

THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION
KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION?

2017

BETWEEN

ASAMURA INTERNATIONAL DEVELOPEMNT CO., LTD

(CLAIMANT)

AND

SHWE PWINT THONE CO., LTD

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

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

QUESTIONS PRESENTED

1. Whether the procedural law applicable to the dispute is Japanese Law;
2. Whether the substantive law applicable to the dispute is Myanmar Law;
3. Whether the termination of the Agreement by SPT was valid as a result of a possible breach of term 11 of the Agreement by AID:
 - a. Whether AID breached term 11 of the Agreement, thus possibly allowing termination; and
 - b. Whether such a breach was serious enough to allow termination of the entire Agreement
4. Whether SPT had signified continuance of the Agreement by acquiescence
5. Whether the termination of the Agreement by SPT entitles AID to compensation
 - a. Whether AID has suffered loss or damage so as to be entitled to compensation under the Contract Act
 - b. Whether AID is entitled to compensation under term 8.
6. Whether the termination was valid under the Partnership Act 1932
 - a. Whether there is a partnership at will under s.7 Partnership Act 1932
 - b. Whether the termination complied with s.43 Partnership Act 1932
7. Whether AID was, or continues to be, the sole owner of the mining equipment and gear
8. Did AID provide SPT with the mining gear as a bailment contract
 - a. If SPT is determined to be the new owner of the mining equipment, is AID entitled to seek compensation?
9. Whether AID has ownership of rights in the JADEYE software
 - a. Whether registration of the software matters in this case
 - b. Whether the software was used primarily by AID or SPT

STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd (“AID”) is a company incorporated in Japan that specializes in crisis relief and development. It designs, manages and implements projects that foster economic growth and local trade. In 2005 the leadership of the company was passed on to Dr. Yugi Asamura. Dr. Asamura is married to Dr. Fiona Lum Ka Ching who does not hold a managerial position with AID and who is a non-executive director.
2. The Respondent, Shwe Pwint Thone Co., Ltd (“SPT”), is a local Myanmar company, owned by U Thein Kyaw, that provides secular and vocational training to underprivileged students who wish to pursue a path to monastic schools. The company runs multiple projects including: teashops, jade carving and polishing studios and training centres.
3. In 2007, U Thein Kyaw was gifted 80 acres of land, believed to have a large amount of jade deposits, in Hpakant in the Kachin State. He wanted to create jobs for the community and start a new training centre. U Thein Kyaw contacted Dr. Yugi Asamura to learn more about jade exploration and extraction, with the prospect of starting a partnership between AID and SPT.
4. After three rounds of discussion, the two individuals decided to enter into a partnership. Although U Thein Kyaw stated that involving lawyers was unnecessary, and suggested a verbal agreement was enough, Dr. Yugi Asamura requested that both parties sign a written agreement.
5. On 9 September 20, both parties drafted and signed their own contract. Under the agreement AID was in charge of directing and instructing the extracting and cutting portion of the procedure. SPT was in charge of the processing and selling. Both AID and SPT were meant to make financial and money decisions together. The partnership was supposed to be for the long term, and the party causing the partnership to end would have to pay compensation.

6. AID sourced, purchased, and reconditioned machinery and equipment for the project. SPT imported the machinery, and obtained the necessary permit from the government. The permit was due to expire on 31 March 2019. AID sent 25 employees to operate the equipment and impart the necessary technical knowledge on SPT's employees. SPT handled all visas and accommodation. In March 2009, AID and SPT both injected capital contributions. AID contributed USD 1.5 million and SPT contributed USD 2.5 million.

7. On 11 April 2012, Joe Yamashita, an AID finance executive, announced that the "JADEYE" software that he had been working on was ready for use. The software allowed the testing of the quality and visibility of the jade at 99%. Mr. Yamashita did not accept any money from SPT or AID for the JADEYE software. Dr. Yugi Asamura ordered the software to be installed in all computers and equipment on the sites. When Mr. Yamashita resigned from the company on 4 January 2013, the source code of the JADEYE was saved on a hard disk drive and given to the Head of Finance of AID. The software was never registered as a patent in Myanmar or Japan.

8. After learning about the low morale of the Myanmar employees and students, following a statement made by Dr. Fiona Lum, and being told by close confidante, U Soe Myint, that SPT could and should continue the work on their own, U Thein Kyaw made a decision to end the partnership.

