAN

ARBITRATION PROCEEDINGS BETWEEN

Asamura International Development Limited Company

(CLAIMANT)

AND

Shwe Pwint Thone Limited Company

(RESPONDENT)

at the

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION– TOKYO (CAM/CCBC)

MEMORANDUM FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

- To ensure an expeditious resolution of the dispute, Asamura International Development Limited Company [“**Claimant**”] and Shwe Pwint Thone Limited Company [“**Respondent**”] have agreed to submit this dispute to arbitration.
- Further, the parties have also agreed to resolve their dispute in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules (“i-Arbitration Rules”) at Tokyo.
- The parties do not dispute the validity and enforceability of the arbitration agreement, and any award rendered by the tribunal is acknowledged to be final and binding upon the Parties as per Rule 12(7) of KLRCA i-Arbitration Rules.

QUESTIONS PRESENTED

The issues to be decided in the present arbitration are as follows:

I. WHETHER THE TERMINATION OF THE AGREEMENT BY THE RESPONDENT WAS VALID?

II. WHETHER THE OWNERSHIP OF THE JADE-MINING MACHINERY AND EQUIPMENT LIES WITH THE CLAIMANT?

III. WHETHER SUBSISTENCE AND OWNERSHIP OF RIGHTS IN THE JADEYE SOFTWARE LIE WITH CLAIMANT?

STATEMENT OF FACTS

I: The Parties

- The CLAIMANT, Asamura International Development Co. Ltd. (AID) is private international development company based in Japan which has been involved in various rehabilitation and rebuilding projects across the world. Dr. Yugi Asamura is the owner of AID and is married to Dr. Fiona Lum Ka Ching.
- The RESPONDENT, Shwe Pwint Thone Co. Ltd. (SPT) is owned by U Thein Kyaw. It is a local Myanmar company which runs tea shops, jade carving and polishing studios and training centers with a view to provide secular and vocational training to students from underprivileged families.

II: Timeline

- **9th September 2008:** SPT wished to create jobs and start a new training centre in Hpakant for the local community. While familiar with jade carving and polishing techniques, U Thein Kyaw had zero experience in jade exploration and production. U Thein Kyaw and Dr. Yugi Asamura decided to enter into a partnership. Albeit reluctance, both men sat down and drafted their own contract.
- **From January 2009:** Under the arrangement, AID sourced for second hand machinery and equipment from Japan, purchased them, and reconditioned them. Such machinery and equipment were then imported into Myanmar by SPT in January 2009, where the jade extraction and production business officially began. 25 of AID's employees were also placed in SPT's base and at the jade fields in Hpakant. SPT also 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. 50 students were assigned to work at the Hpakant base, and 250 new workers were also hired.

- **11th April 2012:** Amidst this, Joe Yamashita, an employee of AID produced a software called 'JADEYE' to ascertain the quality and purity of jade. According to the tests conducted, JADEYE positive results. Yugi Asamura ordered installation of software in all the computers and equipment used on the sites.
- **September, 2016:** During an interview, Dr. Yugi Asamura and Dr. Fiona Lum were asked about their views on the Rohingya minority. 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."
- Many of SPT's employees and students were very upset by Dr. Fiona Lum's statement as it implied that the government was involved in ethnic cleansing. 102 of SPT's workers went on strike for seven days, requesting Dr. Fiona Lum and Dr. Yugi Asamura to issue an apology, but they denied.
- **October 2016:** Yuri Hashimoto, decided to engage Dr. Yugi Asamura's assistance to source for jades from Hpakant, as her company, Hashimoto Co., Ltd (HCL) had won a contract to produce official jadeite souvenirs and merchandise for the Tokyo Olympics in 2020. AID, in consensus with SPT, entered into $1.2 million deal with HCL for next one year.
- **21st November 2016:** 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. He offered a profit split of 85% to SPT.

- **10 January 2017:** U Thein Kyaw made up his mind to end the partnership between AID and SPT. U Thein Kyaw explained that his team is unable to continue working with AID.
- Dr Yugi Asamura protested, saying that SPT had no right to terminate the agreement like that, and that even in the event of a termination, SPT has to compensate AID more than just on the relocation costs. The men then argued over the ownership of the jade-mining machinery, equipment, and in particular the JADEYE software. U Thein Kyaw said that SPT held the title to all such machinery and equipment as they imported them into Myanmar, and have obtained the government permits required to operate them. In any event, SPT was recorded as the owner and operator of these machineries and equipment on those permits.
- Parties eventually agreed to attend arbitration in Tokyo using the KLRCA i-Arbitration Rules.

Hence, this matter before the Arbitral tribunal.

SUMMARY OF PLEADINGS

ISSUE I: THE TERMINATION OF THE CONTRACT BY THE RESPONDENT IS INVALID.

- The unilateral termination of the agreement by SPT is invalid as this is an enforceable contract. Dr. Fiona Lum's comments were made in her personal capacity, she being the chairperson of Second Life. The unilateral repudiation of contract by the respondent was not justified as no reasonable notice was given for it by them as is required in contracts with no expiry date.
- The respondent is liable for specific performance of the contract with the claimant with respect to the agreement made by the claimant with HCL. The claimant is entitled to compensation more than what has been proposed by the respondent for the breach of the agreement on the part of the respondent.

ISSUE II: CLAIMANT IS THE OWNER OF THE JADE-MINING MACHINERY AND EQUIPMENT.

- Claimant is the owner of the Jade mining machinery and equipment. This is because there was no intention of the parties to effect the sale or transfer of the title. Consequently, no sale deed has been executed for the machinery and equipments in favor of SPT and the obligation of SPT was restricted merely in getting the requisite permits and licenses from the government because AID was not allowed by the laws of Myanmar to import goods on its own. Also, the general principle of common law states that if equipments are

transferred for the term of the contract, it has to be returned to the transferor, in case of any default from transferee.

ISSUE III: CLAIMANT HAS OWNERSHIP AND SUBSITENCE OVER THE RIGHTS IN THE JADEYE SOFTWARE.

- Subsistence and ownership of rights over JADEYE software will remain with Claimant because the software is a protected copyright work of a japanese national. Hence, laws of Japan would be applicable in this case for the copyright protection. The initial owner is the creator of copyright but when the creator is under employment, the first and initial owner of the same would be Claimant.

