

THE 12<sup>th</sup> 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 RESPONDENT

---

---

**TABLE OF CONTENTS**

---

**INDEX OF AUTHORITIES..... V**

**STATEMENT OF JURISDICTION..... X**

**QUESTIONS PRESENTED .....XI**

**STATEMENT OF FACTS..... XII**

**SUMMARY OF PLEADINGS .....XV**

**PLEADINGS ..... 1**

**ISSUE I: THE TERMINATION OF THE AGREEMENT BY THE RESPONDENT IS  
VALID..... 1**

A. THERE WAS A MATERIAL BREACH OF PARTNERSHIP AGREEMENT ON PART OF THE  
CLAIMANT..... 1

*a) There was a breach of Clause 8 by the claimant. .... 3*

*b) There was a breach of Clause 9 by the claimant. .... 3*

*c) There was a breach of Clause 11 by the claimant. .... 4*

B. DR. FIONA LUM AS A NON-EXECUTIVE DIRECTOR IS THE AGENT OF AID. .... 4

C. THE ACTS OF THE CLAIMANT HAVE FRUSTRATED THE CONTRACT THEY HAD ENTERED WITH  
THE RESPONDENT. .... 5

D. THE TERMINATION CLAUSE WAS RIGHTLY EXERCISED BY THE DEFENDANT. .... 7

E. THE AGREEMENT BETWEEN THE CLAIMANT AND THE RESPONDENT IS DIVISIBLE IN NATURE.

**ISSUE II : SUBSISTENCE AND OWNERSHIP OF THE RIGHTS IN JADEYE**

**SOFTWARE RESTS WITH SPT. .... 9**

A. BILL OF LADING IS A CONCLUSIVE PROOF OF TITLE FOR THE JADE MINING EQUIPMENT AND MACHINERY. .... 9

*(i) The Respondent has the title to the goods as the bill of lading serves as a document of title. .... 9*

*1. An intention to pass the property in the goods exists..... 10*

*2. Indorsement of bill of lading transfers possession and ownership in the goods. .... 11*

B. PURCHASE AND EXPORT OF JADE-MINING MACHINERY AND EQUIPMENT DOES NOT CONFER OWNERSHIP ON THE CLAIMANT..... 11

C. THE RESPONDENT IS THE BENEFICIARY TO THE PURCHASE AGREEMENT OF JADE MINING MACHINERY AND EQUIPMENT..... 13

**ISSUE III: SUBSISTENCE AND OWNERSHIP OF THE RIGHTS IN JADEYE**

**SOFTWARE RESTS WITH SPT. .... 14**

A. APPLICABILITY OF MYANMAR LAWS DUE TO PARTY AUTONOMY IN CHOICE OF LAW CLAUSE. .... 14

B. EXISTENCE OF AN IMPLIED CONTRACT BETWEEN JOE YAMASHITA & U THEIN KYAW REGARDING THE JADEYE. .... 15

C. ALTERNATIVELY, ALGORITHM IS NOT PROTECTED UNDER THE COPYRIGHT ACT OF JAPAN. . 16

D. ADDITIONALLY, REVERSE ENGINEERING IS ALLOWED IN JAPAN. .... 17

*a) Reverse Engineering is a legal process and cannot be prohibited. .... 17*

**CONCLUSION: ..... 18**

**PRAYER FOR RELIEF..... 20**

## INDEX OF AUTHORITIES

---

### CASES

<i>Alkok v. Grymek</i> , (1966) 56 DLR (2d) 393 (Canada).....	2
<i>B.V. Nagaraju v. Oriental Insurance Co. Ltd.</i> , 1996 SCC (5) 71. ....	1
<i>Beswick v. Beswick</i> , [1967] UKHL 2, [1968] AC 58.....	13
<i>Bunge Corpn v. Tradax Export SA</i> , [1981] 2 All ER 513.....	2
<i>Cf Rice v. Great Yarmouth BC</i> , (2001) 3 LGLR 4.....	7
<i>Collis Line Private Ltd. v. New India Assurance Co. Ltd. and Anr.</i> , AIR1982Ker127 .....	10
<i>Coventry v. Gladstone</i> (1868), L.R. 6 Eq. 44 102, 108. ....	9
<i>Dalkia Utilities Services plc v. Celtech International Ltd.</i> , [2006] EWHC 63 (Comm). ....	7
<i>Darlington BC v. Wiltshier Northern Ltd.</i> , (1995) 3 All ER 895 .....	13
<i>EE Master v. Garrett &amp; Taylor Ltd.</i> , AIR 1931 Ran 126. ....	2
<i>Everett v. Emmons Coal Min. Co.</i> , 289 Fed. 686, 692 (C. C. A. 6th, 1923.....	8
<i>FA Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.</i> , [1916] 2 AC 397, 406.....	5
<i>Ferguson v. Wilson</i> , (1866) 2 Ch App 77 .....	5
<i>Jackson v. Union Marine Insurance Co. Ltd.</i> , (1874) LR 10 CP 125. ....	6
<i>Jl MacWilliam Co Inc v. Mediterranean Shipping Company SA</i> [2005] UK HL 11 (The "Rafaela S"). ....	10
<i>Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.</i> , (1942) AC 154, 164.....	5
<i>Judhah v. Rampada Gupta</i> , AIR 1959 Cal 715. ....	5
<i>Karsales (Harrow) Ltd. v. Wallis</i> , [1956] 1 WLR 936. ....	1