9. On 1 January 2017, U Thein Kyaw informed Dr. Yugi Asamura of his intention to end the partnership. Dr. Asamura said that SPT had no right to terminate the agreement, and that if there was to be a termination, SPT would have to compensate more than just relocation costs.

10. Unable to resolve the matter, the Parties turned to a mutual acquaintance who recommended arbitration. The place of arbitration is Tokyo, Japan, and the arbitration is to be conducted in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

SUMMARY OF PLEADINGS

A. The applicable procedural law to the arbitration is Japanese law

The Parties have designated the place of arbitration to be Japan. This is equivalent to designating Japan as the seat of arbitration. The choice of seat in this case displays an implied intention for the procedural laws of Japan to apply.

B. The law applicable to the substantive issues is Myanmar law

Applying Japanese procedural law and the KLRCA i-Arbitration Rules, the arbitral tribunal is required to apply the rules of law as designated by the parties as applicable to the dispute in accordance with their contract. The parties included a choice of law clause in their contract designating Myanmar law as applicable to this dispute.

C. The termination of the agreement by SPT was invalid because there was no serious breach of contract by AID

AID did not breach the contract because the view expressed by Dr. Fiona Lum in the interview is accurate, well known and widely held and thus does not harm the national interest or solidarity of Myanmar. However, even if her remarks do constitute a breach of the Agreement, the breach is not sufficiently serious so as to permit rescission.

D. SPT has signified by conduct their acquiescence in its continuance.

Even if AID has breached the Agreement, SPT has signified by continuing to work under the Agreement for four months, their acquiescence to its continuance, and therefore are not permitted to rescind the Agreement.

E. AID is entitled to compensation

AID is entitled to compensation for their loss resulting from SPT's wrongful termination of the Agreement. Alternatively, they are entitled to compensation under the penalty clause contained in term 8.

F. The termination was not valid under the Partnership Act 1932

The partnership was partnership at will, which requires dissolution to be in writing. Mr. U Thein Kyaw did not inform AID in writing of his intention to end the partnership and therefore, the termination was invalid.

G. AID was the original owner of the mining equipment, and retains ownership

As AID never received consideration from SPT for the use of the mining equipment, AID retains ownership over the mining assets as it retained the bill of sale. As such, the mining assets ought to be viewed as a gratuitous loan amounting to a resting contract.

H. The contract amounted to a resting contract

AID has, at best, awarded a resting contract, otherwise known as a bailment contract, to SPT. As such, regardless of the cost to transport, register, or maintain the mining equipment, ownership never transferred to SPT.

I. AID has subsistence and ownership of rights in the JADEYE software

AID has ownership rights in JADEYE, and this remains in force and effect if the partnership comes to an end. The software was never registered under Myanmar law. Further it was created by an AID employee and its function primarily helped AID's activities in the venture. Alternatively, if Japanese law applies, employers have the right to patent their employees' inventions.

PLEADINGS

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

1. The procedural law is the law that will regulate the conduct of the present arbitration proceedings, and is determined by the seat of arbitration. The Claimant, Asamura International Development Co., Ltd (“AID”) and the Respondent, Shwe Pwint Thone Co., Ltd (“SPT”) (collectively, “the Parties”) have agreed that Japan is the seat of the present arbitration (A). As such, the procedural law of Japan applies (B).

A. *Japan is the seat of the present arbitration*

2. Under Rule 7(1) of the KLRCA Arbitration Rules (“KLRCA Rules”), parties may agree on the seat of the arbitration. The place of arbitration is tantamount to the seat of arbitration. The Parties have agreed to the arbitration being heard in Tokyo, Japan, and thus the seat of the present arbitration is Japan.

B. *The procedural law of Japan applies to this dispute*

3. It is generally accepted that the law of the place of arbitration governs the arbitration procedure.¹ In private international law, all procedural issues are governed by the *lex fori* (law of the forum); in arbitration, it is called the *lex arbitri*. The most established view is that the *lex arbitri* should be the law of the

¹ Yasuhei Taniguchi and Tatsuya Nakamura, “Japan” in Michael J. Moser (ed), *Arbitration in Asia* (2nd edn, Juris Publishing 2008) Jap-18

place where the arbitration is held.² The present arbitration is being held in Japan, and thus the law governing the procedure of the arbitration is Japanese law.