PLEADINGS

I. THE TERMINATION OF THE CONTRACT BY THE RESPONDENT IS INVALID.

The termination of the contract by the respondent is invalid because: The respondent has waived the right to repudiate the contract [1]; Contract without an expiry date cannot be repudiated unilaterally [2]; There exists a fiduciary duty of both parties towards each other [3]; Dr. Fiona Lum made her comment with bona fide intention and in her personal capacity [4] and; Clause 11 of the partnership agreement is unconscionable [5].

A. The respondent has already waived the right to repudiate the contract.

1. A breach of a contract by one party does not automatically terminate the innocent party's obligations of the contract.[1] The innocent party may choose between discharging its obligations arising out of the contract or continue with the contract.[2] However, if a party affirms or accepts the breach, its option to discharge the obligations arising out of the contract is waived.[3] Affirmation of the contract can be implied from the delay in discharging the obligations under the contract after the breach.[4] Affirmation is a voluntary act and a party must have knowledge to the relevant facts in order to be able to affirm or terminate the contract.[5]

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1 *White and Carter (Councils) Ltd. v. McGregor*, [1962] AC 413.
2 *Vitol SA v. Norelf Ltd.,* [1996] AC 800, 810-11.
3 *Graves v. Legg*, (1854) 9 Exch 709, 717; A. Burrows Beaton, *et al.,* ANSON'S LAW OF CONTRACT, (30th Edi.) Page No. 554.
4 *Force India Formula One Team Ltd v. Etihad Airways* PJSC, [2010] EWCA Civ 1051.
5 *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.,* [1971] AC 850, 877-8.

2. In the present dispute, the respondent relied on the comments of Dr. Lum for discharging its obligations under the contract.[6] The comments came to the knowledge of the respondents in September 2016.[7] However, they discharged their obligations under the contract in January 2017.[8] Furthermore, between this time frame of more than 4 months, the Claimant even entered into a $1.2 million deal with HCL for supplying jade in consensus with the respondent.[9] Both, the Claimant and the respondent shared profits out of this new contract with HCL.[10]

3. Thus, there was no sign of any affirmation on the part of the respondent. They repudiated the contract only when they got a more lucrative offer from Mr. Patrick Green which provided the respondent with a higher share in profit.[11]

B. Contract without an expiry date cannot be repudiated unilaterally.

4. Contracts without an expiry date are known as indefinite contracts.[12] It is an implied term in indefinite contracts that the terminating party without any breach by the other party, may terminate the contract by providing "reasonable notice" to them.[13] Reasonable time must be sufficiently long to enable the other party to deploy his labour and equipment in alternative employment, to carry out his commitments.[14] Also, time must be sufficient to

[6] Moot Proposition, ¶ 41.
[7] Moot Proposition, ¶ 29.
[8] Moot Proposition, ¶ 41-42.
[9] Moot Proposition, ¶ 35.
[10] Answer to Question No. 5, Additional Clarifications, Moot Proposition.
[11] Moot Proposition, ¶ 37.
[12] Dundas Lawyers, *Terminating a contract with no end date*, https://www.dundaslawyers.com.au/terminating-a-contract-with-no-end-date/.
[13] *Stones Corner Motors Pty Ltd. (trading as Keema Automotive Group) v. Mayfairs W'Sale Pty Ltd. (trading as Suzuki Auto Co.),* [2010] FCA 1465.
[14] *Software Link (Australia) Pty Ltd. v. Texada Software Inc.,* [2005] FCA 1072.

bring current negotiations to an end and to wind up the current venture in a lawful manner.[15]

5. In the present dispute, Claimant entered into contract with HCL to supply jade for Tokyo Olympics, 2020.[16] The same was done with the consent of the respondent.[17] However, the respondent repudiated the contract unilaterally without giving any reasonable notice for the same.[18] Reasonable time, in the instant case, would amount to specific performance of the obligations of the respondent atleast till the the permit ends in 2019. Till then, this venture will have to continue its operations and provide HCL with jade as per the contract.

C. <u>There exists a fiduciary duty of both parties towards each other.</u>

6. Joint Venture as a business entity is recognised by Myanmar as a means to enter into commercial ventures with foreign partners.[19] The expression 'joint venture' connotes a legal entity which has 3 basic distinct features. It is in the nature of a partnership where **a)** two or more people are engaged in a single defined project,[20] **b)** with an express or implied agreement,[21] **c)** engaged in the joint undertaking of a particular transaction for mutual profit.[22]

7. Fiduciary duty means that the partners should be loyal and not take an undue advantage that causes loss to the other partners or the partnership.[23] There exists an implied

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[15] *Id*.
[16] Moot Proposition, ¶ 35.
[17] *Id.*
[18] Moot Proposition, ¶ 41.
[19] Myanmar Company Incorporation, http://www.yangonsetup.com/joint-venture .
[20] *Faqir Chand Gulati v. Uppal Agencies*, 2008 (4) ALD 102 (SC).
[21] Black's Law Dictionary, 7th Edition, Page No. 843.
[22] *New Horizons Ltd. v. Union of India*, 1995 SCC (1) 478.
[23] L.S. Sealy, FIDUCIARY RELATIONSHIPS, [1962] Cambridge L.J. 69, 71-72.

fiduciary duty in a joint venture agreement.[24] Furthermore, a partner has a bundle of rights in case of a breach of fiduciary duty. When a plaintiff has been deprived of business by the defendant's breach, the former is entitled to be restored to the extent of loss caused to the plaintiff.[25] Moreover, the court is free to grant any other remedy that may restore the unjust enrichment faced by plaintiff.[26]

8. In the instant dispute, the Claimant, AID and the Respondent, SPT have entered into an agreement to carry on partnrship for a long term.[27] The respondent decides to act on advice of his friend to end the contract with the claimant unilaterally.[28] This rescission of contract by the respondent caused financial loss as well as loss of goodwill to the Claimant. There is nothing to show that there was a breach of any fundamental term by Claimant. Therefore, it can be concluded that respondent is taking benefit of the situation and using the workers' unwillingness as a facade.