<i>Kewanee Oil Corp v Bicron Corp.</i> , [1974] USSC 86.....	17
<i>Khirod Behari Dutt v. Man Gobinda</i> , AIR 1934 Cal 682.....	13
<i>Lickbarrow v. Mason</i> ((1788), 2 T. R. 63 and (1794) 5 TR 683).....	10
<i>Lombard Borth Central plc v. Butterworth</i> , [1987] QB 527. ....	7
<i>Muralidhur Chatterjee v. International Film Co. Ltd.</i> , (1943) 70 Ind App 35.....	2
<i>P&amp;O Nedlloyd BV v. Utaniko Ltd. Dampskibsselskabet AF 1912 A/S (Maersk Line v East West Corp)</i> [2003] EW.....	11
<i>Pac. Timber Co. v. Iowa Windmill &amp; Pump Co.</i> , 135 Iowa 308, 310, 112 N. W. 771 (1907). ....	8
<i>Re City Equitable Fire Insurance Co.</i> , [1925] Ch 407. ....	5
<i>Sanders Bros v. Maclean &amp; Co.</i> , (1883) LR 11 QBD 327 (CA) 341. ....	10
<i>Sarathi Leasing Finance Co. v. B Narayana Shetty</i> , (2006) 131 Comp Cas 798 Kant.....	5
<i>Sewell v. Burdick</i> , (1884) 10 App.Cas. 74, p. 80.....	10
<i>System Science v. Japan Technato</i> ,130 HANJI, Tokyo High Court, June 20, 1989.....	17
<i>Taylor v. Caldwell</i> , (1863) 3 B. & S. 826 at 836.....	6
<i>Taylor v. Oakes Roncoroni &amp; Co.</i> , (1922) 127 LT 267, 269.....	1
<i>Vita Food Products, Inc. v. Unus Shipping Co</i> , [1939] AC 290.....	15
<i>Walford v. Miles</i> , [1992] 2 AC 128, 138.....	6

## **STATUTES**

Article 10(3)(iii), Copyright Act of Japan, 1970. ....	18
Article 2(e), The Myanmar Export and Import Law, 2012.....	12
Article 6, The Myanmar Export and Import Law, 2012. ....	12
Section 1, The Burma Copyright Act, 1911. ....	16
Section 2(j), Myanmar Investment Law, 1998.....	12

## **TREATISES**

A. Burrows Beaton, <i>et al.</i> , ANSON’S LAW OF CONTRACT, (30th Ed.) .....	17
A. G. Guest and Judah P. Benjamin, BENJAMIN’S SALE OF GOODS, Vol.2 .....	11
Anson’s Law of Contract, 30 <sup>th</sup> Edition, J. Beatson, A. Burrows, J. Cartwright .....	8
Cheshire, Fifoot & Furmston’s Law of Contract, Michael Furmston, 14 <sup>th</sup> Edition, International Student Edition.....	2
Frederick Pollock & Dinshaw Fardunji Mulla, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, pg. 88, Vol. I, (Lexis Nexis, 2013).....	14
Frederick Pollock & Dinshaw Fardunji Mulla, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, Vol. I, (Lexis Nexis, 2013).....	17
Jason C.T Chuah, LAW OF INTERNATIONAL TRADE: CROSS-BORDER COMMERCIAL TRANSACTIONS, 4th edition.....	10
The Law of Contract in Myanmar, Adrian Briggs and Andrew Burrows, University of Oxford ..	1
Thomas Edward Scrutton, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING.....	10
Thomas Edward Scrutton, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING,.....	10, 11
Thomas Gilbert Carver, M.A, A TREATISE ON THE LAW RELATING TO THE CARRIAGE OF GOODS BY SEA, 4th edition.....	12
Willis Reese & Maurice Rosenberg, CONFLICT OF LAWS, CASES AND MATERIALS, 576-96 (8 <sup>TH</sup> Ed. 1984).....	16

## **REPORTS**

<i>The Report: Myanmar 2016</i> , Oxford Business Group.....	16
--	----

## **ARTICLES**

Andrew Johnson-Laird, ‘ <i>Software Reverse Engineering in the Real World</i> ’, 19 U. DAYTON L. REV. 843, 857 (1994).....	19
Casalav Pejovic “ <i>Documents of Title in Carriage of Goods by Sea: Present Status and possible future directions</i> ” [ J.B.L. 2001 Sept.] ¶ 462.....	10
Chalmers Johnson, MITI and the Japanese Miracle: ‘ <i>The Growth of Industrial Policy</i> ’, 1925-75 (Stanford: Stanford University Press, 1982).....	19
Edward G Durney, ‘ <i>Protection on Computer Programs under Japanese Copyright Law</i> ’,(1991) 9 UCLA Basin Law Journal p 44.....	19
Gerald Dworkin, ‘ <i>The Concept of Reverse Engineering in Intellectual Property Law and its Application to Computer Programs</i> ’, (1990) 1 The Intellectual Property Law Journal, p 164.18	
Howard Benett, “STRAIGHT BILLS OF LADING” (2005) 121 L.Q.R. 555 .....	11
Information and the non-executive director, Alan Grieve, Royal Society for the Encouragement of Arts, Manufactures and Commerce, November 1991 .....	4
KANEKO Yuka and Ye Naing Lin, ISSUES IN MYANMAR INVESTMENT LAW: TOWARD BETTER POLICY BALANCING.....	13
Lorenzen, <i>Territoriality, Public Policy, and the Conflict of Laws</i> (1924) 33 Yale L. J. 736, 748. ....	16
Mark S. Lee, ‘ <i>Japan's Approach to Copyright Protection for Computer Software</i> ’, 16 Loy. L.A. Int'l & Comp. L. Rev. 675 (1994).....	19
Party Autonomy: <i>Choice-Of-Law Clauses In Commercial Contracts</i> , Morris J. Levin, Georgetown Law Journal 46 Geo. L. J. (1957-1958), p. 260. ....	16
THE PASSING OF PROPERTY AS AFFECTED BY A BILL OF LADING TO THE SELLER'S ORDER, Columbia Law Review, Vol. 22, No. 5 (May, 1922), pp. 462-465. ....	12



Walter Parent, PASSAGE OF TITLE UNDER BILLS OF LADING, 5 Notre Dame L. Rev. 91 (1929)... 12

**REFERENCES**

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>..... 13

Wendy Zeldin, Burma Amended Foreign Investment Law, <http://www.loc.gov/law/foreign-news/article/burma-amended-foreign-investment-law-published/>. .... 12

## 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:*

- 1. WHETHER THE TERMINATION OF THE AGREEMENT BY THE RESPONDENT IS VALID?**
- 2. WHETHER THE MACHINERY AND EQUIPMENTS USED FOR THE VENTURE ARE OWNED BY THE CLAIMANT OR THE RESPONDENT?**
- 3. WHETHER THE JADEYE SOFTWARE IS OWNED BY THE CLAIMANT OR THE RESPONDENT?**

## 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 married to Dr. Fiona Lum Ka Ching.
- The RESPONDENT, Shwe Pwint Thone Co. Ltd. (SPT) 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

- **9<sup>th</sup> September 2008:** SPT hoped to create jobs in Hpakant for the local community, and to start a new training centre there. 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.

