

T1716 “R”

THE 12th LAWASIA INTERNATIONAL MOOT

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2017

Asamura International Development Co., Ltd.

(CLAIMANT)

v.

Shwe Pwint Thone Co., Ltd.

(RESPONDENT)

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

&	And
Arb.	Arbitration
Art	Article
AID	AsamuraInternationalDevelopmentCo.,Ltd
AIR	All India Reports
AJIL	American Journal of International Law
ALJR	Australian Law Journal Reports
App.	Appellate
CEGAT	Customs, Excise And Service Tax Appellate Tribunal
Civ	Civil
CLR	Commonwealth Law Report
Co.	Company
Corp.	Corporation
Del.	Delhi
e.g.	Example
Ed.	Edition
ER	England Law Report
F. 2d	Federal Reporter
Govt.	Government
Inc.	Incorporation
Ltd	Limited

No.	Number
N.Y	New York
NZSC	Supreme Court of New Zealand
Pg.	Page Number
Para	Paragraph
PECL	Principle of European Contract Law
SC	Supreme Court
Seq.	Sequence
SPT	ShwePwintThone Co., Ltd.
Tex.	Texas
TRIPS	Trade Related Aspect of Intellectual Property
U.K	United Kingdom
U.S.A	United States of America
UNSWLJ	University of New South Wales Law Journal
v.	Versus
WLR	Washington law Report

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STATEMENT OF JURISDICTION

Shwe Pwint Thone Co. Ltd has the honor to submit the present dispute and its memorandum before the Kuala Lumpur Regional Centre for Arbitration seated in Tokyo, Japan under Rule 1 of the KLRCA i- Arbitration Rules which states that:

Where parties have agreed in writing to arbitrate their disputes in accordance with the Rules, then:

- a) Such disputes shall be settled or resolved by arbitration in accordance with the Rules; and
- b) The arbitration shall be conducted and administered by the Kuala Lumpur Regional Centre for Arbitration (hereinafter referred to as “KLRCA”) in accordance with the Rules.

QUESTIONS PRESENTED

The Parties agreed that the issues to be decided in the arbitration are as follows:

1. Whether the termination of agreement by SPT was valid?
2. Whether AID has the ownership of the jade-mining machinery and equipment?
3. Whether there subsists any right in the JADEYE software and if any, who has the ownership of rights in it?

STATEMENT OF FACTS

1. **Asamura International Development Co., Ltd.** (AID or the CLAIMANT) was founded in Tokyo, Japan and is represented by Dr. Yugi Asamura.
2. **Shwe Pwint Thone Co., Ltd.** (SPT or RESPONDENT) is represented by U Thein Kyaw. It started with the aim of providing secular and vocational training to students from underprivileged families. SPT's main objectives were to develop new skill sets for its students, create jobs for the local community, to increase the revenues of SPT so that it can be channeled back to the training centers.
3. U Thein Kyaw approached Dr. Yugi Asamura to discuss the prospects of a partnership between SPT and AID as he had zero experience in jade exploration and production, although he was familiar with jade carving and polishing techniques.
4. The time line of dispute is mentioned below:
 - On **9 September 2008**, U Thein Kyaw and Dr. Yugi Asamura entered into a partnership and drafted their own contract. See Annexure 1. Under the arrangement, AID sourced for second hand machinery and equipment from Japan, purchased them, and reconditioned them. SPT handled all the visa and accommodation requirements of AID's employees. SPT also obtained the necessary jade mining and equipment permit from the government. The jadeite venture involves four main business activities:
 - (i) exploration and extraction;
 - (ii) breaking and cutting;
 - (iii) processing and production;
 - (iv) distribution and sales.

- In **January, 2009**, machinery and equipments were then imported into Myanmar by SPT. 25 of AID's employees were also placed in SPT's base on secondment from Japan. AID's employees operated the equipment, while imparting technical knowledge to SPT's employees and students. They trained them how to operate and maintain the jade- mining equipment and machinery.
- In **March 2009**, AID and SPT injected capital contributions of USD 1.5 million and USD 2.5 million respectively to bear the operation cost, because AID felt burdened when it bore the operational cost alone. The funds were held in SPT's bank account.
- On **11 April 2012**, AID's finance executives, Joe Yamashita, informed Dr. Yugi Asamura that his process optimization and operations management software named "JADEYE" was ready to be used which once installed on the computer systems and mining equipment, will allow the user to test the quality and viability of the jade at 99% its statistical and optimization algorithms, JADEYE can expedite assessment work, also assisting in the determination of scalability and economic value of the site. Trial tests yielded positive accuracy and software was installed in all the computers and equipment used on the sites.
- On **4 January 2013** Joe Yamashita during his resignation handed the source code of JADEYE to Head of Finance of AID in Tokyo.
- In **October 2016**, Dr. Yugi Asamura was approached by Yuri Hashimoto regarding sourcing jades from Hpakant for her company, Hashimoto Co., Ltd (HCL) won the contract to produce official jadeite souvenirs and merchandise for the Tokyo Olympics in 2020. U Thein Kyaw, told Yugi Asamura to proceed with the engagement via AID.
- On **1 November 2016**, AID and HCL then entered into a USD 1.2 million contract, wherein AID will supply jades from the Hpakant mines to HCL for the next one year.