D. Dr. Fiona Lum made the comment with bona fide intentions and in her personal capacity.

9. Right of agency emanates from contract between a principal and an agent. A person must have principal's authority to work on behalf of the principal in agency contract.[29] When a principal endows an agency on someone, he is liable for the latter's act done within the authority.[30] Agency may be created in one of the three ways:[31] **a)** by an express authority,

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[24] *Ross River Limited and Anor v. Waverley Commercial Ltd. and Others* [2013] EWCA Civ 910.
[25] *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339 (Cal. Ct. App. 1988).
[26] *Beckman v. Farmer*, 579 A.2d 618 (D.C. 1990).
[27] Clause 3, Annexure 1, Partnership Agreement, Moot Proposition.
[28] Moot Proposition, ¶ 39.
[29] A. Burrows Beaton, *et al.,* ANSON'S LAW OF CONTRACT, (30th Edi.)Page No. 715.
[30] *Hambro v. Burnand*, [1904] 2 KB 10.
[31] A. Burrows Beaton, *et al.,* ANSON'S LAW OF CONTRACT, (30th Edi.) Page No. 716.

b) by principal's ratification of a contract entered by the agent on his behalf, **c)** by an ostensible authority created by principal on the agent.

10. In the present dispute, Dr. Fiona Lum made a comment on the pleas of Rohnigya minority in the Rakhine state.[32] She is the president of a charitable organisation called Second Life, that champions for rights of people.[33] Dr. Lum made the comment in her capacity as the chairperson of the organisation. She was in no way authorised to speak on behalf of Claimant and therefore could not act as its agent. However, her statement was construed in a wrong way and later used by respondent as a weapon by them to shy away from their responsibilities. They did it to enter into a more profitable venture and brought the exisitng contract with the Claimant to an end.

E. Clause 11 of the agreement in an unconscionable term.

11. Anyone who asserts a claim of contractual unconscionability is acknowledging that someone made a bad deal.[34] The question is not whether a covenant is unconscionable or not, but rather is it so one-sided or oppressive that it becomes unconscionable.[35] What makes a contract one-sided is most often tied to the contractual language which is profoundly discriminatory in its effect on one of the parties.[36] Oppression means trying to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition.[37]

12. In the present dispute, clause 11 of the partnership agreement starts with the expression, 'To show respect towards the Golden Land'. It later goes on to say that the Claimant

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[32] Moot Proposition, ¶ 28.
[33] Moot Proposition, ¶ 5.
[34] *Rowe v. Great Atlantic & Pacific Tea Co.,* 46 N.Y.2d 62, 67-68.
[35] Paul Bennet Marrow, "*Contractual Unconscionability: Identifying and Understanding Its Potential Elements*", Columbia Law Review (Feb. 2000) Page No. 22.
[36] *Id.*
[37] *Id.*

cannot do or say anything harmful to the national interest and solidarity of Myanmar, and vice versa.[38] This implies that this term of the agreement was one-sided wherein only respect to the national interest and solidarity of Myanmar was taken into consideration. It was a needlessly burdensome condition which had nothing to do with the object that the venture intended to achieve initially.[39]

F. Specific performance should be awarded as a remedy as compensation alone would not suffice the quantum of relief required.

13. Specific Performance should be awarded because: the value of financial loss to HCL and to its goodwill cannot be detrmined with precision [**1**].

(i) The value of financial loss to HCL and to its goodwill cannot be detrmined with precision.

14. Specific Performance refer to remedy available to compel a person to actually perform a contractual obligation.[40] Specific performance, instead of damages may be provided when the former does better and complete justice.[41] One of the parties may sue for the benefit of the third party also.[42] If one of the parties has fulfilled its obligations and the other party has not, it would be unfair if the latter party is left to remedy in damages.[43] This is done when mutuality exists between the parties. Specific Performance of the contract is awarded when there is no way of ascertaining the value of damages.[44]

[38] Clause 11, Annexure 1, Partnership Agreement, Moot Proposition.
[39] Clause 5, Annexure 1, Partnership Agreement, Moot Proposition.
[40] CHITTY ON CONTRACTS, (29th Edi., Vol. 1), ¶ 28-002.
[41] *Rainbow Estates Ltd. v. Tokenhold Ltd.*, [1998] 2 All E.R. 860, 868; Stickney v. Keeble, [1915] AC 386.
[42] Pollock & Mulla, INDIAN CONTRACT AND SPECIAL RELIEF ACTS, (13th Edi., Vol I) Page No. 113.
[43] *Prince v. Strange*, [1978] Ch 337, 361.
[44] *Tito v. Waddell* (No. 2), [1977] Ch 106, 322.

15. In the present dispute, Claimant enters into a contract worth $1.2 million with HCL with the consent of the respondent.[45] Both Claimant and respondent agrees to share profit out of this new deal. HCL was supposed to supply official jade souveniors for Tokyo Olympics in 2020.[46] However, respondent without giving any proper reason brought the contract to an end.[47] This brings the entire jade venture of these parties to a final halt as /the Claimant was dependent on respondent for production of jade. This by itself frustrates the contract between Claimant and HCL. Since, HCL had a big responsibility on itself to supply jade for Tokyo Olympics, which is a matter of pride for any nation, only continuance of the jade venture would solve the purpose in the instant case. There is no way of ascertaining the value of pride and goodwill which HCL will lose in the market if such a huge governmental contract to supply jade souveniors in Tokyo Olympics is frustrated.

G. <u>The respondent is also liable to compensate the claimant for wrongful rescission of the contract.</u>

16. The respondent is also liable to pay compensation because: There was a fundamental breach of contract on part of the respondent **[1]**.

(i) ***<u>There was a fundamental breach of contract on part of the respondent.</u>***

17. A party is guilty of breach of contract when there is a fundamental breach of contract.[48] A breach of a fundamental term is something which goes to the root of the contract.[49] It has

[45] Moot Proposition, ¶ 35.
[46] Answer to Question No. 5, Additional Clarifications, Moot Proposition.
[47] Moot Proposition, ¶ 41.
[48] *B.V. Nagaraju v. Oriental Insuance Co. Ltd.,* 1996 SCC (5) 71.
[49] *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 WLR 936.

also been said that he breach must be 'fundamental',[50] that it must 'affect the very substance of the contract'[51] or 'frustrate the commercial purpose of the venture'.[52] Section 39 of Myanmar Contract Act, 1972, is concerned with is a refusal to perform one of the central terms of the contract, i.e., a material breach of contractual terms.[53]

18. A test which is frequently applied is stated by Diplock LJ as: 'Does one of the parties deprive the other one to take the whole benefit of the contract as intended initially?'[54] In case of the party in default, in place of primary obligations imposed by the contract there arises a secondary obligation to pay damages for the breach.[55]