4. Furthermore, the Arbitration Law³ of Japan adopts the principle of territoriality⁴, and therefore arbitral proceedings where the place of arbitration is in the territory of Japan shall follow the provisions of the Arbitration Law.
5. Therefore, the Arbitration Law of Japan shall govern the procedure of the present arbitration.

II. THE LAW GOVERNING THE SUBSTANTIVE ISSUES IN THIS DISPUTE IS MYANMAR LAW

6. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute and in accordance with the terms of the contract (A).

A. The tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute

7. The Parties have agreed to using the KLRCA i-Arbitration Rules.⁵ Article 35 of the Rules applies which states that the arbitral tribunal shall apply the rules of law as designated by the parties as applicable to the substance of the dispute⁶ and that this shall be in accordance with the terms of the contract⁷ between the parties, where there is one.

² K.S Harisankar, “International Commercial Arbitration in Asia and the Choice of Law Determination” (2013) 30(6) Journal of International Arbitration, 622

³ Arbitration Law (Law No.138 of 2003), Article 1

⁴ Yasuhei Taniguchi and Tatsuya Nakamura, “Japan” in Michael J. Moser (ed), *Arbitration in Asia (2nd edn, Juris Publishing 2008) Jap-6*

⁵ Moot Problem at [47]

⁶ Article 35(1) KLRCA i-Arbitration Rules

⁷ Article 35(3) KLRCA i-Arbitration Rules

8. Moreover, according to the applicable procedural law, the Arbitration Law⁸ of Japan, the arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute⁹ and shall decide in accordance with the terms of the contract where there is one.¹⁰
9. Term 10 of the contract in this dispute states that ‘everything will be in accordance with and interpreted under the law of the Golden Land of Myanmar.’ Thus the law to be applied to the substance of the dispute is Myanmar law, as designated by the parties within a term of their contract.

III. THE TERMINATION OF THE AGREEMENT BY SPT WAS INVALID BECAUSE THERE WAS NO SERIOUS BREACH OF CONTRACT BY AID

10. SPT had no right to terminate the Agreement because AID did not breach it (A) or, if they did, the breach was not serious enough to give SPT the right to terminate the entire contract (B).

A. AID did not breach the Agreement

11. Under s.39 Myanmar Contract Act 1872, the promisee may put an end to the contract when a party to it has refused to perform, or disabled himself from performing his promise in its entirety. SPT claims to have terminated the contract because the workers and students are unable to look past the interview that Dr. Yugi Asamura and Dr. Fiona Lum had with Asian Influencers Magazine.¹¹

⁸ Arbitration Law (Law No.138 of 2003)

⁹ Ibid, Article 36(1)

¹⁰ Ibid, Article 36(4)

¹¹ Moot Problem at [41]

12. However, AID has not failed to perform their promise to not do or say anything harmful to the national interest and solidarity of Myanmar, under term 11 of the Agreement, by the interview with Dr. Yugi Asamura and Dr. Fiona Lum.
13. The remarks do not constitute harm to the national interest or solidarity of Myanmar because the view expressed by Dr. Fiona Lum is a well-known, accurate and widely held view.
14. The view that there is ethnic cleansing in Myanmar is accurate. Although ethnic cleansing is not formally defined under international law, a United Nations Commission of Experts has defined it as a “purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”¹² For over two decades, United Nations institutions have extensively documented human rights violations against the Rohingya in Myanmar, including forced displacement and deportation, killings, rape, property destruction and forced labour, sometimes described as systematic and a part of state policy.¹³
15. Eyewitness testimonies gathered by the United Nations Office of the High Commissioner of Human Rights in 2016 all refer to such violations against the Rohingyas perpetrated by the Myanmar security forces or civilians acting jointly with security forces¹⁴ in 2016. The majority of the interviewees had experienced

¹² Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (21 May 1994) as referenced in Human Rights Watch, *“All You Can Do is Pray”*: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State (Human Rights Watch, 2013) 124

¹³ Human Rights Watch, *“All You Can Do is Pray”*: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State (Human Rights Watch, 2013) 137

¹⁴ United Nations Office of the High Commissioner of Human Rights, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016* (3 February 2017) 13, 40

multiple displacements and multiple violations¹⁵, with many Rohingya family members still missing after being rounded up by the Myanmar security forces.¹⁶