- On **21 November 2016**, U Thein Kyaw was approached by Patrick Green, a very successful American businessman, who expressed his interest in forming a new partnership with SPT in regard to the jade business.
 - On **10 January 2017**, U Thein Kyaw made up his mind and informed AID about his decision to end the partnership. He offered to have SPT bear all relocation costs for AID's employees in Myanmar. 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, AID has to compensate SPT more than just on the relocation costs.
5. The men then argued over the ownership of the jade-mining machinery, equipment, and in particular the JADEYE software. When refused to be provided with the source code to JADEYE, U Thein Kyaw informed Yugi Asamura that SPT will reverse engineer or create their own version of JADEYE.
 6. Unable to settle their differences parties consider going for arbitration at the Kuala Lumpur Regional Centre for Arbitration in Malaysia. Parties eventually agreed to attend arbitration in Tokyo using the KLRCA i-Arbitration.

SUMMARY OF PLEADINGS

1. Whether the termination of agreement by SPT was valid?

The termination of the contract by SPD is a valid termination because the joint venture contract between AID and SPT does not determine a specific duration for which the partnership between the two companies is to last. As the duration of the contract is not explicitly laid down in the contract it is to be considered as a “contract at will” and can be terminated by any party evidencing an intention to terminate the contract. Therefore, termination of contract by SPT is a valid termination cannot be legally actionable. SPT’s right to terminate the contract also arises from the fundamental breach of contract by AID. AID’s conduct has resulted in an impairment of the core purpose of the contract and entitled SPT to discontinue further performance of the contract by validly terminating it.

2. Whether AID has the ownership of the jade-mining machinery and equipment?

The ownership of the jade mining machinery and equipment lies with Shwe Pwint Thone Co. Ltd and not AID because SPT is registered as the owner of the same in the permits and the same was known to AID, also SPT is registered as the endorsee/ consignee of the machinery and equipment in the bill of lading transferred to SPT. Further, the machinery and equipment formed a part of partnership and thus cannot be separate property of AID and lastly, some of the machinery and equipment were bought from the capital contribution made to the partnership and thus cannot be AID’s separate property.

3. Whether there subsists any right in the JADEYE software and if any, who has the ownership of rights in it?

No copyright subsists on the JADEYE software as the law in Myanmar does not protect computer programmes under The Burma Copyright Act, 1914. Additionally, Myanmar does not recognize the copyright granted by other countries. So even if the copyright is granted in Japan, it will not be protected under laws of Myanmar. The ownership of JADEYE is jointly owned by AID and SPT since it was developed in the course of joint venture by an employee working under the partnership.

WRITTEN SUBMISSIONS

I. THE VALIDITY OF THE TERMINATION OF THE AGREEMENT BY SPT.

It is submitted that the termination of contract by SPT is valid because **(A)** The Contract between AID and SPT does not contain a provision for duration of joint venture and therefore it is legitimately terminable by SPT at will. **(B)** The Termination of Contract is valid because AID has caused a fundamental breach of contract entitling SPT the right to terminate the contract.

A. THE CONTRACT BETWEEN AID AND SPT DOES NOT CONTAIN A PROVISION FOR DURATION OF JOINT VENTURE AND IS THEREFORE TERMINABLE AT WILL.

The rights and duties of the respective joint venturers are determined by the joint venture contract.¹Under the law of Myanmar, where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will."²The law is also settled on the issue that mere fact that a contract is a long-term or relational one is not, of itself, enough to justify such an implication³ and in the absence of an express contractual term fixing the duration of an agreement, a joint venture agreement is terminable at will.⁴

¹J. Leo Johnson, Inc. v. Carmer 156 A.2d 499 (1959); Jones v. Galleher & Co., 187 Va. 602 (1948).

²Myanmar Partnership Act, 1932, § 7.

³Monde Petroleum SA v. WesternZagros Ltd. EWHC 1472 (Comm) (2016); Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd, ECA Civ 396 (2016).

⁴KidzCloz, Inc v. Officially for Kidz, Inc. 320 F.Supp.2d 164 (2004).

In the present case, the joint venture contract between SPT and AID specifies that the joint venture will be for a long term and the party ending it shall be liable to pay compensation.⁵ The respondents submit that as per law of Myanmar, the contract does not determine its duration, there is no ambiguity surrounding the interpretation of any contractual provision regarding the venture's duration. Rather, there simply is no durational term.⁶ It shall also be noted that, the provision relating to liability for compensation is not a liability on the right of a party to terminate the contract but a solatium for the party affected by the termination. Therefore, the logical conclusion flowing hereof is that contract is terminable at will.