19. In cases of failure of performance of the contract by one party which goes to the root of the contract,[56] it is open for the innocent party to treat the contract as continuing or to accept the defective performance when tendered.[57] Even if the innocent party is said to have affirmed the contract, the right to claim damages for breach is still retained.[58]

20. In the present dispute, the parties entered into an agreement forming a long term partnership for production of jade in Myanmar.[59] The partnership agreement was written down and respondent by its conduct violated clause 5 of the agreement. This clause hit at the very root of the contract as it resembles the very purpose for which the venture was formed. The main motive was a long term venture to help local people of Myanmar.[60] SPT had no ground to repudiate the contract in this case. They repudiated the contract to

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[50] *Suisse Atlantique Societe d'Armement SA v. NV Kolen Centrale*, [1967] 1 AC 361.
[51] *Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 KB 1003, 1012.
[52] *MacAndrew v. Chapple*, (1866) LR 1 CP 643, 648; Raleigh C. Minor "*Conflict of Laws, Substance or Obligation of Contract Distinguished from Remedy"*, Harvard Law Review, Vol. 16, No. 4 (Feb., 1903), Page No. 262-271.
[53] Adrian Briggs and Andrew Burrows, THE LAW OF CONTRACT IN MYANMAR, University of Oxford, Page No. 174.
[54] *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*., [1962] 2 QB 26, 66.
[55] *Moschi v. Lep Air Services Ltd*., [1973] AC 331.
[56] *Mersey Steel & Iron Co. v. Naylor, Benzon & Co*., (1884) 9 App Cas 434, 444.
[57] *Photo Productions Ltd. v. Securior Transport Ltd*., [1980] AC 827.
[58] Burrows, REMEDIES FOR TORTS AND BREACH OF CONTRACT, (3rd Edi., 2004).
[59] Clause 8, Annexure 1, Partnership Agreement, Moot Proposition.
[60] Clause 5 & 8, Annexure 1, Partnership Agreement, Moot Proposition.

enter into a seemingly lucrative deal providing them with 85% share of profit.[61] This shows shift in their focus from the main object of the initial agreement.

21. Furthermore, the contract was unilaterally repudiated by the respondent in January 2017.[62] However, the arbitration to settle the dispute takes place in late September.[63] In the span of these 8 months, the Claimant suffered huge financial loss due to non-working of the venture. Therefore, the respondent is liable to compensate the Claimant for the financial loss suffered by the latter due to wrongful rescission of the contract by the respondent.

CONCULSION: Therefore, the termination of the agreement by the respondent is invalid. The claimant are entitled to specific performance along with damages.

ISSUE II: CLAIMANT IS THE OWNER OF THE JADE-MINING MACHINERY AND EQUIPMENT.

22. As per the terms of the jadeite venture entered between the parties, SPT was in charge of obtaining and settling all the permits, requirements and all related matters with the government of Myanmar, whereas claimant was to buy and provide all equipment required and provide technical expertise *for the term of the agreement*.[64] Since, the agreement in question has been terminated invalidly by SPT, the jade mining machinery and equipment should revert back to its lawful owner, i.e., AID.

23. This is because of the following reasons. SPT has no document of title to prove its ownership [**A**] and there was no intention between the parties to transfer of the title of the jade-mining equipment and machinery [**B**]. Moreover, the domestic regulations of

[61] Moot Proposition, ¶ 37.
[62] Moot Proposition, ¶40- 41.
[63] Moot Proposition, ¶50.
[64] Clause 4, The Partnership Agreement (Annexure 1, Moot Proposition).

Myanmar prevented claimant from importing jade mining machinery and equipment [**C**]. claimant is the sole owner because the jade-mining machinery and equipment does not qualify as partnership property [**D**]. As per the principle of privity of contract claimant is the owner of jade-mining equipment and machinery [**E**]. Alternatively, the jade-mining machinery and equipment were under bailment from claimant to SPT [**F**]. Lastly, general rules and specific laws also support AID's claim of receiving back the machinery [**I**].

A. <u>SPT has no document of title to prove their ownership over jade-mining equipment and machinery.</u>

24. Bill of lading is not a conclusive proof of ownership of jade-mining equipment and machinery [**1**]. It only transfers possession to the consignee from the carrier [**2**]. Additionally, only in case of a negotiable and tranferrable Bill of lading the title of the goods passes to the consignee [**3**]. Even if bill of lading is document of title, there was no consideration paid for the jade equipment and machinery by the respondent [4].

(i) ***<u>Bill of lading is not a conclusive proof of ownership of jade-mining equipment and machinery.</u>***

25. The intention of the parties is paramount is deciding whether bill of lading is a document of title. Under the common law system, carriage documents including bill of lading which confers only contractual rights to demand delivery of the goods and is a document of title only under certain limited circumstances.[65] A bill of lading does not *per se* establish legal title,[66] and possession of bill of lading does not amount to having a title over the disputed goods.[67] In *Sewell v. Burdick*, the British House of Lords held that the

[65] A. G. Guest and Judah P. Benjamin, BENJAMIN'S SALE OF GOODS, Vol.2, pg.1105.
[66] Peter Gillies and Gabriël Moens, INTERNATIONAL TRADE AND BUSINESS: LAW, POLICY AND ETHICS, pg.125.
[67] *Sewell v. Burdick*, (1884) 10 App.Cas. 74. [United Kingdom]

effect of the indorsement of a bill of lading depends entirely upon the facts and circumstances of each indorsement and that there is no general rule that indorsement passes the whole legal property in the goods.[68] The previous decision of House of Lords in *Lickbarrow v. Mason*[69] must be interpreted to mean that only property that is intended by the parties to be transferred, is transferred.[70] Hence, in absence of the intention among the parties to effect a sale no property right is passed.

26. In the present case, the bill of lading was intended only for faciltation of exporting jade mining machinery and equipment into Myanmar. Under the agreement, the Respondent had the contractual obligation to procure permits and other documents for importing goods into the country.[71] The purpose of the Bill of Lading was not to transfer title of the machinery to the Respondent. Hence, the bill of lading cannot be considered a document of title over the machinery.