- **11<sup>th</sup> 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.
- **21<sup>st</sup> 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 AGREEMENT BY THE RESPONDENT IS VALID.

- The respondent is justified in rescinding the contract with the claimant as the latter committed breach of contract by violating certain important clauses in the partnership agreement.
- The claimants have also frustrated the contract and the comments of Dr. Fiona Lum made the employees and students of the venture upset and they lost all faith in their Japanese counterparts. Furthermore, the claimant was responsible as a principal for the comments of Dr. Fiona Lum as she being the non-executive director was the agent of the claimant company.

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

- The Respondent is the owner of the Jade mining machinery and equipment. This is because it has bill of lading as a document of title, which is a conclusive proof. It confers complete ownership on the consignee. The Respondent was also recorded as the owner on the import permits. Moreover, the Respondent was the beneficiary of the purchase agreement and is therefore entitled to retain the jade-mining machinery and equipment.

**ISSUE III: SUBSISTENCE AND OWNERSHIP OF THE RIGHTS IN JADEYE SOFTWARE RESTS WITH SPT.**

- The rights in the JADEYE software subsist with SPT. Myanmar copyright law accords no protection to works done by foreign nationals. Additionally, even if Japanese law is applied, algorithm is not protected. SPT may also reverse engineer the JADEYE software to obtain the source code because it is a legal process.



## PLEADINGS

---

### ISSUE I: THE TERMINATION OF THE AGREEMENT BY THE RESPONDENT IS VALID.

---

1. The termination of agreement by the respondent is invalid because: There was a material breach of partnership agreement on the part of the claimant [1], The acts of the claimant has frustrated the contract that they had entered into [2], The termination clause is rightly exercised by the respondent [3], Dr. Fiona Lum as non-executive director is the agent of AID [4], The contract between the claimant and respondent is divisible in nature [5].

A. **There was a material breach of partnership agreement on part of the claimant.**

2. Every contract contains a core or fundamental obligation which must be performed and if one party fails to fulfill its obligations, he will be guilty of breach of contract.<sup>1</sup> A breach of a fundamental term is something which goes to the root of the contract.<sup>2</sup> When a party gives no proper reasons to rescind the contract, it is still justified if the other party had at the time committed a breach.<sup>3</sup>
3. Section 39 of Myanmar Contract Act, 1972, also provides for innocent party to not perform the contract when the other party has refused to perform its promises. Section 39 is basically concerned with is a refusal to perform one of the central terms of the contract.<sup>4</sup>

---

<sup>1</sup> *B.V. Nagaraju v. Oriental Insurance Co. Ltd.*, 1996 SCC (5) 71.

<sup>2</sup> *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 WLR 936.

<sup>3</sup> *Taylor v. Oakes Roncoroni & Co.*, (1922) 127 LT 267, 269.

<sup>4</sup> Adrian Briggs and Andrew Burrows, *THE LAW OF CONTRACT IN MYANMAR*, University of Oxford, pg. 174.

4. The court judges between the importance attached to the term for a party and consequences of breach.<sup>5</sup> The promise that has been violated should be of major as distinct from minor importance.<sup>6</sup> Right to discharge depends on the test whether the breach go so far into the root of the contract so that injured party can say that they have lost a substantial part of what they wanted.<sup>7</sup> They cannot perform further without making good the defaulted part.<sup>8</sup>
5. The party which rescinds the contract on the ground that other party has not fulfilled its obligations is said to have repudiated the contract.<sup>9</sup> In the case of repudiation of a contract for breach, the essence of the complaint is that the promises of the contract were not fulfilled. Although these promises now cease to be obligations which must be performed, they still provide the framework for assessing the measure of any compensation.<sup>10</sup>
6. Therefore, the respondent is justified in repudiating the contract with claimant as the latter violated the terms of the agreement. These terms had a substantial effect on the main agenda for which the partnership was formed and it hit at the very root of the contract. The terms violated are **a)** Clause 8 of the partnership agreement, **b)** Clause 9 of the partnership agreement, **c)** Clause 11 of the partnership agreement.

---

<sup>5</sup> *Bunge Corpn v. Tradax Export SA*, [1981] 2 All ER 513.

<sup>6</sup> Michael Furmston, CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT, 14<sup>th</sup> Edition, International Student Edition, pg. 595.

<sup>7</sup> *Bunge Corpn v. Tradax Export SA*, [1981] 2 All ER 513.

<sup>8</sup> *Alkok v. Grymek*, (1966) 56 DLR (2d) 393 (Canada); *Bunge Corpn v. Tradax Export SA*, [1981] 2 All ER 513.

<sup>9</sup> *EE Master v. Garrett & Taylor Ltd.*, AIR 1931 Ran 126.

<sup>10</sup> *Muralidhur Chatterjee v. International Film Co. Ltd.*, (1943) 70 Ind App 35.

a) **There was a breach of Clause 8 by the claimant.**

7. According to Clause 8 of the partnership agreement, the claimant and the respondent mutually agree to carry on the partnership and brotherhood for long term.<sup>11</sup> The party who does any act that causes the partnership to end must pay compensation.<sup>12</sup> Here, the comments made by Dr. Fiona Lum have hurt the sentiments of the workers causing a downhill in their morale.<sup>13</sup> They are unable to carry out work with the same zeal and have lost faith in their Japanese counterparts.<sup>14</sup> The same has hit the commercial purpose of the venture as the very people who were involved in day-to-day operations of the venture lost faith in it. Without them being taken into confidence, no activity can be undertaken by the venture successfully.

b) **There was a breach of Clause 9 by the claimant.**

8. Clause 9 of the partnership agreement states that in occurrence of any dispute, both the parties will try to solve everything in a polite manner. To pacify the angry workers, the claimant could have issued an apology and retracted their statement, as the former demanded.<sup>15</sup> Furthermore, before entering into the agreement, the respondent made it their priority that they want to help the local people of Myanmar and improve their livelihood.<sup>16</sup> U Thein Kyaw even tried to appease the furious workers but could not succeed.<sup>17</sup> Thus, comments against these employees were unbearable and it negated the very essence of the contract. The employees who were the actual contributors to the

---

<sup>11</sup> Clause 8, Annexure 1, Partnership Agreement, Moot Proposition.