The Respondents further submit that the law governing joint venture contracts states that a venture at will can be terminated without liability for breach of contract by any partner at any time by any act which evidences intent to terminate the association.⁷ Where a relationship between co-venturers is terminable at will, any expectation held by the parties to receiving continuing benefits of relationship was unjustified, precluding their recovery in quantum meruit under law.⁸

B. THE TERMINATION OF THE CONTRACT IS VALID BECAUSE AID'S ACTIONS HAVE RESULTED IN A BREACH OF A FUNDAMENTAL TERM OF THE CONTRACT ENTITLING SPT THE RIGHT TO LEGITIMATELY TERMINATE THE CONTRACT.

⁵Moot Problem, Para 8, Pg. 10.

⁶Credit Francais International v. Sociedad Financiera de Comercio, 490 N.Y.S.2d 670, 681-83 (Sup. Ct. 1985).

⁷Slinin v. Shnaider WL 464426 S.D.N.Y. (2017); Nameh v. Muratex Corp. 34 Fed.Appx. 808, 809, 2nd Cir.(N.Y.); Fisher v. Tice WL 4626205, S.D.N.Y. (2016); Ebker v. Tan Jay Intern. Ltd., 741 F.Supp. 448, 469 (S.D.N.Y.1990)

⁸Judge Rotenberg Educational Centre Inc. v. Blass, 882 F.Supp.2d 371(2012); Lieberman v. Emigrant Mortgage Company, 436 F.Supp.2d 357 (2006).

It is the submission of the respondent that (i) The contract between SPT and AID was created with a central idea of upliftment of the students and employees of SPT in particular, and the welfare of the people of Myanmar in general. This idea forms the core or fundamental term of the contract. All the other provisions of the contract are to be performed keeping in confirmation with this fundamental condition of the contract (ii) AID by its conduct has violated the contract by causing a fundamental breach of which cripples the core of the contract and renders its performance impracticable for SPT, inducing a termination of the contract.

(a) Both AID and SPT are in consensus that the joint-venture is for the upliftment of the students and workers of SPT and for the welfare of the people of Myanmar.

It is an established principle of contract law that in construing a contract, the intent of the parties must be determined with reference to the contract as a whole, not merely by reference to particular words or isolated phrases.⁹With regards to joint venture contracts, the joint venture contract must have a consensus ad idem. The parties must have the intention of associating for a common purpose, and this intent may be implied from the actual conduct of the parties.¹⁰

In the present case, the intentions of SPT and AID to enter into a joint venture contract with each other can be ascertained from the circumstances surrounding the formation of the contract. The main objectives of SPT were to develop new skill sets for its students and to increase the revenues so that 70% of such revenues can be channelled back to the training

⁹LaThrop v. Bell Federal Savings & Loan., 565, 568, 370 N.E.2d 188, 191 (1977); Martindell v. Lake Shore National Bank, 154 N.E.2d 683, 689 (1958).

¹⁰J. Leo Johnson, Inc. v. Carmer, (Del.) 156 A.2d 499; McRoberts v. Phelps, 391 Pa. 591, 138 A.2d 439(1958).

centres.¹¹ Additionally, SPT also intended to establish a training centre to create jobs for the local community at Hpakant, a place which had witnessed numerous deadly landslides. It was under this backdrop that U Thein Kyaw approached Dr. Yugi Asamura for a joint venture between SPT and AID as he was deeply moved by AID's participation in rebuilding the town of Labutta.¹² AID's core competencies included design, management and implementation of projects fostering economic growth and local trade.¹³ Given SPT's inexperience in jade exploration and production¹⁴, collaboration with AID would facilitate the materialisation of SPT's aspirations. AID in turn saw the joint venture as an opportunity to expand the influence and impact of its work of to Kachin state.¹⁵

The law governing joint venture contracts states that a joint venture contract shall be construed to effectuate the intention of the parties as evidenced by the language used by the parties who are therefore bound to enforce the terms of the agreement as set down in an integrated, written instrument.¹⁶ As per the terms of the contracts, the primary objective of the contract is the welfare of the local people of Myanmar. Special emphasis, in clear-cut words, has been laid on the fact that both the parties shall always prioritize the employees and students.¹⁷ It is directly comprehensible from the terms of the contract that both AID and SPT are in a joint venture agreement to do jade business not merely for the sake of doing business but with an overarching purpose of serving the interests of the local people of Myanmar.¹⁸ Furthermore, the contract explicitly lays down that AID cannot do or say anything harmful to the national interest and solidarity of Myanmar, and vice versa.¹⁹

¹¹Moot Problem, Para 10, Pg. 2.

¹²Moot Problem, Para 6, Pg. 2.

¹³Moot Problem, Para 2, Pg. 1.

¹⁴Moot Problem, Para 12, Pg. 2.

¹⁵Moot Problem, Para 13, Pg. 3.

¹⁶Scholastic, Inc. v. Harris 259 F.3d 73 (2001).

¹⁷Moot Problem, Para 5, Pg.9.

¹⁸ Moot Problem, Para 4,5, Pg. 9.

¹⁹Moot Problem, Para 11, Pg. 10.

(b) AID has violated the contract by causing a fundamental breach which cripples the core of the contract and entitles SPT to validly terminate the contract.