(ii) ***Bill of lading only transfers possession to the consignee from the carrier.***

27. Bill of lading is only a document of control over the goods.[72] When Bill of lading is transferred to another person by way of endorsement and delivery, a constructive possession is transferred, rather than the title itself.[73] Hence, in the present case, only the possession of the goods was transferred to SPT and not the title to the goods.

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[68] Thomas Edward Scrutton, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, ¶ 10-007.
[69] *Lickbarrow v Mason*, (1788), 2 T. R. 63. [United Kingdom]
[70] As per Lord Selborne, *Sewell v. Burdick*, (1884) 10 App.Cas. 74 at p.80. [United Kingdom]
[71] Clause 3, The Partnership Agreement (Annexure 1, Moot Proposition).
[72] Roy Goode, COMMERCIAL LAW [3rd Edi.] at 890 ¶ 1.
[73] *Id.*

(iii)***Additionally, only in case of a negotiable and tranferrable Bill of lading the title of the goods passes to the consignee.***

28. When a Bill of Lading is issued in Original to a named consignee, it is referred to as a 'Straight Bill of Lading,' which is a non-negotiable and non-transferable document. [74] The sole purpose of straight bill of lading is to take delivery from the carrier. This Bill of Lading does not serve as a document for the title to the goods.[75] Hence, a non-negotiable bill of lading (i.e.) a straight cannot be a "document of title".

29. In the present case, the bill of lading is a "straight' bill of lading because the it specifically addressed SPT as a consignee.[76] In order for the title over the goods to have transferred from Claimant to SPT, the bill of lading must be negotiable in nature which is not so in the present case. Therefore, the straight bill of lading did not transfer the title of goods to the consingee i.e. SPT.

(iv)***Even if bill of lading is document of title, there was no consideration paid for the jade equipment and machinery by the respondent.***

30. Property in goods at sea may be completely passed by indoresment and delivery of the bill of lading under which the goods are shipped in exchange for payment of the price.[77] In the absence of the consideration, the title over the goods would not pass to the consignee/endorsee. This is because payment of consideration is an essential part of a contractual transaction.[78] In the present case, SPT did not made any payment for the jade-

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[74] Sarah Dromgoole *et. al.*, INTERESTS IN GOODS [2nd Edi., 1998] at 547; *Brij* [2001] 1 Lloyd's Rep 431 [Hong Kong].
[75] Stephen Girvin, CARRIAGE OF GOODS BY SEA, 89 (Oxford University Press, 2011).
[76] Additional Clarifications, Moot Proposition, ¶ 25.
[77] Thomas Edward Scrutton, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, ¶ 10-008.
[78] Section 10, Contract Act (Myanmar).

mining equipment and machinery.[79] Therefore, the title over the jade-mining equipment and machinery remains with AID.

B. <u>There was no intention of the parties to effect the sale or transfer of the title of the jade-mining equipment and machinery.</u>

31. Intention of the parties is paramount in deciding what the consequences of the commercial contract.[80] Every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties.[81] In *McCutcheon v David Macbrayne Ltd*, the House of Lords held that the court's obligation is to decide what each party was reasonably entitled to conculde from the attitude of the other at the point when the parties entered into the agreement.[82] Furthermore, in *East West Corporation v. DKBS*, the English Court of Appeal held that if there is no intention to transfer the property in the goods to the transferee, then no such property passes.[83] Hence, a contract cannot operate to transfer rights more than was envisagned by the parties at the time of entering into an agreement.

32. In the present case, the parties never intended to transfer the ownership of the machinery from claimant to SPT. There no clause in the partnership agreement[84] which can support the contention that the intention of the parties was to transfer the ownership of the machinery which was supplied by AID. The real intention of the parties was to conduct the jadeite business, maximize profits, and, improve the skills and competencies of the

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[79] Answer to Question no. 9, Additional Clarifications, Moot Proposition.
[80] *The Moorcock* (1889) 14 PD 64; *Bettini v. Gye* (1876) 1 QBD 183; *Poussard v. Spiers* (1876) 1 QBD 410; *Bentson v. Taylor, Sons & Co.* (No. 2) (1893) 2 QB 274. [United Kingdom]
[81] *Steel Brothers & Co. Ltd. v. Tokersee Mooljee*, (1932) ILR 10 RANG 372. [Myanmar]
[82] *McCutcheon v David Macbrayne Ltd*, [1964] 1 WLR 125, 128. [United Kingdom]
[83] *East West Corporation v. DKBS*, (2003) QB 1509. [United Kingdom]
[84] Moot Proposition, Annexure 1.

local people of Myanmar. Moreover, the partnership operated in a manner wherein the property brought in by individual partners remained the respective properties of the partners. [85] Therefore, the equipment and machinery brought in by claimant continued to belong to claimant as can be inferred from the Contract.

C. The transaction of jade mining machinery and equipment cannot be made equivalent to a sale.

33. The transaction of sourcing the machinery and equipments cannot be equated to sale as there is no consideration paid by SPT[86] for the transfer of machinery from Japan to Myanmar and the same was paid by AID. Claimant purchased the machinery and sourced them to Japan under its obligations under the agreement.[87]

34. It is an established principle of sale of goods that sale is complete only when there is a consideration to that effect.[88] Under the Myanmar Sale of Goods Act, "Goods" mean every kind of moveable property,[89] and 'price' as the money consideration for the sale for good(s).[90] Furthermore, a contract for sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.[91] Lastly, for a contract of sale to enter into effect, there must be an offer and an acceptance of said offer by the other party.[92]

35. From the above provisions of the Myanmar Sale of Goods Act, it can be inferred that for the title to pass in a movable property, there must exist a contract for such transfer for a

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[85] Clause 2, Partnership Agreement (Annexure I, Moot Proposition).
[86] Additional Clarifications. Moot Problem, Question No. 9.
[87] Moot Proposition, ¶ 16.
[88] Section 10, Contract Act (Myanmar).
[89] Section 2(7), Myanmar Sale of Goods Act 1930.
[90] Section 2(10), Myanmar Sale of Goods Act 1930.
[91] Section 4(1), Myanmar Sale of Goods Act 1930.
[92] Section 5(1), Myanmar Sale of Goods Act, 1930.

consideration. In *Official Assignee v. Subala Dasi*[93], the High Court of Rangoon held that for a transaction of sale to be valid, there must exist a consideration, without which, the transaction would be invalidated. A sale that lacks consideration is void from the beginning and produces no legal effect.[94]