16. The attacks against Rohingya villages and the destruction of their homes, food stocks and sources of food make it impossible for Rohingyas to live in their villages, therefore forcing them to leave.¹⁷ This forced displacement of persons from a specific religious and ethnic group as a result of acts of violence committed against them by the Myanmar security forces and non-Rohingya civilians, can be described as ethnic cleansing.¹⁸ The information gathered by the OHCHR raises concerns that what is occurring in Myanmar is the result of a “purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas”.¹⁹
17. The view that there is ethnic cleansing in Myanmar is well-known and widely held. The Rohingya are often described as one of the world’s most persecuted groups online²⁰ and within the media²¹, which has been reporting on the persecution of the Rohingya in Myanmar for years.

¹⁵ Ibid, 41

¹⁶ Ibid, 19

¹⁷ Ibid, 42

¹⁸ Ibid, 42

¹⁹ Ibid, 42-43

²⁰ Amnesty International, *Who are the Rohingya Refugees?* (4 January 2016) < <https://www.amnesty.org.au/who-are-the-rohingya-refugees/> > ; UN Dispatch, *The 8 Stages of Genocide Against Burma’s Rohingya* < <https://www.undispatch.com/the-8-stages-of-genocide-against-burmas-rohingya/> >

²¹ BBC, *Who will help Myanmar’s Rohingya?* (10 January 2017) < <http://www.bbc.co.uk/news/world-asia-38168917> >

18. Since the view expressed by Dr. Fiona Lum is accurate and widely held, her remarks therefore are not harmful to the national interest or solidarity of Myanmar and term 11 of the Agreement has not been breached.

B. Alternatively, the breach was not serious enough to give SPT the right to terminate the entire contract

19. It would be wrong to read section 39 of the Contract Act as meaning that the promisee may rescind the contract immediately as soon as there is the slightest minor or trivial breach or a single failure to perform one promise of the many promises within the contract.²² It cannot be correct that a promisee who wishes to escape from the contract, perhaps to form a more personally or financially beneficial contract with another, can seize on the smallest imperfection in the promisor's performance to rescind the contract and escape from his obligations as created by the contract. It is therefore a requirement of the law that the failure of performance by the promisor be a serious failure²³, such as refusal to perform one of the central terms of the contract or refusal to perform a promise that affects a vital part of the contract.²⁴

20. Term 11 of contract can scarcely be said to be a central term of the contract, and breach of it does not affect the vital parts of the contract such as the partnership and its purpose, or the performance of the various processes regarding the Jade.

21. Therefore, even if there is a breach of term 11 by AID, the breach is not sufficiently serious so as to permit termination of the entire contract. In

²² Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 173-174

²³ *Federal Commerce v Molena Alpha* [1979] AC 757 (HL)

²⁴ Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 173-174

terminating the Agreement without paying compensation to AID, SPT has actually breached term 8 of the Agreement, and AID is entitled to compensation for that breach.²⁵

IV. EVEN IF THERE WAS A BREACH, SPT HAS SIGNIFIED BY CONDUCT THEIR ACQUIESCENCE IN ITS CONTINUANCE

22. When there is a serious breach of contract, the promisee may rescind unless he has signified, by words or conduct, his acquiescence in its continuance (**A**). Therefore, even if AID has breached term 11 of the Agreement, SPT has signified by conduct that the Agreement is to continue (**B**).

A. Rescission of contract is not permitted where acquiescence to its continuance has been signified by words or conduct

23. Under s.39 Contract Act 1872, when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, *unless he has signified, by words or conduct, his acquiescence in its continuance.*

B. SPT has signified by conduct that the Agreement is to continue

24. The proposed breach of contract occurred in September 2016 when the interview containing the remarks was published in Asian Influencers Magazine.²⁶ However, SPT did not attempt to rescind the contract until 10 January 2017.²⁷ By coaxing the angry workers to presume their duties and continuing with the jade mining venture with AID for four months after the proposed breach, SPT has signified by

²⁵ Federal Commerce v Molena Alpha [1979] AC 757 (HL)

²⁶ Moot Problem at [29]

²⁷ Moot Problem at [40]

conduct acquiescence to the Agreement continuing. Therefore, even if AID did breach term 11 of the Agreement in a sufficiently serious manner, SPT was not entitled to terminate the Agreement in January as a result of that breach, because Mr. U Thein Kyaw had signified that the Agreement continued by continuing to work with AID for four months.