There exists weighty authority under Common Law establishing that every contract contains a core, a central or main promise, which must be performed. The core of the contract is the point in the scale of detailed description at which the contract is said to be based, and that point is regarded as the core. In other words, the main promise or hard core of the contract constitutes the fundamental term of the contract, the central obligation or essence of which all conditions are part.²⁰

A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication, or which the general law regards as a term which goes to the genesis of the contract, so that any breach of that term may immediately, and without further reference to the facts and circumstances, be regarded by the innocent party as a fundamental breach.²¹ It is crucial to note here that fundamental breach can arise although no fundamental term has been broken. In such cases the courts decide that, in view of the breach itself and the surrounding circumstances, the result of the breach has been to destroy the value of the contract as far as the aggrieved party is concerned; the courts are therefore prepared to hold that a fundamental breach has occurred, when such is the case.²²

²⁰Kenyon, Son & Craven v. Baxter Hoare 2 All E.R (1971).

²¹Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale 2 All. E.R. 61 (1966).

²²Idib.

In the present case, the sentiments of workers of SPT were hurt upon learning about the statements made by Fiona Lum in answer to the questions posed to her and Dr. Yugi Asamura, during the course of an interview with the Asian Influencers Magazine for its 2016 edition of “Asia’s Top 20 Power Couples”²³. Fiona Lum’s words “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”²⁴ upset the workers 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 to issue an apology and retract the statement.²⁵ The Respondents submit that it is pertinent to note here that the angry workers were coaxed to resume work by U Thein Kyaw because AID refused to satisfy the requests of the workers.²⁶

It is submitted by the respondents that not only did the actions of Fiona Lum violate a term of the contract to not say anything harmful in the national interest or solidarity of Myanmar, the omission on part of AID’s representative, Dr. Yugi Asamura, who was an accessory to the controversial interview²⁷ and is also a representative of AID²⁸, to render an apology or even a clarification to placate the sentiments of the workers is a clear violation of the duty imposed on AID under the joint-venture contract to prioritize the employees.²⁹

The respondents submit that it is settled law that where a particular breach or breaches of contract by one party is or are such as to go to the root of the contract the other party is

²³Moot Problem, Para 29, Pg. 5.

²⁴Moot Problem, Para 28, Pg. 5.

²⁵ Moot Problem, Para 29, Pg. 5

²⁶Moot Problem, Para 30, Pg.5.

²⁷Moot Problem, Para 27, Pg. 5.

²⁸Moot Problem, Para 1, Pg. 9.

²⁹Moot Problem, Para 5, Pg. 9.

entitled to treat such breach or breaches as repudiation of the whole contract.³⁰ Any fundamental breach, where there has not been a breach of a fundamental term, arises as a result of the extent of the breach; it arises through consideration of the breach itself and its effects, and not the nature of the term broken.³¹ If such breach is so great that a total loss of consideration occurs, if the whole purpose of the contract is destroyed, then this amounts to a fundamental breach, although the term or terms broken might have been only what would normally be considered to be a warranty, or a number of warranties.³²

In the present case, the impact of the conduct of AID has resulted in an unprecedented diminution of the morale of the employees and students and a loss of respect for their Japanese counterparts.³³The most significant fact to be accounted for is that SPT's employees no longer want to continue working with AID.³⁴In light of these events, the respondents submit that the contract would not fructify without the unreserved cooperation of the workers. This means that an act of a party leading to a impairing of the concerns of the workers, shall be deemed to be a fundamental breach of the contract, as it renders the further performance of the contract meaningless, by crippling the core object of the contract.

(c) SPT is entitled to terminate the joint venture contract as the purpose of the joint venture has been rendered impracticable by AID.

Additionally, under the law governing contractual joint ventures, if events subsequent to the formation of a contract for a joint venture make the accomplishment of the venture's

³⁰Ibid.

³¹Hongkong Fir Case (1962) 2 Q.1. 26.

³²Ibid.

³³Moot Problem, Para 38, Pg. 7.

³⁴Moot Problem, Para 41, Pg. 7.

purpose impracticable, the contract terminates and the venture is dissolved.³⁵ Joint venture agreements which contain no provision regarding duration are terminable only when their purpose has been accomplished, or when such accomplishment has become impracticable.³⁶

Pursuant to the pertinent provisions of the partnership law which apply to joint ventures³⁷ a judicial dissolution will be decreed on the ground of discord and dissension among the parties.³⁸

A judicial dissolution may be appropriate where disagreement between the coventures is so severe that all confidence and cooperation between the parties has been destroyed or where the behaviour of a party materially hinders a proper conduct of the venture business.³⁹ Court has the power to dissolve a joint venture in light of unravelling confusion created by the parties and of a deteriorated relationship that would make carrying on the venture impracticable.⁴⁰ Court may even disregard the provisions of a joint venture agreement, if there is serious dissension among the parties.

It is submitted by the respondents that in the present case, by refusing to render an apology or clarification to the students and employees of SPT for its statements published in the Asian Influencers Magazine, SPT has created a severance of confidence between the parties, which is of utmost importance for the functioning of the joint venture as it is

³⁵Woods, et al. v. Southwest Airlines, CO., et al. No. 06 C 2203 (2007).