36. In the present case, there existed no contract between claimant and SPT stipulating the sale of the the machinery concerned. Furthermore, no consideration was either stipulated in the agreement, or paid by SPT to AID in lieu of the machinery that was supplied by AID. Considering that no sale exists without any consideration, the title remains unchanged. Hence, the transaction involving the jade mining machinery and equipments does not fall under the ambit of sale. The ownership of the same would thereby rest in the person who has paid a consideration for the same, which, in this case is AID, as the invoice and purchase receipts had the name of AID.[95]

D. <u>The domestic regulations of Myanmar prevented AID from importing the jade mining machinery and equipment.</u>

37. The strict internal regulations of Myanmar severely restricted AID's ability to import the machinery itself into Myanmar.[96] This is because Myanmar's Foreign Investment Law, at the time of contract, prohibited direct investment in mining activities by foreign nationals and was permitted only under a joint venture with a Myanmar national.[97] Moreover, only Myanmar nationals are allowed to engage in an import transaction and an

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[93] *Official Assignee v. Subala Dasi,* (1935) AIR 1935 Rangoon 98.
[94] *Catindig v. Vda de Meneses*, GR No. 165851; *Roxas Sr. vs. CA*, GR No. 168875, 02 February 2011.
[95] Additional Clarifications. Moot Problem, Question No. 27.
[96] Union of Myanmar Foreign Investment Law (1988).
[97] Wendy Zeldin, Burma Amended Foreign Investment Law, http://www.loc.gov/law/foreign-news/article/burma-amended-foreign-investment-law-published/.

import license can be only granted to a Myanmar national.[98] Lastly, the Myanmar Ministry of Commerce, Directorate of Trade, had strictly prohibited the import of second hand machinery in the country.

38. Hence, under such circumstances, both the parties being aware about the strict prohibition on the import of used machines, still went ahead with the agreement on the confidence shown by SPT about settling all the permits, requirements and all related matters with the government of Myanmar. 'Settling' under the agreement would have referred to the ways in which SPT would arrange for the permits and others matters with the government to do the jade mining business. This is why the agreement stipulated that it would be SPT's obligation to obtain and settle all the permits, requirements and all related matters with the government of Myanmar and this would not entitle SPT to become the owner of the jade mining equipment and machinery.

E. <u>Since the jade-mining machinery and equipment does not qualify as partnership property, AID retains exclusive and sole ownership over the goods.</u>

39. The property used in the course of partership does not per se qualify as the partnership property [**i**]. Furthermore, there is no presumption of ownership arises due to the continued use of property [**ii**].

(i) ***<u>The property used in the course of partnership does not per se qualifies as the partnership property.</u>***

40. Property is not necessarily partnership property because it is used by all the members of the firm.[99] Any property qualifies as partnership property only if there was an agreement

[98] National Trade Portal Myanmar, Guide to importing goods into Myanmar, http://www.Myanmartradeportal.gov.mm/kcfinder/upload/files/Guide%20to%20Importing%2019052016%282%29.pdf.

to that effect. In *Arm Group Enterprises v. Waldorf Restaurant*, the Supreme Court of India held that property exclusively belonging to a person, in the presence of an agreement to the contrary, does not, on the person entering into partnership, becomes a property of the partnership merely because it is used for the business of the partnership.[100] Hence, in absence of the evidence of the surrender of individual interest by the Claimant in the assets or admission of the fact that the respondent was to be an equal owner, the rights over the property would continue to vest with the original owner i.e Claimant.

(ii) ***No presumption of ownership arises due to continued use of the property.***

41. No presumption can be made regarding whatever is brought by a partner in the partnership is continued to be used by the other partner is presumed to have become the property of the partnership.[101] In *Kelly v. Kelly,* when the marketable authority of the assets were not recorded in the books of accounts although the annual license fees were paid by partnership, the High Court of Australia held that the assets remained the personal property of the original owner. [102]

42. In the present case, the machinery and equipments were initially bought in Japan by Claimant and then exported to Myanmar. All the cost of these assets was borne by AID.[103] There is no list of the property of partnership.[104] Also, there is nothing during the course of partnership which goes on to state that the partners had any agreement with respect to the treatment of these assets as the property of partnership.

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[99] William R. White, LAW OF PARTNERSHIP (21) 1959, pg.25.
[100] *Arm Group Enterprises v. Waldorf Restaurant*, AIR 2003 SC 4106; *Arjun Kanoji Tankar v. Santaram Kanoji Tankar*, 1969 (3) SCC 555. [India]
[101] *Harvey v. Harvey*, (1970) 120 CLR 529.
[102] *Kelly v. Kelly*, (1990) 92 ALR 74. [Australia]
[103] Additional Clarifications. Moot Proposition, Question No. 9.
[104] Additional Clarifications. Moot Problem, Question No. 28.

F. As per the principle of privity of contract CLAIMANT is the owner of jade-mining equipment and machinery.

43. One who is a stranger to a contract, to its consideration has no right to enforce it.[105] He can neither claim a benefit nor sustain a liability under it.[106] As observed by the British House of Lords in *Dunlop v. Selfridge* that privity of contract was a fundamental principle of English common law that only a party to a contract who had provided consideration could sue on it.[107] One of the source of myanmar law is the colonial British law.[108] Hence, in myanmar as well similar principle of common law is followed.

44. In the present case, the machinery was purchased by Claimant in Japan and they then reconditioned them.[109] The contract of purchase of jade-mining equipment and machinery was entered into between the seller and Claimant in Japan. All the consideration for the sale proceeds was paid by AID and SPT had no share in it.[110]

G. The jade-mining machinery and equipment were under bailment from AID to SPT.

45. Under bailment goods are delivered by the bailor to the bailee for a purpose, upon the promise that, when the purpose is accomplished, be returned or otherwise disposed of acoording to the directions of the person delivering them.[111] A specific contract of bailment is not required for section 148 of the Myanmar Contract Act to be applicable. It can be entered into through an implied agreement between bailor and bailee.[112]

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[105] *Evans v. U.S.,* 42 Ct. Cl. 287.
[106] *St. Louis v. Wright Cont. Co.,* 202 Mo. 451, 101 S. W. 6.
[107] *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd*. [1915] AC 847.
[108] Adrian Briggs and Andrew Burrows**,** THE LAW OF CONTRACT IN MYANMAR, (University of Oxford, 2017).
[109] Moot Proposition, ¶ 16.
[110] Answer to Question no. 9, Additional Clarifications, Moot Proposition.
[111] Section 148, Contract Act (Myanmar).
[112] Adrian Briggs and Andrew Burrows**,** THE LAW OF CONTRACT IN MYANMAR, (University of Oxford, 2017).