<sup>12</sup> Clause 8, Annexure 1, Partnership Agreement, Moot Proposition.

<sup>13</sup> ¶ 29, Moot Proposition.

<sup>14</sup> ¶ 41, Moot Proposition.

<sup>15</sup> ¶ 29, Moot Proposition.

<sup>16</sup> Clause 5, Annexure 1, Partnership Agreement, Moot Proposition.

<sup>17</sup> ¶ 30, Moot Proposition.

success of the venture lost faith in the venture and the agenda with which the venture was formed was negated by the acts of the claimant.

c) **There was a breach of Clause 11 by the claimant.**

9. Clause 11 of the partnership agreement states that AID is prohibited to do or say anything that harms the national interest or solidarity of Myanmar. Dr. Fiona Lum says that the Rohingyas are being persecuted and are deprived of their basic rights.<sup>18</sup> This implies that the Myanmar government is involved in ethnic cleansing. These statements are a direct dig at the solidarity and reputation of Myanmar. In protest, as many as 102 workers also went on a strike requesting Dr. Lum and Dr. Asamura to retract their statement and issue an apology,<sup>19</sup> but they did not pay any heed.
10. The same hits at the root of the contract as it leads to suspension of work for which the partnership was formed. Also, the workers' morale was very low when they again started working. Even after seeing all this, Dr. Lum did not render an apology to the masses of Myanmar violating a principle term of the contract. The venture's commercial purpose took a hit as its result.
11. Therefore, there was breach of agreement on part of the claimant, and the respondent is justified in repudiating the agreement.

**B. Dr. Fiona Lum as a non-executive director is the agent of AID.**

12. There is no difference between responsibilities any director, executive or non-executive.<sup>20</sup>

A director is required to apply his mind diligently while discharging his duties as a man

---

<sup>18</sup> ¶ 28, Moot Proposition.

<sup>19</sup> ¶ 29, Moot Proposition.

<sup>20</sup> Information and the non-executive director, Alan Grieve, Royal Society for the Encouragement of Arts, Manufactures and Commerce, November 1991.

of ordinary prudence.<sup>21</sup> It has been recognised across various common law jurisdictions that directors are agents of the company in the eyes of law.<sup>22</sup> The company as a whole would be liable on any default on the part of any of the director.<sup>23</sup>

**13.** In the present case, Dr. Fiona Lum made comments on the Rohingya community which made the people of Myanmar upset.<sup>24</sup> The same had a negative effect on the working of the venture as 102 workers went on a strike demanding her apology.<sup>25</sup> Even when the workers came back from strike, they were low in confidence which had a direct impact on the commercial purpose of the venture. She also violated the clause 11 of the partnership agreement which said that both parties would not speak or do anything against the national interest of the other party. Dr. Fiona, being the non-executive director of the claimant company, her act would be the act of an agent of the company. Furthermore, her act of sending jades to Japan thrice a year proves her interest in the working of the venture.<sup>26</sup> Therefore, the claimant would be held liable for the comments of Dr. Fiona, its non-executive director under the principle of agency.

**C. The acts of the claimant have frustrated the contract they had entered with the respondent.**

**14.** When the performance of the contract would be radically different from what the contract had stipulated for, it would lead to frustration of contract.<sup>27</sup> The test to be applied to such a situation is called the ‘disappearance of the foundation of the contract’.<sup>28</sup> It judges whether the events that had occurred were of character so sweeping as to cause the

---

<sup>21</sup> Re City Equitable Fire Insurance Co., [1925] Ch 407.

<sup>22</sup> *Ferguson v. Wilson*, (1866) 2 Ch App 77; *Judhah v. Rampada Gupta*, AIR 1959 Cal 715.

<sup>23</sup> *Sarathi Leasing Finance Co. v. B Narayana Shetty*, (2006) 131 Comp Cas 798 Kant.

<sup>24</sup> ¶ 28-29, 12<sup>th</sup> Moot Proposition.

<sup>25</sup> ¶ 29, Moot Proposition.

<sup>26</sup> ¶ 20, Moot Proposition.

<sup>27</sup> *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*, (1942) AC 154, 164.

<sup>28</sup> *FA Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 AC 397, 406.

foundation of the contract to disappear.<sup>29</sup> A contract is also said to be frustrated when the commercial object, or its purpose, is frustrated.<sup>30</sup> In such cases, the contract is discharged although the performance is not literally impossible.<sup>31</sup> The parties cannot be asked to renegotiate the terms of the agreement over such a situation.<sup>32</sup>

**15.** In the present case, the most important reason of formation of contract between the claimant and respondent was helping the local Myanmar people, to improve their livelihoods.<sup>33</sup> These were the majority of the people who were involved in the day-to-day functioning of the venture.<sup>34</sup> However, due to the comments of Dr. Fiona, these people got very upset and went on a strike for 7 days.<sup>35</sup> Even after the strike was called off, the morale of the employees were on an all time low as they had lost faith in their Japanese counterparts.<sup>36</sup>

**16.** Thus, the contract which was formed basically to uplift the people of Myanmar and make them competitive lost its essence with the comments of Dr. Lum. The foundation of the contract was shaken to such an extent that the employees lost faith in the claimant. This frustrated the contract between the claimant and the respondent and the latter is justified in rescinding the present contract. Furthermore, the offer by Mr. Patrick Green was more beneficial for the people of Myanmar and if new venture is taken by the respondent, it

---

<sup>29</sup> *FA Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 AC 397, 406.

<sup>30</sup> *Taylor v. Caldwell*, (1863) 3 B. & S. 826 at 836.

<sup>31</sup> *Jackson v. Union Marine Insurance Co. Ltd.*, (1874) LR 10 CP 125.

<sup>32</sup> *Walford v. Miles*, [1992] 2 AC 128, 138.

<sup>33</sup> Clause 5, Annexure 1, Partnership Agreement, Moot Proposition.

<sup>34</sup> ¶ 18, Moot Proposition.

