

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 RESPONDENT

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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 breach of of the Agreement by AID:
 - a. Whether AID breached the Agreement; and
 - b. Whether such a breach was serious enough to allow termination of the entire Agreement
4. Whether the Agreement continued by acquiescence by SPT, under s.75 Contract Act 1872
5. Whether the termination of the Agreement by SPT entitled AID to compensation
 - a. Whether AID suffered loss or damage so as to be entitled to compensation
 - b. Whether term 8 is a valid penalty clause
 - c. Whether AID is entitled to compensation under term 8
6. Whether AID transferred ownership of mining equipment and vehicles to SPT during importation
7. Whether AID can independently operate mining equipment in Myanmar
8. Whether AID intended to eventually transfer ownership and control to SPT
9. Whether SPT obtain ownership through maintenance
10. Whether SPT has subsistence and ownership of rights in the JADEYE software
 - a. Where was the software created
 - b. Whether registration of software matters for the purpose of establishing ownership rights in this case
 - c. What was the purpose for which the software was created

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.
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. U Thein Kyaw was reluctant to have any sort of written agreement. He explained that in Myanmar people simply trust each other, and wished to have a verbal agreement. After Dr. Yugi Asamura agreed not to involve a lawyer, but insisted that both parties sign a written agreement, U Thein Kyaw obliged.
5. On 9 September 2008, both parties drafted and signed their own contract. Under the agreement AID was in charge of the extracting and cutting portion of the procedure and SPT was in charge of the processing and selling. Both companies were meant to make financial and money decisions together.

6. AID sourced, purchased, and reconditioned machinery and equipment for the project. SPT imported the machinery, and obtained the necessary permit from the government. AID sent 25 employees to operate the equipment and impart the necessary technical knowledge on SPT's employees. SPT handled all their visas and accommodation. SPT also assigned 50 students to work at the base, and hired an additional 250 workers. 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, one of AID's 25 employees working in Myanmar, 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 in Myanmar. 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 in Tokyo, Japan. The software was never registered as a patent in Myanmar or Japan.

8. Dr. Yugi Asamura, and his wife Dr. Fiona Lum Ka Ching, were interviewed for the Asian Influencers Magazine for its 2016 edition. In response to a question about the Rohingya people in Myanmar, Dr. Fiona Lum stated that the persecution should be stopped, and that the new government should deal with the problem. She went on to state that ethnic cleansing was an issue in particular. As a result of her insinuation that the Myanmar government was involved in ethnic cleansing, 102 SPT workers went on strike. Dr. Yugi Asamura and Dr. Fiona Lum did not issue an apology or retract their statements. The workers were eventually coaxed back into working by U Thein Kyaw himself.

9. After learning about the low morale of the Myanmar employees and students, following the 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.

10. 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.

11. Unable to resolve the matter, the Parties turned to a mutual acquaintance who recommended arbitration. The place of arbitration is Toyo, 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, which is tantamount to designating Japan as the arbitration seat. It is well established that the procedural law of the seat applies to the dispute. Accordingly, the applicable procedural law is Japanese law.

B. The law governing the substantive issues in this dispute is Myanmar law

Applying Japanese procedural law, 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 dispute. The contract in the dispute states the law of Myanmar as applicable, and therefore the tribunal must decide the dispute in accordance with Myanmar law.

C. The termination of the agreement by SPT was valid because there was a serious breach of contract by AID

AID breached two terms of the agreement. One of the terms was central to the contract, thus amounting to a serious breach permitting rescission.

D. SPT has not signified their acquiescence to the contract continuing

SPT rescinded the Agreement as soon as they realised the damage that had been caused by AID's breach of contract, therefore not signifying their acquiescence.

E. Termination of the Agreement by SPT does not entitle AID to compensation

AID is not entitled to compensation for any loss caused by SPT rescinding the Agreement because their loss is too remote. They also cannot claim compensation under term 8 because it is not a valid penalty clause. Furthermore, term 8 ought to be amended by the

arbitral tribunal so as to reflect the intentions of the parties' when the term was formulated. Under the rectified term, AID is not entitled to compensation.

F. AID transferred ownership to SPT

As SPT paid for the importation and maintenance of the mining equipment and registered it as the property of SPT, AID has consented to transfer ownership to SPT.

G. AID cannot independently operate mining equipment in Myanmar

As a result, it is clear that the equipment would have to become the property of SPT.