46. In the present case, AID was the bailor of the jade-mining equipment and machinery. The Claimant remained in ownership of the machinery, under the law of bailment. Hence, upon the unilateral termination of the partnership agreement goods by SPT, the machinery bailed by AID to SPT is liable to be returned.

H. Additionally, SPT cannot benefit from its own wrongdoing to claim ownership over the jade-mining machinery and equipment.

47. It is a well established principle of common law that one cannot benefit from one's own wrongdoing.[113] In the present case, under clause 8 of the contract signed between AID and SPT, the partnership was envisaged to be of "long term".[114] The unilateral and abrupt termination of the partnership by SPT was to gain a greater share of profit through collaboration with other company.[115] Hence, keeping in view the principle laid out above, the Respondent should not be allowed to benefit from its wrongdoing and the ownership of the equipment should belong to AID.

I. General rules and specific laws also support AID's claim of receiving back the machinery.

48. Since the contract was terminated by SPT unilaterally and without following proper method, the general laws are of the view that, AID shall get back the machinery and equipment as the contract has been terminated. The common law remedy of Replevin (*revendication*) enables a person to get back personal property, pending a final

[113] *Riggs v. Palmer*, 115 N.Y. 506 (1889) (United States).
[114] Clause 8, Partnership Agreement, (Annexure I, Moot Proposition).
[115] Moot Proposition, ¶ 37.

determination by a court of law, and get compensation for resulting losses.[116] The remedy is available even in an unjust detention of property, even where the original taking was lawful.[117]

49. It is a principle of general law that if there is a breach in a contract, then the party alleging the breach can seek return of the equipment given to be used under the terms of the contract, along with damages which the party breaching the contract is obliged to pay as the contract no more exists for which the equipment was given.[118] Furthermore, the issue of what a wrongful termination of contract entails was raised in *Pav-Saver Corp. v. Vasso Corp*[119] wherein it was held that the contract equipment must be returned on termination of the contract. Hence, SPT is obligated to return back the jade mining machinery and equipment to AID because the machinery was sent to Myanmar only for the term of the contract and now that the contract has been terminated by SPT, on default, the same should be reverted back to its lawful owner.

CONCLUSION: Since there was no sale of the machinery and equipments but mere importation by SPT because AID was not capacitated to import it on its own, and since the termination of agreement was done in a wrongful manner by SPT, the machinery should be returned to its rightful and legal owner, i.e. AID.

[116] William Blackstone, "Of injuries to personal property" *in* COMMENTARIES ON THE LAWS OF ENGLAND III, (1771) pp. 151–152.
[117] *Id.,* at pp.144–143.
[118] *Relational Funding Corporation v. Tcim Services, Inc*., 2002 (D.Del. 2002).
[119] *Pav-Saver Corp. v. Vasso Corp,* (2002) 143 Ill. App. 3d 1013 [United States].

ISSUE III: AID HAS OWNERSHIP OVER THE RIGHTS IN THE JADEYE SOFTWARE.

50. Myanmar Law is not applicable to determine the ownership over JADEYE software [**A**]. Instead, Japanese Law is applicable to determine the ownership over JADEYE software and as per Japanese Copyright Act AID is the owner of the JADEYE software [**B**]. Alternatively, if Myanmar law governs the rights over JADEYE, the ownership of JADEYE nonetheless vests with the Claimant. [**C**].

A. Myanmar Law is not applicable to determine the ownership over JADEYE software.

51. The Myanmar Copyright Act, 1914 does not specifically recognise copyright over software.[120] Myanmar has, however, signed the TRIPS Agreement under the WTO and is therefore obligated to implement adequate IP legislation.[121] In an effort to get in line with the international IP laws, a draft copyright law has been enacted by Myanmar. The draft copyright law is based upon the WIPO Model Law and is in line with the TRIPS Agreement and Conventions and Treaties administered by WIPO. Under the draft copyright law, protection will cover works created by nationals of other member states that adhere to treaties or conventions that relate to copyright.[122] Since Japan is an active signatory to WIPO and TRIPS, the proposed legislation will grant protection to the copyright of the Japanese nationals too.

[120] Copyright Act, 1914. (Myanmar).
[121] Yuwadee Thean-Ngarm & Shalini Ghosh, Update on Mayanmar IP Laws, http://www.managingip.com/Article/3521769/Myanmar-Update-on-Myanmars-IP-laws.html.
[122] Tilleke & Gibbins, Myanmar's IP Laws and draft copyright law, http://www.lexology.com/library/detail.aspx?g=92584574-19a4-4eb4-8f67-12c806a218bb

B. <u>As per the Japanese Law, Claimant is the owner of the JADEYE software.</u>

52. Japanese Copyright Act is applicable to determine the ownership over JADEYE software [**i**]. Article 10 (ix) of the Copyright Act is applicable [**ii**] and ownership of the copyrightable work created by an employee vests with the employer [**iii**]. There is no requirement of registration for the grant of protection under the Copyright Act [**iv**]. Reverse engineering of a copyrightable work amounts to copyright infringement [**v**]. There was no transfer of JADEYE to SPT [**vi**].

(i) ***Japanese Copyright Act is applicable to determine the ownership over JADEYE software.***

53. Japanese Law provides that otherwise applicable law will not have control if it is contrary to the "public order and good morals" of Japan.[123] Furthermore, it has been broadly accepted in judgments of Japanese courts and in academic opinion that the courts of the country which granted the IP right in question shall have the exclusive jurisdiction.[124] The effect of the IP rights protected in Japan shall be subject to the exclusive jurisdiction of the Japanese courts.[125]

54. Under Article 6 (i) of the Japanese Copyright Act ("Copyright Act"), protection is granted to the works of Japanese nationals.[126] In the present case, the first author of the software is Mr. Joe Yamashita is a Japanese national. Since JADEYE was created in course of his employment, the employer i.e. Claimant has the ownership over the software. Hence, the ownership rights of the software is governed by the Copyright Act.