³⁶Maimon v. Telman, 40 Ill.2d 535, 240 N.E.2d 652 (1968).

³⁷Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (1989); Kaluzny Bros., Inc. v. Mahoney Grease Service, Inc., 165 Ill. App. 3d 390 (3d Dist. 1988).

³⁸Kaluzny Bros., Inc. v. Mahoney Grease Service, 518 N.E.2d 1269 (3d Dist. 1988).

³⁹Tiger, Inc. v. Fisher Agro, Inc. 391 S.E.2d 538 (1989).

⁴⁰Ray-Tek Services, Inc. v. Parked 835 N.E.2d 254 (2005).

essentially a collaborative effort and cannot be performed effectively when one of its most important stakeholder is unwilling to continue its performance. Consequently, SPT is entitled to validly terminate the joint venture as its carrying forward has been rendered impracticable.

II. THE OWNERSHIP OF THE JADE MINING MACHINERY AND EQUIPMENT LIES WITH SHWE PWINT THONE CO.

The respondents most humbly submit that the ownership of the jade mining machinery and equipment lies with Shwe Pwint Thone Co. Ltd. The present contention has been argued in three parts: **(A)** SPT was registered as the owner of the same in the permits and the same was known to AID; **(B)** secondly, SPT is the endorsee/ consignee of the machinery and equipment in the bill of lading; and **(C)** the machinery and equipment formed a part of partnership and thus cannot be separate property of AID and lastly, some of the machinery and equipment were bought from the capital contribution made to the partnership and thus cannot be AID's property alone.

A. SPT WAS REGISTERED AS THE OWNER OF THE MACHINERY AND EQUIPMENT IN THE PERMITS AND THE SAME WAS KNOWN TO AID.

Manifestation of acceptance may include signature, silence or conduct⁴¹. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his

⁴¹Southern Bell Tel. Co., 30 N.C. App. 590, 227 S.E. 2d 645 (1976).

representative to deny the truth of that thing. It is not merely a positive or active declaration that can be the basis for a plea of estoppel but also an act or omission can constitute such basis. An estoppel may arise from silence as well as words.⁴²

In the case of ‘estoppel by silence’ a person has to have been silent on some occasion when he should have spoken.⁴³ An estoppel may arise where a party refrains from correcting another party ‘knowing the mistake the other laboured under’.⁴⁴ Deane J applied the principle that a representor will be prevented from departing from an assumption of existing fact induced by silence ‘where the party estopped has knowingly and silently stood by and watched the other party act to his detriment.’⁴⁵ In the case of *Ramsden v. Dyson*⁴⁶ it was held that if a stranger begins to build another’s land, supposing it to be his own, and such other, perceiving his mistake, abstains from setting him right, and leave him to persevere in his error, a Court of Equity will not allow such other person afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when the person saw the mistake into which the stranger had fallen, it was that person’s duty to be active and to state his or her adverse title; and that it would be dishonest in such person to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which that person could have prevented.

So, in the case of *Gregg v. Wells*⁴⁷, it was held that the owner of goods, who stands by and

⁴²University of Delhi v. Ashok Kumar Chopra and Anr AIR Del 131 (1968); Tri Nagar v. Shanand Mann Del HC (2013).

⁴³Lacy v. Wozencraft, 188 Okl. 19, 105 P.2d 781.

⁴⁴Thompson v Palmer (1933) 49 CLR 507, 547 (emphasis added). See, to similar effect, Grundt v. Great Boulder Gold Mines Pty Ltd (1937) 59 CLR 641, 676 per Dixon J; West v. Commercial Bank of Australia Ltd (1935) 55 CLR 315, 322 per Rich, Starke, Dixon and McTiernanJJ; Holdings Pty Ltd v. Short (1972) 46 ALJR 563.

⁴⁵Waltons Stone (interstate) Ltd v. Maher (1988) 164 CLR 387.

⁴⁶L. R. I H.L. p.129.

⁴⁷10 Adol. & Ell. 90.

voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bona fide, cannot recover them from the vendee.

In the given matter, SPT were the ones who imported the machinery and equipment and have obtained the government permit required to operate them.⁴⁸ SPT was also recorded as the owner and operator of these machineries and equipment on those permits⁴⁹ and AID was aware of the same.⁵⁰

Hence, it is humbly submitted that AID is estopped from asserting title of the machinery and equipment as it was aware of the Respondent being registered as the owners of the same in the permit and the Claimant never questioned the same.

B. SPT IS THE ENDORSEE/ CONSIGNEE OF THE MACHINERY AND EQUIPMENT IN THE BILL OF LADING.

Sir Frederick Pollock explained the ability of keys and bills of lading to give their holders symbolic possession of goods as follows: “The key and the bill of lading is not a symbol in the sense of representing the goods, but the delivery of the key [and of a bill of lading] gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act, instead of words, may be called symbolic) that the transferor intends no longer to meddle with the goods.”⁵¹ Bill of lading is still most effectively and commonly identified by its three main characteristics which it has developed over time, firstly, it acknowledges receipt of the goods by the carrier,

⁴⁸Moot Problem, Para 43, Pg. 7.