H. Alternatively, AID intended to eventually transfer ownership to SPT

It was the purpose of the joint venture that the people of Myanmar would develop the skills and ability to independently extract resources, which will only be possible if the local people control the equipment.

I. SPT obtained ownership through maintenance

The cash injection provided by SPT amounts to consideration for the purchase of the equipment.

J. SPT has ownership rights in the JADEYE software

JADEYE was developed primarily in Myanmar. It would not have made a difference if SPT had registered the software, due to Myanmar's lack of IP law. AID however, had ample opportunity to patent JADEYE, which they did not. The software was created to increase efficiency of the processes happening on SPT's site. It then follows that the technology should continue to be used onsite in Myanmar and that SPT has the ownership rights.

PLEADINGS

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

1. The seat of the arbitration determines the law applicable to the procedure of the arbitration. The Respondent, Shwe Pwint Thone Co., Ltd (“SPT”) and the Claimant, Asamura International Development Co, Ltd (“AID”) have selected Japan as the seat for the present arbitration (A), and thus the procedural law of Japan applies (B).

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

2. Applying Rule 7(1) KLRCA i-Arbitration Rules as selected by the Parties, the Parties may agree on the seat of the arbitration, the seat being equivalent to the place where the arbitration is to be held,¹ absent any agreement to the contrary. The Parties have selected Tokyo as the place of arbitration and thus the seat of the present arbitration is Japan.

B. *The procedural laws of Japan apply to the present dispute*

3. Since the arbitration is seated in Japan, the procedural laws of Japan apply to this dispute. There is an established view that arbitration proceedings are subject to the law of the place of the arbitration.² For example, in *PT Garuda Indonesia v. Bergein Air*,³ it was held that since the agreed place of arbitration was Indonesia, the arbitration proceedings would be governed by Indonesian law.

¹ Dicey, Morris and Collins, *The Conflict of Laws (15th edn, Sweet and Maxwell 2012)* 16-035

² K.S Harisankar, “International Commercial Arbitration in Asia and the Choice of Law Determination” (2013) 30(6) *Journal of International Arbitration*, 632

³ (2002) SGCA 12

4. Furthermore, the Arbitration Law⁴ of Japan provides that where the place of arbitration is in the territory of Japan, the Arbitration Law of Japan shall apply.
5. Accordingly, the procedural law applicable to the present arbitration is Japanese law.

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. Article 35 KLRCA i-Arbitration Rules applies to this dispute as decided by the parties,⁵ which provides 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 the tribunal shall decide in accordance with the terms of the contract⁷ where there is one.
8. Furthermore, under 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

⁴ Arbitration Law (Law No.138 of 2003)

⁵ Moot Problem at [47]

⁶ Article 35(1) KLRCA i-Arbitration Rules

⁷ Ibid, Article 35(3)

⁸ Arbitration Law (Law No.138 of 2003)

dispute⁹ and shall decide in accordance with the terms of the contract where there is one.¹⁰

9. The contract in the present dispute provides in term 10 that ‘everything will be in accordance with and interpreted under the law of the Golden Land of Myanmar.’ The applicable law to the substance of the dispute is therefore Myanmar law, as designated by the parties within a term of the contract.

III. THE TERMINATION OF THE AGREEMENT BY SPT WAS VALID BECAUSE THERE WAS A SERIOUS BREACH OF CONTRACT BY AID

10. SPT had a right to terminate the Agreement because AID breached term 11 and term 5 of it (A) and this was a sufficiently serious breach so as to allow SPT to rescind the contract (B).

A. AID breached 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 decided to terminate the Agreement due to remarks made by Dr. Fiona Lum during an interview that implied that the Myanmar government was involved in ethnic cleansing.¹¹ These remarks breach term 11 of the contract which states that AID cannot do or say anything harmful to the national interest and solidarity of Myanmar.
12. The remarks damage the national interest and solidarity of Myanmar because they are untrue and outdated. The Myanmar military has rejected allegations by the United Nations that it committed atrocities against the Rohingya in

⁹ Ibid, Article 36(1)

¹⁰ Ibid, Article 36(4)

¹¹ Moot Problem at [28]

2016, stating that the accusations were incorrect, false and fabricated.¹²

Myanmar's leader Aung San Suu Kyi has also denied ethnic cleansing of the Rohingya Muslims, stating that ethnic cleansing is too strong a term to describe what has been happening.¹³