<sup>35</sup> ¶ 29, Moot Proposition.

<sup>36</sup> ¶ 38, 41, Moot Proposition.

would **a)** rejuvenate the employees' morale, **b)** provide higher capacity to the respondent to help the people of Myanmar due to higher share of profit and other benefits.<sup>37</sup>

**D. The Termination Clause was rightly exercised by the defendant.**

**17.** There are agreements where a termination clause is drafted more generally providing a remedy for breach of contract.<sup>38</sup> Sometimes they have been held to cover breaches which are less than 'fundamental', but more than trivial or minimal.<sup>39</sup> The party seeking to rely on such a clause must establish strictly that the clause entitles it to terminate in relation to the breach.<sup>40</sup>

**18.** In the present case, Dr. Fiona Lum, who is a non-executive director of AID,<sup>41</sup> said that the Rohingyas are being persecuted and are deprived of their basic rights.<sup>42</sup> This implies that the Myanmar Government is involved in ethnic cleansing. This made the students and employees of the community very upset and 102 of SPT's workers went on strike for seven days, requesting Dr. Lum and Dr. Asamura to issue an apology and to retract the statement.<sup>43</sup> It led to disruption in the working of the firm for 7 days.<sup>44</sup> Even after the strike was called off, the workers and students were low in confidence and did not show the enthusiasm that they used to.<sup>45</sup> Even after being aware of the situation, the claimant refused to serve an apology to the people of Myanmar.

---

<sup>37</sup> ¶ 37, Moot Proposition.

<sup>38</sup> *Lombard Borth Central plc v. Butterworth*, [1987] QB 527.

<sup>39</sup> *Dalkia Utilities Services plc v. Celtech International Ltd.*, [2006] EWHC 63 (Comm).

<sup>40</sup> *Cf Rice v. Great Yarmouth BC*, (2001) 3 LGLR 4.

<sup>41</sup> Answer to Question No. 3, Additional Clarifications to Moot Problem, Moot Proposition.

<sup>42</sup> ¶ 28, Moot Proposition.

<sup>43</sup> ¶ 29, Moot Proposition.

<sup>44</sup> ¶ 29, Moot Proposition.

<sup>45</sup> ¶ 41, Moot Proposition.

19. Thus, the claimant violated clauses 8, 9, 11 of the agreement which proved to be a lot derogatory to the interests of the firm. It is, therefore, established that the same led to repudiation of the contract being justified.

**E. The Agreement between the claimant and the respondent is divisible in nature.**

20. The term divisible in its technical connotation means that situation where one party's performance is made independent of the other's.<sup>46</sup> Almost uniformly the question of "divisibility" is said to depend on the intent of the parties.<sup>47</sup> Such intent is to be determined by means of the language used and the subject matter of the contract.<sup>48</sup> When the contract is divisible, the guilty party is entitled to counter-claim in respect of performance completed.<sup>49</sup>

21. In the present case, the claimant agreed to provide all equipment required, and provide technical expertise for the term of the agreement and to train the local people of Myanmar so that they can learn new skill set and be independent.<sup>50</sup> The respondent, on the other hand, was in charge of obtaining and settling all the permits and requirements to do the jade-mining business and all related matters with the government of Myanmar.<sup>51</sup>

22. Thus, the act of the claimant of providing all equipments was not dependent on the acts of the respondent taking the jade-mining permit from the Government of Myanmar. The contract was, therefore, divisible. Furthermore, the claimant even in the event of it violating any term of the agreement would not be liable to pay the entire sum of

---

<sup>46</sup> Michael Furmston, CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT, 14<sup>th</sup> Edition, International Student Edition, pg. 593.

<sup>47</sup> *Everett v. Emmons Coal Min. Co.*, 289 Fed. 686, 692 (C. C. A. 6th, 1923).

<sup>48</sup> *Pac. Timber Co. v. Iowa Windmill & Pump Co.*, 135 Iowa 308, 310, 112 N. W. 771 (1907).

<sup>49</sup> J. Beatson, A. Burrows, J. Cartwright, ANSON'S LAW OF CONTRACT, 30<sup>th</sup> Edition, Pg.554.

<sup>50</sup> ¶ 16, Moot Proposition.

<sup>51</sup> ¶ 16, Moot Proposition.



compensation from the very beginning of the partnership as stipulated by the agreement.<sup>52</sup> The compensation of re-allocating the employees of the claimant is enough in the present case.

---

**ISSUE II : SUBSISTENCE AND OWNERSHIP OF THE RIGHTS IN JADEYE SOFTWARE RESTS WITH SPT.**

---

The rights in the JADEYE software subsist with the Respondent because Bill of lading is a conclusive proof of title for the jade mining equipment and machinery [A]. Purchase and export of jade-mining machinery and equipment does not confer ownership on Claimant [B]. SPT is the beneficiary to the purchase agreement of Jade mining machinery and equipment [C].

**A. Bill of lading is a conclusive proof of title for the jade mining equipment and machinery.**

The Respondent has the title to the goods as the bill of lading serves as a document of title. [i].

**(i) The Respondent has the title to the goods as the bill of lading serves as a document of title.**

24. In the words of Lord Blackburn, bill of lading is an acknowledgement of the receipt and an undertaking to deliver the goods to the named person at the end of the voyage.<sup>53</sup> It is a transport document issued by the shipper in respect of the carriage of goods by sea in favour of a consignee or endorsee.<sup>54</sup> An intention to pass the property in the goods exists [1]. Indorsement of bill of lading transfers possession and ownership in the goods [2].

---

<sup>52</sup> Clause 8, Annexure 1, Partnership Agreement, Moot Proposition.

<sup>53</sup> *Coventry v. Gladstone* (1868), L.R. 6 Eq. 44 102, 108.

<sup>54</sup> Thomas Edward Scrutton, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, ¶ 1-002.