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[123] Law no. 10 of June 21, 1898 Art. 33, *translated in* Zentaro Kitagawa, Doing Business in Japan, Statute Volume, Appendix 3B (1995).
[124] *Chizaishu* (1994), 26 (HC)717.
[125] Toshiyuki Kono, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW 770 (2012).
[126] Article 6, Japanese Copyright Act, 1970.

(ii) ***<u>Article 10 (ix) of the Copyright Act is applicable.</u>***

55. Under Article 10 (ix) of the Copyright Act, the "works" that are protected under the act includes computer program ("*puroguramu*"). Computer program includes all types of programs, including application software operating system programs.[127] In *Taito K.K. v K.K. ING Enterprises,* the Tokyo District Court held that computer program in object code was a creative expression based on the scientific thoughts of the creator and was therefore a work of authorship under the Copyright Law.[128] The same principle was upheld by the Yokohama District Court.[129] Hence, computer software which are a creative expression based on the scientific thoughts of the creator are protected under the Copyright Act.

56. In the present case, JADEYE software is a process optimisation and operations management software which allows for testing of jade quality and viability with 99% accuracy level. Furthermore, JADEYE software can expedite assessment work through assistance in determination of scalability and economic value of the mining site. Hence, JADEYE software is a computer program protected under Article 10 (ix) of the Copyright Act.

(iii)***<u>Ownership of the copyrightable work created by an employee vests with the employer.</u>***

57. Japanese law recognises "work for hire" doctrine. Under article 15 (2) of the Japanese Copyright Act, both moral rights and economic rights *(chosakuken)* are transferred to the

[127] Hoffman, Grossman, Keane & Westby, *Protection for Computer Software: An International Overview, Part 1,* 10 EUR. INTELL. PROP. REV. 337 (1988) at 34.
[128] *Taito K.K. v K.K. ING Enterprises,* (1982) Chisai (District Court) Tokyo, 1060 HANJI 18 [Japan].
[129] *Taito K.K. v Makoto Denshi kogyo K.K, (*1983) Chisai (District Court) Yokohama, 1081 HANJI 125 [Japan].

employer when the program work is made for hire. Even though, certain specific conditions are required to be fulfilled. Generally, courts in Japan have been liberal about giving benefits to employers even when the employee has made the software outside work time and using his own equipment.[130] Furthermore, program works need not be published under the name of the employer for the employer to become the author of the program works.

58. In the present case, the JADEYE software was created by Mr Joe Yamashita in the course of his employment with AID in Myanmar. Furthermore, even after being discharged from employment from AID, Mr. Yamashita had duly vested the software matrix with the Finance Head at AID,[131] therefore making the company the ultimate retainer of the JADEYE software and all interest that flow from it.

(iv) ***There is no requirement of registration for the grant of protection under the Copyright Act.***

59. Japanese Copyright law does not require the registration of a copyrighted article for copyright to vest in said article. Under article 17(2) of the Copyright Act the authors are automatically conferred with the copyright protection, wihtout the requirement of registration.[132] Hence, even in case of a non registered work the initial owner would have the right to proceed against an infringment.

60. In the present case, AID was due to the operation of law automatically conferred the copyright over the JADEYE software. Hence, the ownership of JADEYE software vests with the Claimant.

[130] *Missing link software v. Magee* (1989) 361 (FSR); *Noah vs Shuba* (1991) 14 (FSR). [Japan]
[131] Moot Proposition, ¶25.
[132] Article 17(2), Japanese Copyright Act.

(v) ***Reverse engineering of a copyrightable work amounts to copyright infringement.***

61. If one uses decompiling to create a program which is substantially similar in expression to the original program, the fact that decompiling was used will not change the fact that the program is infringed.[133] Reverse engineering is an illegal practice under the Japanese Law. In *Microsoft Corp. v. Shuwa System Trading Co.,*[134] the Tokyo District Court held that reverse engineering illegal. Hence, reverse engineering is not a permissible mean of reproduction of a work protected under the Japanese Copyright Act. In the present case, since JADEYE software is protected computer program under the Copyright Act, SPT cannot use reverse engineering to recreate the JADEYE software.

(vi) ***There was no transfer of JADEYE to the respondent.***

62. Only a registered transfer of a copyrighted work is effective against a third party.[135] In absence of a registration no rights over the copyrighted work can be transferred. In the present case, there has been no registration or even agreement to transfer JADEYE to the respondent. Hence, AID remained the owner of the JADEYE software.

C. Alternatively, even if Myanmar law governs the rights over JADEYE, the ownership of JADEYE vests with the Claimant.

63. In the scope of the employment, any invention by an employee is owned by the employer. Under section 5(1)(b) of the Copyright Act 1911, the copyright over a work done by an employee in the course of his employment is owned by the employer.[136]

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[133] Edward Durney, "*Protection on Computer Programs under Japanese Copyright Law*," (1991) 9 UCLA Basin Law Journal at 42. *Infra*, note 71.
[134] *Microsoft Corp. v. Shuwa System Trading Co*, (1987) Chisai (District Court) Tokyo 1219 HANJI 48 [Japan].
[135] Article 77 (2), Japanese Copyright Act.
[136] Section 5(1)(b), Copyright Act 1911. (Myanmar).

64. In the present case, the JADEYE software was invented by Mr. Joe Yamashita who was an employee of AID.[137] The salary of Mr. Joe Yamashita, the inventor, was paid by AID.[138] Hence, all rights in the JADEYE software vests with AID.

CONCLUSION: It can be validated from the above that by virtue of Mr. Joe Yamashita was an employee of AID and made the software during course of employment, thus making AID the real author and owner of JADEYE.

[137] Moot Proposition, ¶ 21.
[138] Answer to Question no. 14, Additional Clarifications, Moot Proposition.

PRAYER FOR RELIEF

On the basis of the foregoing arguments and CLAIMANT's prior written pleadings, CLAIMANT respectfully requests the Tribunal, while dismissing all contrary requests and submissions by RESPONDENT, to **adjudge** and **declare** that:

- The termination of agreement by the respondent was invalid;
- The respondent is liable for specific performance along with compensation.
- The jade-mining machinery and software must be restituted to the Claimant, who is the real owner; and
- The subsistence and ownership of JADEYE software shall lie with the Claimant.

DATE: 11TH AUGUST, 2017 COUNSELS ON BEHALF OF **CLAIMANT**

PLACE: TOKYO, JAPAN COUNSEL NO. **T1715**