13. The remarks therefore do harm the national interest and solidarity of Myanmar by perpetuating the fallacy that the Myanmar government is engaged in ethnic cleansing, which will discourage investment and economic growth, etc.
14. However, even if the remarks are true, they still damage the national interest and solidarity of Myanmar and breach term 11 of the Agreement. The accuracy of the remarks has no bearing on whether they breach the term or not because the interview still disseminates a negative perception of Myanmar, as a whole, which will discourage involvement with the Golden Land.
15. Furthermore, by refusing to issue an apology and to retract the statement¹⁴, AID breached term 5 of the Agreement because they failed to prioritize the employees and students, who were upset by the remarks and subsequently went on strike for seven days. If they had prioritized the employees and students, they would have issued an apology.

B. The breach was sufficiently serious so as to allow rescission

16. It would be wrong to read section 39 as though it said and meant that as soon as there is the slightest shortcoming in performance of the promisor that the promisee may pounce on it and put an end to the contract.¹⁵ What is required

¹² BBC, *Myanmar army rejects UN Rohingya abuse claims* (23 May 2017) < <http://www.bbc.co.uk/news/world-asia-40011437>>

¹³ BBC, *Aung San Suu Kyi: No ethnic cleansing of Myanmar Muslim minority* (6 April 2017) < <http://www.bbc.co.uk/news/world-asia-39507350>>

¹⁴ Moot Problem at [29] and [30]

¹⁵ Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 173

is a serious failure¹⁶, such as a refusal to perform one of the central terms of the contract, or a refusal to perform a promise which affects a vital part of the contract.¹⁷

17. The present breach was not a slight failure of performance. It was a complete failure on the part of Dr. Fiona Lum to show respect to the Golden Land of Myanmar, which, by failing to issue an apology and to retract the statement, resulted in a seven-day strike¹⁸ and low morale¹⁹ amongst the students and employees. Term 5 is a central term of the contract because the purpose of both AID and SPT is to help and assist others,²⁰ and this shared goal was reflected in term 5 of the Agreement. The remarks therefore constitute a failure to perform a promise (term 8) affecting a vital part of the contract (term 5) and failure to apologise for them constitutes a refusal to perform one of the central terms of the contract (term 5).
18. Therefore, AID have committed a serious breach of contract, entitling SPT to terminate the Agreement.

IV. SPT HAS NOT SIGNIFIED BY CONDUCT THEIR ACQUIESCENCE TO THE CONTRACT CONTINUING

19. 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).
SPT has not signified their acquiescence 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

¹⁶ Federal Commerce v Molena Alpha [1979] AC 757 (HL)

¹⁷ Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (OUP 2017) 174

¹⁸ Moot Problem at [29]

¹⁹ Moot Problem at [38]

²⁰ Moot Problem at [2] and [7]

20. 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 promise may put an end to the contract, *unless he as signified, by words or conduct, his acquiescence in its continuance.*

B. SPT has not signified their acquiescence to the Agreement continuing.

21. As soon as Mr. U Thein Kyaw realised the full extent of the damage caused by the breach of contract by AID on his employees and students, with morale being at an all-time low,²¹ threatening SPT which Mr. U Thein Kyaw had single-handedly built over the years, he terminated the Agreement. These effects took a few months to manifest, but once they had, SPT rescinded the contract. They therefore did not signify by words or conduct their acquiescence to the Agreement continuing.

V. TERMINATION OF THE AGREEMENT BY SPT DOES NOT ENTITLE AID TO COMPENSATION

22. The loss that AID has suffered is too remote and indirect to entitle them to compensation under the Contract Act (A). Furthermore, AID is not entitled to compensation under term 8 of the Agreement because term 8 is not a valid penalty clause (B). Alternatively, the termination was valid as a result of breach of contract by AID and the arbitral tribunal should rectify the term which was only intended to apply where the contract was terminated without cause (C).

A. The loss that AID has suffered it too remote and indirect

²¹ Moot Problem at [38]

23. 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. Such compensation is *not* to be given for any *remote and indirect loss or damage* sustained by reason of the breach.

24. The loss that AID will suffer as a result of the termination of the partnership between AID and SPT is the contract to supply jades to Hashimoto Co., Ltd (“HCL”). However, this was not a loss that the parties knew of when they *made* the contract, and a party is only liable for non-ordinary losses if they had knowledge of the circumstance when *entering* the contract.²² Therefore, the loss is too remote and AID is not entitled to claim compensation for their loss.