⁴⁹Ibid.

⁵⁰Clarification No. 14, Pg. 3.

⁵¹POLLOCK & WRIGHT, POSSESSION IN THE COMMON LAW Pg. 68 (Oxford, Clarendon Press 1888).

secondly, it is usually evidence of the contract of carriage and thirdly, it is capable of operating as a document of title over the goods. These are functions that have been given to the bill of lading through mercantile custom and have since been accepted by the law.⁵²

Bills of Lading are ancient mercantile documents and are well established as documents of title both by the statute and by the custom of merchants.⁵³ According to the Common Law principles, Bill of Lading is the only recognised document of title, which makes its relevance more in the common law countries.⁵⁴ This proprietary function of the Bill of Lading was customarily recognised first in the case "*Lickbarrow v. Mason*"⁵⁵ and its recognition as a document establishing the ownership of the goods and "constructive possession of goods by the transferee."⁵⁶

For property law, transfer of a bill of lading in the performance of a contract of sale will usually transfer to the transferee title to the goods that the bill represents. Therefore, this function of a bill of lading in relation with property guarantees that property of sold goods and any possession of these goods belongs to the transferee of the bill of lading.⁵⁷

In the case at hand there exists a Bill of Lading that addresses SPT as a consignee/endorsee for the machines and equipment and thus it is asserted that Bill of Lading proves as a document of title over the goods transferred, making SPT the rightful owner of the machinery and equipment.

⁵²NICHOLAS GASKELL, "BILLS OF LADING" Pg. 3 (LLP 2000).

⁵³Casalav Pejovic, "*Documents of Title in Carriage of Goods by Sea: Present Status and possible future Directions.*" Para 462 (J.B.L. 2001 Sept.).

⁵⁴Ibid.

⁵⁵[1787] 2 T.R. 63, 69.

⁵⁶SARAH DROMGOOLE AND YVONNE BAATZ, "THE BILL OF LADING AS DOCUMENT OF TITLE", 547 (Second Edition 1998 edited by NORMAN PALMER & EWAN MCKENDRICK).

⁵⁷GOLDBY, INTERNATIONAL LAW ON CARRIAGE OF GOODS BY SEA: UNCITRAL'S MOST RECENT HARMONISATION EFFORTS. THEORY AND PRACTICE OF HARMONISATION, Pg.3-4 (2011).

C. THE MACHINERY AND EQUIPMENT FORMED A PART OF PARTNERSHIP AND THUS CANNOT BE SEPARATE PROPERTY OF AID.

Section 14 of The Partnership Act states that subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

All property and rights and interests which the partners, may have brought into the common stock as their contribution to common business are the parts of the partnership property.⁵⁸

In case of separate property of partner has been consistently used in the business it will be presumed that such property has been thrown in the common stock and has become property of the firm.⁵⁹

In the given case although AID sourced for all the second hand machinery and equipment⁶⁰, SPT took the charge of importing the same and also paid for the import⁶¹. SPT also obtained the relevant permits to operate the machinery.⁶² Further, the objective of the agreement was that AID will train the local people of Myanmar so that they can learn new skill set and be independent and thus SPT's employees were trained on how to operate and maintain the jade- mining equipment and machinery.⁶³

⁵⁸S.D SINGH & J.B GUPTA, LAW OF PARTNERSHIP IN INDIA Pg. 267 (4th Ed).

⁵⁹Waterer v. Waterer (1893) LR 15 Eq 402; Davies v. Games (1879) 12 Ch D 813.

⁶⁰Moot Problem, Para 16, Pg. 3.

⁶¹Additional Clarification No. 30, Pg.5.

⁶²Moot Problem, Para 18, Pg. 4.

⁶³Moot Problem, Para 16, Pg. 3.

Thus, it is respectfully submitted that the jade- mining machinery and equipment formed an essential part of the partnership business as they were in consistent use of the business and therefore they form a part of partnership property and not AID's separate property.

In arguendo, some of the machinery and equipment were bought from the capital contribution of the partnership.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm. In *Wary v. Wary*⁶⁴ it was held that “unless the contrary intention appears, property bought with the money belonging to the firm is deemed to have been bought on account of the firm”.

From the given facts it is clear that, in March 2009, AID and SPT injected capital contributions of USD 1.5 million and USD 2.5 million respectively⁶⁵. And also, there have been machinery and equipment provided by AID after the capital contribution was made.⁶⁶

Hence, it can be concluded that there are certain machinery and equipment that were purchased from the capital contribution made by both AID and SPT making them partnership property and therefore AID cannot claim sole ownership over the said machinery and equipment.

⁶⁴(1905) 93 LT 304.

⁶⁵Moot Problem, Para 17, Pg. 3 &4.

⁶⁶Additional Clarification No. 10, Pg.3.