**1. An intention to pass the property in the goods exists.**

25. Bill of lading is customarily used as a document of title amongst merchants and the international acceptance of the same has been reiterated.<sup>55</sup> In various common law judgments,<sup>56</sup> such trade custom was established, recognising the bill of lading as a document of title. A straight bill of lading is one that specifically names a consignee and the goods are deliverable to him.<sup>57</sup> It is only transferable by a simple delivery from the shipper to the named consignee and not otherwise.<sup>58</sup> Straight bills of lading are non-negotiable and non-transferable, which means that they cannot be passed on to any other person other than the named consignee.<sup>59</sup> In common law jurisdictions, a straight bill of lading is considered to be a document of title that holds the power to demand delivery of the goods.<sup>60</sup> To confer the title through the bill of lading, the consignor must have an intention to do so.<sup>61</sup>
25. In the present dispute, the Claimant issued a straight bill of lading in favour of Respondent for the shipment of jade mining machinery and equipment.<sup>62</sup> This reflects the intention of Claimant to pass the property in favour of the Respondent. Therefore, the existence of trade custom and acceptance of the same makes the bill of lading operate as a document of title conferring all rights of an owner on SPT.

---

<sup>55</sup> Jason C.T Chuah, LAW OF INTERNATIONAL TRADE: CROSS-BORDER COMMERCIAL TRANSACTIONS, 4th edition, pg. 196; Casalav Pejovic “*Documents of Title in Carriage of Goods by Sea: Present Status and possible future directions*” [ J.B.L. 2001 Sept.] ¶ 462.

<sup>56</sup> *Lickbarrow v. Mason* ((1788), 2 T. R. 63 and (1794) 5 TR 683); *Collis Line Private Ltd. v. New India Assurance Co. Ltd. and Anr.*, AIR1982Ker127.

<sup>57</sup> A. G. Guest and Judah P. Benjamin, BENJAMIN’S SALE OF GOODS, Vol.2, pg.1009.

<sup>58</sup> Thomas Edward Scrutton, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, ¶ 1-003.

<sup>59</sup> *Ibid.*

<sup>60</sup> Howard Benett, “STRAIGHT BILLS OF LADING” (2005) 121 L.Q.R. 555; *JI MacWilliam Co Inc v. Mediterranean Shipping Company SA* [2005] UK HL 11 (The “Rafaela S”).

<sup>61</sup> *Sewell v. Burdick*, (1884) 10 App.Cas. 74, p. 80.

<sup>62</sup> Answer to Question no. 25, Additional Clarifications, Moot Proposition.

**2. Indorsement of bill of lading transfers possession and ownership in the goods.**

26. The bill of lading passes the property to a person whose name is written in that bill of lading and such person is known as the consignee or indorsee.<sup>63</sup> It operates as a receipt and document of title which constructively passes the possession of goods to the consignee.<sup>64</sup> Once the bill of lading has passed to the consignee, it transfers the rights in entirety.<sup>65</sup> This means that not only the possession but the complete ownership in those goods passes to the consignee.<sup>66</sup> Therefore, by indorsement of bill of lading, the Claimant transfers both possession and ownership in favour of the Respondent.

**B. Purchase and export of jade-mining machinery and equipment does not confer ownership on the Claimant.**

27. According to Article 2(c) of the Export and Import Law of Myanmar, 'imports' is defined as any goods that enter into the State by sea, land or air. For importing goods, a license has to be obtained<sup>67</sup> and it works as a permit issued by the Government to export or import the goods.<sup>68</sup> It is an order that describes the approval of the commission relating to a proposal by the investor.<sup>69</sup>

28. In the year 2008, Myanmar Foreign Investment law was applicable. Under this law, a direct investment by foreign nationals in mining activities was permissible only under a joint

---

<sup>63</sup> *Sanders Bros v. Maclean & Co.*, (1883) LR 11 QBD 327 (CA) 341.

<sup>64</sup> Thomas Gilbert Carver, M.A, A TREATISE ON THE LAW RELATING TO THE CARRIAGE OF GOODS BY SEA, 4th edition.

<sup>65</sup> *P&O Nedlloyd BV v. Utaniko Ltd. Dampskibsselskabet AF 1912 A/S (Maersk Line v East West Corp)* [2003] EW.

<sup>66</sup> Walter Parent, PASSAGE OF TITLE UNDER BILLS OF LADING, 5 Notre Dame L. Rev. 91 (1929) ; THE PASSING OF PROPERTY AS AFFECTED BY A BILL OF LADING TO THE SELLER'S ORDER, Columbia Law Review, Vol. 22, No. 5 (May, 1922), pg. 462-465.

<sup>67</sup> Article 6, The Myanmar Export and Import Law, 2012.

<sup>68</sup> Article 2(e), The Myanmar Export and Import Law, 2012.

<sup>69</sup> Section 2(j), Myanmar Investment Law, 1998.

venture with a Myanmar National.<sup>70</sup> The motive behind the same was to prevent political lobbying and excessive interference from other countries. So, the Myanmar Investment Corporation (MIC) put this restriction on foreign investment by another national and added a requisite of a joint venture with a local national.<sup>71</sup> As a result, the Myanmar Government permits import of goods if it is registered as a company authorized to engage in international trade with the Directorate of Investment and Company Administration (DICA), Ministry of Planning and Finance.<sup>72</sup>

- 29.** Therefore, SPT was given the charge of obtaining and settling all the permits and requirements in order to ensure smooth transitioning of business.<sup>73</sup> AID on the other hand, was in charge of buying all the equipment required, providing technical expertise during the contract.<sup>74</sup> The necessity for the same also arose because there were no locally manufactured machinery and equipment and all such businesses usually import from other countries, even Japan.<sup>75</sup> The work to be done was clearly delineated and divided between the parties.
- 30.** The main intent of this partnership was to develop skill-set in the local people of Myanmar and employees. Both the parties have to prioritize these employees and people.<sup>76</sup> The Claimant cannot be said to be the owner of the jade-mining machinery and equipment merely because it imported it into Myanmar. The agreement was entered into after three

---

<sup>70</sup> Wendy Zeldin, Burma Amended Foreign Investment Law, <http://www.loc.gov/law/foreign-news/article/burma-amended-foreign-investment-law-published/>.

<sup>71</sup> KANEKO Yuka and Ye Naing Lin, ISSUES IN MYANMAR INVESTMENT LAW: TOWARD BETTER POLICY BALANCING.

<sup>72</sup> 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>.

<sup>73</sup> Clause 3, Partnership Agreement (Annexure I, Moot Proposition).