B. Term 8 is not a valid penalty clause

25. AID is also not entitled to compensation under term 8 of the Agreement because it does not constitute a valid penalty clause under s.74 Contract 1872. S.74 states 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 proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation.

²² Hadley v Baxendale [1854] 156 ER 145 (EXCH); Victoria Laundry v Newman [1949] 2 KB 528 (CA)

26. The case of *AKRMMK Chidambaram Chettyar v Khoo Hwa Lam*²³ held that a provision agreeing compensation which will be paid if a contract is not performed will not be a penalty. When a contract is rescinded it will not be performed. Therefore term 8, stipulating that compensation is owed because there will be non-performance as a result of termination, cannot constitute a penalty clause under s.74, and therefore AID is not entitled to compensation under it.

C. The arbitral tribunal should rectify term 8 so that it only operates where the contract was terminated without cause

27. AID is not entitled to compensation under term 8 of the Agreement because they breached the contract, and analysis will show that this term was only intended to operate where the contract was terminated without cause, and thus ought to be amended.

28. The term should be amended by the arbitral tribunal under s.31 Specific Relief Act 1877 which provides that when, through mutual mistake of the parties, a contract does not truly express their intentions, either party may institute a suit to have the instrument rectified; and if the tribunal finds it clearly proved that there has been mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the tribunal may in its discretion rectify the instrument so as to express that intention. The tribunal is not confined to asking what the language in the written document was intended to be, but may enquire into the intended meaning and legal consequences.²⁴

²³ (1950) BLR 98 (SC)

²⁴ S.33 Specific Relief Act 1877

29. The term ought to be amended because, in its current form, it would require compensation to be paid by the terminating party to the other, even where the terminating party is doing so as a result of a serious or complete failure of performance by the other party. This cannot be correct and cannot have been the intention of the parties when writing term 8. The tribunal should therefore use their discretion to rectify the term so as to reflect the parties' intentions that compensation should only be payable when the Agreement is terminated without good cause, and not where the termination is due to a breach by the other party.

30. Under this amended term, SPT is not liable to pay compensation to AID because SPT terminated the Agreement as a result of a breach of terms 11 and 5 by AID.

VI. AID TRANSFERRED OWNERSHIP TO SPT DURING IMPORTATION

1. AID purchased the mining equipment and vehicles for SPT in order for the joint venture to begin its mining operations. SPT's contribution to purchase of the mining assets was to pay for transportation between Japan and Myanmar. Had SPT not done so, AID's purchase would have been meaningless.²⁵
2. Once the mining equipment and vehicles arrived in Myanmar, SPT obtained the required licenses and registered the assets under SPT's name.²⁶ AID was aware of SPT being registered as the owner of the property and thus consented to the transfer of ownership as per the *Sales of Good Act* [1930].

²⁵ Moot Problem Question at [16 and 3].

²⁶ *Ibid.*

VII. AID CANNOT INDEPENDENTLY OPERATE MINING EQUIPMENT IN MYANMAR

3. As international investors can only access Jade in Myanmar by entering into joint-ventures with local corporations, when the mining equipment was shipped to Myanmar and registered under the ownership of SPT, the objective observer could only conclude that AID had intended for SPT to become the sole owner of the mining assets, less they sit in harbor to act as statues upon arrival to Myanmar.²⁷

VIII. ALTERNATIVELY, AID INTENDED TO EVENTUALLY TRANSFER OWNERSHIP TO SPT

4. Under Annex 1, it was an intended objective of the contract that AID and SPT would work towards training and improving the skills and abilities of locals and students, eventually having them become independent. In order for independence to truly happen locals could not be dependent on a foreign investor to mine their national resources. As AID was training and allowing locals and students to operate the mining machinery, AID had demonstrated an intent to transfer control of mining assets to SPT.

IX. SPT OBTAINED OWNERSHIP THROUGH MAINTENANCE

1. SPT, at the request of AID, injected USD four million into the joint-venture to lighten the financial burden that AID was suffering. As this financial burden was directly related to mining over-head costs, it can be assumed that at least some part of the cash injection covered the maintenance and purchase cost of the mining equipment. Meaning that in addition to paying for the importation of the mining equipment, SPT also paid for the operational and purchase cost of the equipment. This would amount

²⁷ Mines Law [2015] s.4(f)

to consideration that SPT *has* purchased the mining assets from AID, as per the conditions for transferring ownership of assets under the *Sale of Goods Act*.²⁸

X. SPT HAS OWNERSHIP OF RIGHTS IN THE JADEYE SOFTWARE

31. The software was created primarily in Myanmar (A). It was created well after the partnership was formed, and it was created for the purpose of benefitting all those in the partnership (B). Alternatively, SPT has partial ownership of rights under Japanese law (C).