III. SUBSISTENCE AND OWNERSHIP OF RIGHTS IN THE JADEYE SOFTWARE.

This contention is dealt with under three sub-contentions- **(A)** copyright does not subsist in JADEYE software under the laws of Myanmar; **(B)** even if any rights subsist on the software, the ownership of the software is jointly vested in both the partners, AID and SPT; and **(C)** SPT can validly reverse engineer or create their own version of JADEYE.

A. NO COPYRIGHT SUBSISTS ON THE JADEYE SOFTWARE.

Copyright being a statutory right is granted by the national legislation under which it is claimed. No copyright protection subsists on JADEYE because (a) copyright laws of Myanmar do not provide any protection to computer programmes, and (b) if protection is claimed under Japanese Copyright laws, then the copyright laws of Myanmar do not recognise copyright of other countries.

(a) No copyright protection subsists on JADEYE under copyright laws of Myanmar.

The governing copyright legislation in Myanmar is The Burma Copyright Act, 1914. Even after their independence, the existing law on copyright was the same according to the Union of Burma (Adaptation of Law) Orders, 1948. Myanmar is a signatory to TRIPS Agreement. Under its international obligation, Myanmar was to bring its domestic laws in line with the TRIPS standards. This transition period has been extended until 1 July 2021 by the TRIPS

Council.⁶⁷ Therefore, the Copyright Act of 1914 is still the existing law, relating to copyright protection in Myanmar.⁶⁸

The Burma Copyright Act does not protect computer software and are not recognised as copyrightable subject matter. The Myanmar Copyright Act of 1914 provides for copyright for original literary, dramatic and artistic work if: (a) in the case of a published work, the work was first published within Myanmar; and (b) in the case of an unpublished work, the author was a citizen of Myanmar or “within” Myanmar when the work was created.⁶⁹

Copyright is a statutory right.⁷⁰ Section 16 of the Indian Copyright Act makes it clear that there cannot be a copyright which exists in any work except as provided by the statute. There is no common law protection for copyright. IPRs are essentially national rights.⁷¹ Hence, any person is entitled to copyright or any similar right in any work, whether published or not, within the provisions of the Act alone and not otherwise.⁷² The copyright being a creation of the statute has to be claimed within the four corners of the Act.⁷³

It is submitted that copyright is a statutory right generated only if the law of the territory provides for it. Since, computer software are not given copyright protection under the laws of Myanmar, there subsists no copyright protection on JADEYE.

(b) Myanmar does not recognise copyright granted by other countries.

⁶⁷World Trade Organisation, IP (https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm).

⁶⁸U Khin Maung Win, Deputy Director, Attorney General’s Office, *Copyright in Myanmar Since 1914*.

⁶⁹The Burma Copyright Act, 1914, § 1.

⁷⁰MICHAEL A. EPSTEIN, EPSTEIN ON INTELLECTUAL PROPERTY 11-13 (5th ed. 2008).

⁷¹IAN HEWITT, JOINT VENTURES Pg. 415 (4th ed, Sweet & Maxwell Ltd 2008).

⁷²Manojah Cine Productions v Sundaresan, AIR 1976 Mad 22 (DB); Richmark Camera Services v Neison Horded (1981) FSR 413.

⁷³NARAYANAN P, LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 14 (4 ed. Eastern Law House).

Notwithstanding its accession to the TRIPs Agreement, Myanmar has yet to implement national treatment principles in its local laws. Myanmar is not a signatory to the Paris Convention for the Protection of Industrial Property, nor is it a signatory to the Berne Convention for the Protection of Literary and Artistic Works.⁷⁴

Copyrights from other countries are not recognized in Myanmar and there are no procedures for registering copyrights obtained in any other country in Myanmar. Copyrighted works of other nations are afforded no protection in Myanmar under the present system.⁷⁵

Therefore, it is submitted that even if it be considered that JADEYE is protected under the copyright laws of Japan, no such right would be recognised or be enforceable in Myanmar since Myanmar grants no protection to copyright of any other country.

B. ARGUENDO, THERE SUBSISTS A COPYRIGHT IN JADEYE, IT MUST VEST WITH THE PARTNERSHIP AND THE PARTNERS WILL JOINTLY OWN THE RIGHTS IN JADEYE SINCE IT WAS DEVELOPED BY AN EMPLOYEE WORKING UNDER THE PARTNERSHIP.

It is humbly submitted that the ownership of JADEYE cannot be exclusively granted to one partner since it is jointly owned by both SPT and AID.

In case of copyright, a work created by an employee vests in the employer in absence of an agreement to the contrary.⁷⁶ According to the Supreme Court of United States in

⁷⁴IP Factsheet: Myanmar, South East Asia IPR Helpdesk, Pg. 4 (Report).

⁷⁵The Report: Myanmar 2016, Oxford Business Group, Pg. 203 (Report).

⁷⁶Picture Music, Inc. v. Bourne, Inc. 53 F.3d 549, 555 (2nd Cir.).

Community for Creative Non-Violence et al. v. Reid⁷⁷, the following non exhaustive criteria must be used to determine whether an employer-employee relation, as understood under agency law, exists:

- (1) Work done at the employer's location, and provides equipment or other means to create work;
- (2) Control by employer over the employee;
- (3) Status and conduct of employer.