V. AID IS ENTITLED TO COMPENSATION

25. AID has suffered loss as a result of SPT breaching term 8 of the contract by terminating the contract and is therefore entitled to compensation under the Contract Act (A). Even if there is no loss, AID is still entitled to compensation under term 8 of the Agreement, whether AID had breached the Agreement or not (B).

A. AID has suffered loss as a result of SPT terminating the contract in breach of term 8

26. Under s.73 Contract Act 1872, when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach or which the parties knew, when they made the contract, to be likely to result from the breach of it.

27. As SPT terminated the Agreement in breach of term 8, AID is entitled to receive compensation for any loss or damage caused to them as a result of this breach. Termination will result in AID being unable to fulfil their obligations under the contract created with Hashimoto Co., Ltd (“HCL”) whereby AID were to supply

jades from Hpakant to HCL for one year, meaning they will lose the USD 1.2 million contract.

28. Compensation is not to be given for remote or indirect loss or damage.²⁸

However, the loss here is not remote or indirect. Mr. U Thein Kway knew of this contract and encouraged AID to enter into the contract.²⁹ Therefore, SPT had knowledge of the loss that would occur if they terminated the contract in breach³⁰ of term 8, meaning that the damage was not remote or indirect.

29. Therefore, AID is entitled to such compensation as would put them into the position they would have been in had the Agreement not been breached,³¹ the determination of which shall be done in another hearing.³²

B. AID is entitled to compensation under term 8 of the Agreement, whether they breached the Agreement or not

30. Alternatively, even if the loss is too remote, AID is entitled to compensation under term 8 of the Agreement which states that ‘the party causing the partnership to end must pay compensation.’

31. S.74 Contract Act 1872 provides that ‘when a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach, *or if the contract contains any other stipulation by way of penalty*, the party complaining of the breach is entitled, *whether or not actual damage or loss is*

²⁸ S.73 Contract Act 1872

²⁹ Moot Problem at [35]

³⁰ Hadley v Baxendale [1854] 156 ER 145 (EXCH), Victoria Laundry v Newman [1949] 2 KB 528 (CA)

³¹ Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 185

³² Moot Problem at [49]

proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation.'

32. In order to be considered a penalty clause under s.74, the term must be seen not as encouraging performance, but as *punishing non-performance*.³³ Looking to the written express term as recorded and giving it its ordinary and natural meaning,³⁴ term 8 serves to discourage termination and to punish the party causing the partnership to end, and therefore constitutes a penalty clause under s.74. This supports the Parties' intentions according to the written terms of the Agreement³⁵ that the 'partnership and brotherhood will be for the long term.'
33. AID is therefore entitled to reasonable compensation³⁶ under the penalty clause, such compensation to be determined in a separate hearing.³⁷
34. AID is entitled to this whether they committed a breach themselves or not because SPT has signified by conduct acquiescence in its continuance but also because term 8, when given its ordinary and natural meaning,³⁸ simply states that the party causing the partnership to end must pay compensation. SPT caused the partnership to end, and therefore they must pay compensation as the express written term of their agreement requires.

³³ Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 173-174

³⁴ Tan Byan Seng v Ellermans Arracan Rice and Trading Co Ltd (1948) BLR 148 (HC); Steel Bros & Co Ltd v Tokersee Mooliee AIR 1932 Ran 162, (1932) ILR 10 Ran 372; The State Agricultural Marketing Board v U Ba Chein (1960) BLR 405 (HC)

³⁵ ³⁵ Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 134

³⁶ Ma Si v Ma Tha Ya (1892-96) UBR 290; U Htan Hmat v Daw Gon (1957) BLR 73 (HC)

³⁷ Moot Problem at [49]

³⁸ Tan Byan Seng v Ellermans Arracan Rice and Trading Co Ltd (1948) BLR 148 (HC); Steel Bros & Co Ltd v Tokersee Mooliee AIR 1932 Ran 162, (1932) ILR 10 Ran 372; The State Agricultural Marketing Board v U Ba Chein (1960) BLR 405 (HC)

VI. THE TERMINATION WAS NOT VALID UNDER THE PARTNERSHIP ACT 1932

35. The partnership is partnership at will (A) under the Partnership Act 1932. The termination of the partnership was therefore invalid under s.43 Partnership Act 1932 because the termination was not in writing (B).