A. JADEYE was created mainly in Myanmar

32. The software was created primarily in Myanmar by one of the 25 employees that were stationed in Myanmar. SPT covered the visa and accommodation for those employees, including Joe Yamashita. The software was never registered in Japan and to date there has been no attempt to file an application for a patent in Japan.

33. Unfortunately, there is no proper Patent Law in force in Myanmar at the moment. In accordance with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Myanmar must produce Intellectual Property laws in line with TRIPS by 1 July 2021.²⁹ The Patent Law is in the process of being drafted with guidance from the World Intellectual Property Organization (WIPO).³⁰

34. Although nothing was registered, registration would not have made much of a difference in this case because the law is not in force and effect.³¹ One method

²⁸ Moot Problem at [17]

²⁹ 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->](http://eurocham-myanmar.org/post/83/Myanmar-Patent-Protection-in-Draft-Patent-Law-)

³⁰ Association of Southeast Asian Nations, 'IP Guide in Myanmar' <<http://www.aseanipa.org/index.php/members/myanmar/209-ip-guides-myanmar?limitstart=0> >

³¹ 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->](http://eurocham-myanmar.org/post/83/Myanmar-Patent-Protection-in-Draft-Patent-Law-)

of registering patents, is by doing so under s.18 (f) of the Registration Act, which is generally used to register trademarks.³² In order to do this, a Declaration of Ownership would be filed through the Myanmar Registry Office of Deeds and Assurances. However, this does not give the owner of the Patent any patent rights.³³

35. Looking at the use and purpose of the software would be more helpful in determining which Party has more of a right to the patentability of the software, since it was not patented in either country.

B. JADEYE was created for the AID-SPT partnership venture

36. Although Joe Yamashita wasn't a direct employee of SPT, his work benefitted both companies, and he created the JADEYE for the benefit of everyone involved.³⁴ Moreover, the software was created well after the partnership was formed, and it was specifically created for the purpose of making the venture's activities more efficient.
37. Since the activities were conducted on SPT land in Hpakant, and the software was used onsite in Myanmar, this in turn indicates that SPT should have at least some rights in the software. The rights in the software could be split between AID and SPT, as the intention behind the creation of the product was to benefit both companies.
38. If the partnership is to end, SPT should be allowed access to the JADEYE source code. There was no End User Licence Agreement (EULA) created for the software, and nothing was declared in the signed agreement between AID

³² World Intellectual Property Organization, 'Direction 13 of the Registration Act' <<http://www.wipo.int/wipolex/en/details.jsp?id=6180> ->

³³ 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->>

³⁴ Moot Problem, para 24.

and SPT. In this case, if it is found that SPT does not have any ownership rights in the JADEYE, they would have the ability to reverse engineer the software.

C. Alternatively, SPT has partial ownership under Japanese law

39. In Japan, the Patent Law was amended to protect employees who create inventions and whose employers then apply for patents. Employees must be compensated and receive “reasonable benefits” in accordance with the amount of profit received by his or her employer, and any circumstances relating to the invention.³⁵ The circumstances relating to the invention may include the fact that Joe Yamashita specifically made the JADEYE for the benefit of all companies.
40. Joe Yamashita was never compensated or given “reasonable benefits” for his invention. If AID were to file a patent, which they have not done so far, they would need to compensate their employee, and take the circumstances relating to the invention into account as well. Since Mr. Yamashita already refused monetary compensation, it is likely that he may refuse it again. However, he clearly stated that the JADEYE was for the benefit of both companies. SPT should retain at least 50% ownership in the rights of JADEYE to honour Mr. Yamashita’s intention.

³⁵ Patent Act (Act No. 121 of April 13, 1959, as amended up to Act No. 55 of July 10, 2015) Article 35 (para 4-5)(7).

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent 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 valid and the Claimant is not entitled to compensation;
4. The Respondent has obtained ownership of the mini equipment;
5. The Respondent has subsistence and ownership of rights in the JADEYE software.