In the present case, JADEYE was created by Joe Yamashita; who was working under the partnership agreement.⁷⁸ The work was done mainly in Myanmar⁷⁹ and the operational cost was borne by the funds maintained by the partnership in SPT's bank account.⁸⁰ All the visa and accommodation requirements were handled by SPT.⁸¹ Once the software yielded positive results, Yugi Asamura ordered the software to be installed in all the computer and equipments on the site⁸² after which U Thein Kyaw presented Joe Yamashita with UDS 18,000.⁸³

It is submitted that the above facts make it abundantly clear that Joe Yamashita was an employee of the partnership and the software created was also for the purpose of benefiting the partnership of jade business. Hence, the ownership of the software must vest with the partnership.

In a joint venture IPR can be classified as –

⁷⁷490 U.S. 730 (1989).

⁷⁸Additional Clarification No. 17, Pg.4.

⁷⁹Additional Clarification No. 15, Pg.3.

⁸⁰Moot Problem, Para 17, Pg. 4.

⁸¹Moot Problem, Para 18, Pg. 4.

⁸²Moot Problem, Para 23, Pg. 5.

⁸³Moot Problem, Para 25, Pg. 5.

- Existing – Rights and technology existing at the outset of the Joint venture.
- Future – those arising after its establishment (whether in the course of operations or, through independent activities of joint venture parties itself.)⁸⁴

Where the work has been jointly generated by parties during the course of a joint venture, parties become the joint owner of such work.⁸⁵

It is submitted that the work should lie with the partnership as the work was created in the course of operation of Joint Venture and Joe Yamashita was working under the partnership agreement. The resources required, his salary, accommodation and other necessary amenities in the employment were provided by AID and SPT together. The work was created jointly as resources of both the parties were put into work.

C. SPT CAN VALIDLY REVERSE ENGINEER OR CREATE THEIR VERSION OF JADEYE.

Copyright protects only the author's original expression, not the underlying facts or ideas.⁸⁶

It does not protect any 'idea, procedure, process, system, method of operation, concept, principle or discovery'.⁸⁷

It is submitted that the rights in software are on the source codes which is an expression of ideas. There exists no right on the idea. Therefore, SPT can validly reverse engineer JADEYE or can create its own version of the software.

⁸⁴Vytautas Mizaras, *The Structure of Intellectual Property Law*, 83 EDWARD ELGAR PUBLISHING (2011).

⁸⁵IAN HEWITT, JOINT VENTURES Pg 415 (4th ed, Sweet & Maxwell Ltd 2008).

⁸⁶Feist Publications Inc v Rural Telephone Service Co Inc 20 IPR 129 (U.S. Sup Ct) (1991).

⁸⁷17 U.S.C. 102(b) (1994) (U.S.A.).

This validity of reverse engineering has been upheld under several jurisdictions. In United States, the courts have widely recognised that there is a major public benefit to reverse engineering, encouraging inventors and businesses to develop similar products, facilitating healthy competition in the open market.⁸⁸ Federal Circuit in *Atari v Nintendo* which stated that reverse engineering is justified where it is required to ‘undertake necessary efforts to understand the [copyrighted] work’s ideas, processes, and methods of operation’.⁸⁹ Furthermore, while providing exclusive rights to expressions, the copyright act encourages others to build freely upon the ideas and information conveyed by a work.⁹⁰ In United Kingdom, the European Conference on Information System argued in favour of reverse engineering asserting that this would lead to a high degree of interoperability and encouraging competition between software developers.⁹¹ Software Directive also permits program decompilation by legitimate users where this is essential to obtain information required to create an independent interoperable program.⁹²

Therefore, it is humbly submitted that contention of SPT that it will reverse engineer or create its own version of JADEYE is legal and it is well within its rights to do the same without infringing the copyright on the software.

⁸⁸Bonito Boats Inc v. Thunder Craft Boats Inc (1989) USSC 20; 489 U.S. 141, 160 (1989).

⁸⁹Atari Games Corp v. Nintendo of America, Inc 975 F.2d 832, 842 (Fed. Cir. 1992).

⁹⁰Ibid.

⁹¹MJ Weichsellbaum, ‘The EEC Directive on the Legal Protection of computer Programs and U.S. Copyright Law: Should Copyright Law Permit Reverse Engineering of Computer Programs?’ 14 FORDHAM INTERNATIONAL LAW JOURNAL 1027(1991).

⁹² Software Directive, 2009, Art. 6 (EU).

PRAYER FOR RELIEF

In the light of the facts stated, issues raised, authorities cited and arguments advanced the Counsel for the RESPONDENT respectfully requests the Tribunal to hold that:

1. The termination of the Partnership Agreement by SPT is valid.
2. The ownership of jade- mining machinery and equipment vests with SPT.
3. The ownership of JADEYE software vests jointly with AID and SPT and no copyright subsists on JADEYE software.

And also grant any other remedy that the tribunal finds just and equitable in the present matter.

All of which is respectfully affirmed and submitted.