A. The partnership is a partnership at will

36. S.7 of the Partnership Act 1932 provides that ‘where no provision is made by the contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is “partnership at will”.

37. There is not stipulation as to the duration of the partnership between AID and SPT in their Agreement except that it will be for the long term, a duration which is not of a fixed length. There are also no clauses regarding when and how their partnership will resolve. Therefore, the partnership between AID and SPT is partnership at will.

B. The termination of the partnership was invalid because it was not in writing

38. S.43(1) Partnership Act 1932 states that ‘where the partnership is at will, the firm may be dissolved by any partner giving notice *in writing* to all the other partners of his intention to dissolve the firm’.

39. Mr. U Thein Kyaw did not inform Dr. Yugi Asamura by writing of his decision to end the partnership.³⁹ Therefore, the termination was invalid under s.43(1)

Partnership Act 1932, and AID is entitled to compensation.

VII. AID WAS THE ORIGINAL OWNER OF THE MINING EQUIPMENT, AND RETAINS OWNERSHIP

40. AID never relinquished control over the mining equipment that it purchased for SPT to conduct mining operations. All machinery was purchased by AID in Japan, the seat of arbitration, and was shipped by sea from Japan to Myanmar.

41. SPT may have paid for the transportation cost of the mining equipment, but it never paid for the equipment or vehicles. As there was no consideration given to AID by SPT the mere transportation of the mining equipment cannot create a contract or transference of ownership.

42. AID never intended to transfer ownership of the mining equipment. This is shown in Annex 1 where AID was identified as the group responsible for handling the machinery and equipment and its operation in extracting jade.

43. Under the *Sales of Goods Act*, s.27, ownership does not transfer from one party to another until the owner or ‘seller’ consents to the sale.⁴⁰ Meaning that even though SPT licensed the mining assets under its own name, AID never consented to the transfer of ownership.

44. Registering the mining equipment as the property of SPT was not part of the original contract. Paragraph 3 stated that SPT was to be in charge of the obtaining

³⁹ Additional Clarifications, Question 13

⁴⁰ *Sale of Goods Act* 1930

the permits required to conduct the business in Myanmar, not to take possession of the mining machinery and equipment.

45. AID originally bore the majority of operational costs of the mining operations in Myanmar. It was not until Asamura requested support that SPT started making minor cash injections of USD 1.5 and 2.5 million.⁴¹ This means that, at least for a period of time, the maintenance of the mining equipment and vehicles was covered completely by AID. Proving a continued ownership and control over the vehicles, despite SPT holding the licence and registration in Myanmar.

VIII. THE CONTRACT AMOUNTED TO A RESTING CONTRACT

46. A resting contract, or bailment contract under Myanmar law, is equitable with gratuitous lending. Bailment is the delivery of goods by one person (the bailor) to the bailee for some purpose, in this case mining equipment for the purpose of extracting jade; at the conclusion of termination of the contract the property of the bailor is to be returned.⁴²
47. A bailment contract can be constructed as the facts show that AID never intended to transfer ownership, but only to allow SPT the privilege of using the equipment in order to full-fill its obligations as a partner corporation.
48. Alternatively, should the courts find that SPT's cash injecting into covering the operational costs of production and extraction included vehicle and equipment maintenance, this goes no further than a duty owed under a bailment contract -

⁴¹ Moot Problem Para 17.

⁴² Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 274.

whereby the bailee is expected to maintain the condition of the property belonging to the bailor.

49. If, in the alternative, the court finds that ownership was transferred from AID to SPT, then under s.7 of the Consumer Protection Act, the entrepreneur (AID) is entitled to monetary compensation - the value of which is to be determined at a later hearing.⁴³

IX. AID HAS OWNERSHIP OF RIGHTS IN THE JADEYE SOFTWARE

50. AID has ownership of rights in the JADEYE software because the software was never registered in Myanmar (A). Further, the primary purpose of the software was to support AID's activities in the venture (B). Alternatively, AID has ownership of rights under Japanese law (C).