<sup>74</sup> Clause 4, Partnership Agreement (Annexure I, Moot Proposition).

<sup>75</sup> Answer to Question no. 6, Additional Clarifications, Moot Proposition.

<sup>76</sup> Clause 5, Partnership Agreement (Annexure I, Moot Proposition).

rounds of discussion with their free will, devoid of any coercion.<sup>77</sup> The Claimant was aware of the existing regulations and laws in Myanmar and agreed to follow the same.<sup>78</sup> The Respondent was recorded as the owner and operator of these machineries and equipment on the permit.<sup>79</sup> The Claimant party was aware of the same.<sup>80</sup> Therefore, because of these reasons, the ownership of Jade mining machinery and equipment lies with the Respondent.

**C. The Respondent is the beneficiary to the purchase agreement of Jade mining machinery and equipment.**

31. Doctrine of Privity of Contract states that a contract cannot confer rights or impose obligations arising under it on anyone except the parties to it. The premise is that only parties to the contracts can sue to enforce their rights.<sup>81</sup> An accepted exception to the same is when a third party is a beneficiary to the contract.<sup>82</sup> According to Lord Williams, ‘Ordinarily only a person who is a party to the contract can sue on it, however, where a contract is made for the benefit of a third person, there may be an equity in the third person to sue upon the contract’.<sup>83</sup> The rationale behind this is that when a contract purports to confer benefit on a third party, it should be enforceable by the third party in its own name.<sup>84</sup> The contract is bound to respect third party rights.<sup>85</sup>

32. The partnership between AID and SPT came into existence for raising the living standards of local Myanmar people. The foundation of the agreement was to teach them technical skills,

---

<sup>77</sup> Clause 14, Partnership Agreement (Annexure I, Moot Proposition).

<sup>78</sup> Clause 10, Partnership Agreement (Annexure I, Moot Proposition).

<sup>79</sup> Answer to Question no. 8, Additional Clarifications, Moot Proposition.

<sup>80</sup> Answer to Question no. 14, Clarifications, Moot Proposition.

<sup>81</sup> Frederick Pollock & Dinshaw Fardunji Mulla, *THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS*, pg. 88, Vol. I, (Lexis Nexis, 2013).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Khirod Behari Dutt v. Man Gobinda*, AIR 1934 Cal 682.

<sup>84</sup> *Beswick v. Beswick*, [1967] UKHL 2, [1968] AC 58.

<sup>85</sup> *Darlington BC v. Wiltshier Northern Ltd.*, (1995) 3 All ER 895.

help them be competitive and improve their livelihood.<sup>86</sup> In furtherance of the agreement, AID was assigned the task to purchase machinery and equipment. The agreement also provided for 65% of the profit from the venture in favour of SPT.<sup>87</sup> SPT was the beneficiary to the agreement of purchase of machinery and equipment made between AID and the sellers of those assets in Japan. Therefore, SPT is not a stranger to that contract of purchase and can enforce it.

**CONCLUSION:** The jade-mining machinery and equipment belongs to SPT because it holds bill of lading which confers the title and rights of an owner. Moreover, the claim of AID that it obtained the machinery and equipment is also irrelevant because SPT is recorded as the owner on the permit. Moreover, ownership is also conferred because Respondent is the beneficiary to the purchase agreement.

---

**ISSUE III: SUBSISTENCE AND OWNERSHIP OF THE RIGHTS IN JADEYE SOFTWARE RESTS WITH SPT.**

---

**33.** The rights in the JADEYE software subsist with SPT because of the following reasons. Applicability of Myanmar laws due to party autonomy in choice of law clause [A]. Existence of an implied contract between Joe Yamashita & U Thein Kyaw regarding the JADEYE [B]. Alternatively, algorithm is not protected under the Copyright Act of Japan [C]. Additionally, reverse engineering is allowed in Japan [D].

**A. Applicability of Myanmar laws due to party autonomy in choice of law clause.**

---

<sup>86</sup> Clause 5, Partnership Agreement (Annexure I, Moot Proposition).

<sup>87</sup> Clause 7, Partnership Agreement (Annexure I, Moot Proposition).

34. Party autonomy is a choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern a contract.<sup>88</sup> The parties must expressly stipulate the application of laws of a particular state or nation in the contract.<sup>89</sup> The law so stipulated must have a substantial connection with the contract and its enforcement must not be contrary to the public policy.<sup>90</sup> It is based on the premise that contracting parties have the freedom to determine the law that suits their requirements.<sup>91</sup> In the present dispute, the parties have stipulated that everything will be in accordance with and interpretation of laws of Myanmar.<sup>92</sup> Therefore, all laws of Myanmar shall be applicable here.

a) *The Burma Copyright Act, 1911 will be applicable.*

35. According to Section 1<sup>93</sup> of the Act, The Burma Copyright Act, 1911 will be applicable only to Myanmar. It accords copyright protection only to Burmese nationals and their works. It is limited in scope as it covers works that are either first published in Myanmar, or if unpublished, are the work of a citizen or person inside of Myanmar at the time of creation.<sup>94</sup> Joe Yamashita does not fulfil the conditions required to be given protection by the Act and therefore, the software is not legally protected.

**B. Existence of an implied contract between Joe Yamashita & U Thein Kyaw regarding the JADEYE.**

---

<sup>88</sup>Willis Reese & Maurice Rosenberg, CONFLICT OF LAWS, CASES AND MATERIALS 576-96 (8<sup>TH</sup> Ed. 1984).

<sup>89</sup>Party Autonomy: *Choice-Of-Law Clauses In Commercial Contracts*, Morris J. Levin, Georgetown Law Journal 46 Geo. L. J. (1957-1958), pg. 260.

<sup>90</sup> *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] AC 290.

<sup>91</sup> Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws* (1924) 33 Yale L. J. 736, 748.

<sup>92</sup> Clause 10, Annexure 1, Partnership Agreement, Moot Proposition.

<sup>93</sup> Section 1, The Burma Copyright Act, 1911.

<sup>94</sup> *The Report: Myanmar 2016*, Oxford Business Group, pg. 202.

