T1702-C

THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION 2017

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

MEMORIAL FOR CLAIMANT

On behalf of

ASAMURA INTERNATIONAL DEVELOPMENT Co., Ltd.

(AID)

CLAIMANT

Against

SHWE PWINT THONE Co., Ltd.

(SPT)

RESPONDENT

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STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd. (AID) is a private international development company incorporated in Japan, providing assistance to manage projects in developing countries. The Respondent, Shwe Pwint Thone Co., Ltd. (SPT) is a local Myanmar company providing training to develop skills for underprivileged students.

2. On 9 September 2008, Dr. Asamura representing the Claimant and Mr. U Thein Kyaw representing the Respondent (each a "Party" and collectively, "the Parties") entered into the Partnership Agreement ("the Agreement") for the jade business on the site of Respondent in Myanmar. Under the Agreement, the Respondent will obtain permits and requirements for the business, while the Claimant will buy and provide all equipment required, and provide technical expertise. During the venture, the Claimant will take charge in the activities of extracting and cutting jades, while the Respondent will play the main role in processing and selling jades. Profit will be shared: 65% to the Respondent and 35% to the Claimant.

3. Both Parties agreed to prioritize the employees and students. The partnership between the Parties ("the Partnership") will be for long term and whoever causes the partnership to end must pay compensation. Parties also agreed not to do or say anything harmful to the national interest and solidarity of each other's nation.

4. During the business, the Claimant suggested for both Parties to make capital contribution to the partnership to cover operational costs for machinery and equipment. In March 2009, the Claimant and the Respondent injected capital contribution of USD 1.5 million and USD 2.5 million respectively. The funds were held in the Respondent's bank account.

5. On 11 April 2012, one of the Claimant's employees on secondment from Japan to Myanmar, Mr. Yamashita, announced about his JADEYE software. The software was later installed in computers and equipment used on the site to test the jades. On 4 January 2013, Mr. Yamashita resigned and handed the software source code to Head of Finance of the Claimant in Tokyo.

6. In September 2016, Dr. Asamura and his wife, Dr. Lum attended an interview where they were asked about the plea of the Rohingya minority in Myanmar. The answer of Dr. Lum had caused negative reaction from the Respondent's employees and students.

7. On 10 January 2017, Mr. U Thein Kyaw informed Dr. Asamura his decision to end the Partnership, explaining that workers and students of the Respondent is unable to look pass the interview and cannot continue working with the Claimant.

8. Unable to resolve the matter, the Parties have submitted the dispute to binding arbitration. The place of arbitration is Tokyo, and the arbitration is to be conducted in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

STATEMENT OF JURISDICTION

The Parties have agreed to submit the present dispute before the Kuala Lumpur Regional Centre for Arbitration. The arbitration is held in Tokyo and in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

QUESTION PRESENTED

1. The validity of the termination of the agreement by the Respondent;
2. The ownership of the jade-mining machinery and equipment; and
3. Subsistence and ownership of rights in the JADEYE software.

SUMMARY OF PLEADINGS

I. THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY THE RESPONDENT IS INVALID

Pursuant to the Partnership Act,[1] the Partnership in this case is not a partnership at will. Thus, the Respondent cannot terminate the Agreement at its will prior to 31 March 2019. Even if the Respondent is entitled to do so, it fails to comply with the relevant regulation regarding the service of written notice. Additionally, the Respondent cannot terminate the Agreement as such act by the Respondent was without reasonable cause and in bad faith.

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

The Claimant holds the ownership of the jade-mining machinery and equipment as the Claimant purchased such machinery and equipment by its own money and there is no agreement between Parties providing that all the rights of ownership the machinery and equipment were transferred to the Respondent as a matter of contractual obligation. Further, during the course of the business, such machineries were not used and treated as partnership property by both Parties.

[1] Partnership Act (No 9 of 1932) (Myanmar) (hereinafter "Partnership Act").