A. *The JADEYE software was not registered in Myanmar*

51. The former Burma Patents and Designs Act 1945 was repealed in 1993 and replaced with the Patents and Designs (Emergency Provisions) Act of 1946.⁴⁴ However currently, there is no active law in Myanmar for registering and filing patents. This law does not have legal weight and does not enforce patent rights.⁴⁵

52. Part of the Draft Patent Law was released in 2015, but still has not been enacted.⁴⁶

There is a target of having such law enacted soon, because of the Agreement on

⁴³ *The Consumer Protection Law*, 2014

⁴⁴ Patents and Designs (Emergency Provisions) Act of 1946

⁴⁵ Association of Southeast Asian Nations, 'IP Guide in Myanmar'

<<http://www.aseanipa.org/index.php/members/myanmar/209-ip-guides-myanmar?limitstart=0>>

⁴⁶ Baker & McKenzie, 'Myanmar Publishes Draft Patent Law' (October 2015)

<http://f.datasrvr.com/fr1/716/94088/Myanmar_Publishes_Draft_Patent_Law_IPD_Jan2016.pdf>

Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS has given Myanmar the deadline of 1st July 2021 to have such rights established in law.⁴⁷

53. At the moment, patents are usually registered through the Myanmar Registry Office of Deeds and Assurances by filing a Declaration of Ownership.⁴⁸ It is also required that the company release an announcement in the newspaper so as to declare the fact that they have filed a patent.⁴⁹ However, this does not fully protect the patent as it does not grant patent rights.
54. Since Myanmar laws do not properly protect patents, it makes sense for the software to be registered in Japan. It is also clear that AID has been more involved in the process of creating, using, and protecting the software. What matters more in this case, since neither party filed a patent, is looking at how the software was used in practice.

B. *The purpose and creation of the JADEYE was for AID's portion of the jadeite venture*

55. Joe Yamashita was an AID employee, hired and paid by AID to work for the company. He was the sole creator of JADEYE, and created it to optimise the exploration and extraction process. It was determined in the agreement that AID would take charge of the instruction and direction of the extracting and cutting part of the venture. Through its algorithms, JADEYE expedited this part of the process because it could test the quality and visibility of jade and could determine

⁴⁷ European Chamber of Commerce in Myanmar, 'Myanmar Patent Protection in Draft Patent Law' (23 March 2017) <<http://eurocham-myanmar.org/post/83/Myanmar-Patent-Protection-in-Draft-Patent-Law->>

⁴⁸ Ibid.

⁴⁹ Ibid.

the scalability and economic value of each site.⁵⁰ Further it was Dr. Yugi Asamura who ordered the installation of JADEYE on all computers and equipment being used by the project.

56. Joe Yamashita declined any payment from SPT. After he resigned, during the exit clearance process, the source code of JADEYE was saved in a hard disk drive with other documents, and it was handed to the Head of Finance of AID in Tokyo.⁵¹

57. Since the primary purpose of the software was to make the detection and extraction part of the process more efficient, and these activities were AID's responsibility, it thus follows that the software should remain with AID and that they should have exclusive ownership in the rights of the JADEYE software.

C. *Alternatively, AID has ownership of rights in JADEYE under Japanese law*

58. Alternatively, if Japanese law governs the agreement and the arbitration, then AID nonetheless has ownership rights in the JADEYE software. The JADEYE software was never registered in Myanmar under Myanmar law. In Japanese law companies have the right to register patents created by their employees.

59. Article 35 of the Patent Act (Act No. 121 of April 13, 1959, as amended up to Act No. 55 of July 10, 2015) allows employers to have rights in the Patent.⁵² If the invention falls within the scope of the business of the employer, and if it was

⁵⁰ Moot Problem, para 22.

⁵¹ Moot Problem, para 25.

⁵² Patent Act (Act No. 121 of April 13, 1959, as amended up to Act No. 55 of July 10, 2015)

invented by an employee, then the employer can file a patent and obtain ownership in the rights of the patent.

60. In this case, under Japanese Law, AID would have ownership of rights of the JADEYE software.

61. An additional note is that the source code of the JADEYE software was handed over to the Head of Finance of AID in Tokyo after Joe Yamashita's resignation. SPT did not raise any issue with the source code being kept in Japan.

62. Every indication in this case leads to the conclusion that AID has ownership of rights in the software.

PRAYER FOR RELIEF

For the foregoing reasons, the Claimant respectfully requests the Tribunal to declare that:

1. Japanese law is the applicable procedural law;
2. Myanmar law is the applicable substantive law;
3. The termination of the agreement by the Respondent was invalid and the Claimant is entitled to compensation;
4. The Claimant retains ownership of the mining equipment;
5. The Claimant has subsistence and ownership of rights in the JADEYE software.