36. An implied contract is created when two or more parties have no written contract, but the law creates an obligation in the interest of fairness based on the parties' conduct or circumstances and this is a contract assumed to have been drawn.<sup>95</sup> Implied contracts are of two types: contracts that are implied in-fact and contracts that are implied at-law.<sup>96</sup> Implied-in-fact contracts create an obligation between the parties based on the facts of the situation. If the parties' conduct or the circumstances suggests they had an agreement or understanding that created an obligation, then the law finds that they had an implied in-fact contract.<sup>97</sup> An implied contract is legally enforceable the same way express contracts are.<sup>98</sup>
37. In the present dispute, U Thein Kyaw presents USD 18,000 in cash to Joe Yamashita. He was impressed by the hard-work put in by Mr. Joe in creation of the JADEYE software that would expedite the assessment work and improve the viability of jades up to 99%.<sup>99</sup> He declines the cash and remarks 'it is for the benefit of all of us'.<sup>100</sup> Moreover, JADEYE is not registered anywhere which reflects the intent of creating this software for use only under this partnership. By these facts, it can be inferred that Joe Yamashita created the software for the main purpose of the contract, which is to benefit the people of Myanmar.<sup>101</sup> Therefore, AID is not the owner of the JADEYE software. There exists an implied contract between U Thein Kyaw and Joe Yamashita about the ownership of the JADEYE software.

### **C. Alternatively, algorithm is not protected under The Copyright Act of Japan.**

---

<sup>95</sup> A. Burrows Beaton, *et al.*, ANSON'S LAW OF CONTRACT, (30th Ed.), pg. 156.

<sup>96</sup> Frederick Pollock & Dinshaw Fardunji Mulla, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, Vol. I, (Lexis Nexis, 2013), pg. 86.

<sup>97</sup> *Ibid*, pg. 54.

<sup>98</sup> *Supra*, note 8, pg. 157.

<sup>99</sup> Moot Proposition, ¶ 22.

<sup>100</sup> Moot Proposition, ¶ 24.

<sup>101</sup> Clause 5, Annexure 1, Partnership Agreement, Moot Proposition.



38. Article 10 of the Copyright Act of Japan, 1970 provides protection to program ‘works’.

Article 10(3) of the Copyright Act of Japan, 1970, specifically excludes the computer programming languages, rules and algorithms from the protection of copyrights. Algorithm is the method to combine instructions to the computer in respect to a program.<sup>102</sup> It was also held in *System Science v. Japan Technato*,<sup>103</sup> that the exclusion of algorithm means that there is no copyright protection for the basic structural design of the program.

Therefore, the algorithm of JADEYE can be used by SPT as there is no protection accorded by law under the Japanese Copyright Law.

#### **D. Additionally, Reverse Engineering is allowed in Japan.**

39. Reverse engineering means the analysis of a program by examining its coding and structure in order to develop other programs.<sup>104</sup> It is a fair and honest means of starting with the known product and working backwards to derive the process which aided in its development.<sup>105</sup>

a) **Reverse Engineering is a legal process and cannot be prohibited.**

40. It is legal because the true secrets of the organizational structure and inner workings of the program are not revealed. It is an entirely additive process, with the reverse engineer adding

---

<sup>102</sup> Article 10(3)(iii), Copyright Act of Japan, 1970.

<sup>103</sup> *System Science v. Japan Technato*, 130 HANJI, Tokyo High Court, June 20, 1989.

<sup>104</sup> 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.

<sup>105</sup> *Kewanee Oil Corp v Bicron Corp.*, [1974] USSC 86.

his own inputs and knowledge.<sup>106</sup> Moreover, it aids in the development of ideas that exist in the public domain of copyright law.<sup>107</sup> Prohibition of the same prevents another person to discover the ideas that lie in the program. This, in turn violates the principle that copyright law should protect only ‘expression of an idea’ and not the idea itself.<sup>108</sup> In Japan, there is absence of any explicit provision about reverse engineering but according to common theory it is legitimate.<sup>109</sup> Reverse engineering is illegal only when it infringes the right to reproduce and not when the software or program is for personal use.<sup>110</sup>

41. In the present case, SPT threatens to reverse engineer the JADEYE software if AID does not provide the source code.<sup>111</sup> Even if SPT were to reverse engineer, it is legal as it does not infringe the right to reproduce. It is merely for its personal use. After considering the efforts of Joe Yamashita in developing JADEYE, U Thein Kyaw presented him with USD 18,000 in cash. He declines and says that it was for the ‘benefit of all’.<sup>112</sup> This reflects the intent to use it for expedition of jade assessment, in order to benefit the business.

**CONCLUSION:** The rights in the JADEYE software subsist with SPT. This is because of the applicability of Myanmar Copyright Law which accords no protection to works by foreign nationals. There also exists an implied contract between Joe Yamashita and U Thein Kyaw

---

<sup>106</sup> Andrew Johnson-Laird, ‘*Software Reverse Engineering in the Real World*’, 19 U. DAYTON L. REV. 843, 857 (1994).

<sup>107</sup> Chalmers Johnson, MITI and the Japanese Miracle: ‘*The Growth of Industrial Policy*’, 1925-75 (Stanford: Stanford University Press, 1982).

<sup>108</sup> Edward G Durney, ‘*Protection on Computer Programs under Japanese Copyright Law*’,(1991) 9 UCLA Basin Law Journal p 44.

<sup>109</sup> Ibid.

<sup>110</sup> Mark S. Lee, ‘*Japan’s Approach to Copyright Protection for Computer Software*’, 16 Loy. L.A. Int’l & Comp. L. Rev. 675 (1994).

<sup>111</sup> Moot Proposition, ¶ 44.

<sup>112</sup> Moot Proposition, ¶ 24.

regarding the JADEYE. Even if Japanese law was to be applied, algorithm is not protected and reverse engineering is legitimate.

---

**PRAYER FOR RELIEF**

---

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

1. The termination of agreement by the respondent was valid;.
2. The jade-mining machinery and software must be restituted to the respondent, who is the real owner; and
3. The subsistence and ownership of JADEYE software shall lie with the respondent.

**DATE:** 11<sup>TH</sup> AUGUST, 2017

COUNSELS ON BEHALF OF **RESPONDENT**

**PLACE:** TOKYO, JAPAN

COUNSEL NO. **T1715**