III. COPYRIGHT SUBSISTING IN JADEYE AND IS PROTECTED UNDER THE BERNE CONVENTION AND MYANMAR COPYRIGHT ACT 1914

Subsistence of copyright in computer software has not been provided under Myanmar domestic law system. Concerning both Myanmar and Japan are parties to the TRIPS Agreement,[2] regulation under TRIPS shall be used as a mean of interpretation in this case. Accordingly, JADEYE is a computer program and copyright subsists in it pursuant to TRIPS. In the meantime, such right in JADEYE is protected under the Berne Convention[3] and Myanmar Copyright Act.[4]

IV. THE CLAIMANT IS THE OWNER OF COPYRIGHT SUBSISTING IN JADEYE

Under the Copyright Act, the Claimant was the first the owner of copyright subsisting in JADEYE as Mr. Yamashita was the only author of JADEYE and he was in the employment of the Claimant under a contract of service. Furthermore, JADEYE was made in the course of his employment and there was no agreement between The Claimant and Mr. Yamashita determining the owner of JADEYE. On the other hand, the Claimant did not contribute the ownership of copyright in JADEYE to the joint venture but only granted an implied license to the joint venture to use the copyright in JADEYE.

[2] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994 (hereinafter "TRIPS").
[3] Berne Convention for the Protection of Literary and Artistic Works (1971 Paris Act plus Appendix) (hereinafter "Berne Convention").
[4] Copyright Act (No 3 of 1914) (Myanmar) (hereinafter "Copyright Act").

PLEADINGS

I. THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY THE RESPONDENT IS INVALID

1. The Respondent does not have the right to terminate the Partnership Agreement ("the Agreement") at its will (**A**). Even if the Respondent is entitled to do so, it fails to comply with the relevant regulation regarding the service of written notice (**B**). The Respondent's termination of the agreement was without reasonable cause (**C**) and in bad faith (**D**).

A. The Partnership is not a partnership at will and the Respondent cannot terminate it at its will prior to 31 March 2019

2. On a plain reading of Section 7 of the Partnership Act,[5] in order for a partnership to be regarded as a partnership at will, there should be no provision in the agreement between the partners for the duration of their partnership and no provision in the agreement for the determination of that partnership as well. If either of these provisions exists, the partnership would not be a partnership at will.

3. The duration of a partnership may be expressly provided for in the agreement but even where there is no express provision, it has been held that the partnership will not be at will,

[5] *Partnership Act*, Section 7: "*Where no provision is made by contract between the partners for the duration oftheir partnership, or for the determination of their partnership, the partnership is "partnership-at-will".*"

if any stipulation as to the duration can be implied.[6] The general rules of partnership are well-settled. Where no term is expressly limited for its duration, and there is nothing in the agreement to fix it, the partnership may be terminated at either party's will. In the absence of express stipulation, therefore, an implied term as to when the partnership will determine may be gathered from the agreement and the nature of the business.[7]

4. In the present case, while both the Claimant and the Respondent (each a "Party" and collectively, "the Parties") intended their Partnership in the jadeite venture to be for "the long term",[8] a determined fixed term can be inferred from the Agreement as well as the jade mining business's nature. According to the Agreement, in order to run the business at the jade field, the Respondent was granted the necessary jade mining and equipment permit from the government which was due to expire on 31 March 2019.[9] This also reflects the business's nature as the duration by law is 10 years[10] for large scale[11] gemstone production permit one can enjoy. The Agreement therefore impliedly contains a duration until 31 March 2019 and thus, not a partnership at will.

5. Moreover, in August 2016, Myanmar announced that it would not issue any new permits or renew any existing permits for jade mining until new legal reforms are implemented.[12] This,

[6] *Keshavlal Lallubhai Narnadas and v Patel Bhailal Narandas and Ors*, [1968], GLR 649.
[7] *Crawshay v Maule*, [1818], Swan 495; *Vide Thiagarjan v MuthappaChettiar*, [1961] SC 1225.
[8] *Moot Problem*, Annexure 1, Clause 8.
[9] *Moot Problem*, para.18.
[10] Paul Shortell and Maw Htun Aung, *Mineral and Gemstone Licensing in Myanmar*, Natural Resource Governance Institute Briefing, April 2016, p.6: The maximum tenure for large scale gemstone production permit issued by the Ministry of Mines is 10 years.
[11] *Clarification*, Q.7.
[12] *Moot Problem*, para.31.

as a matter of practice, emphasizes the determination of the Partnership's term to exist until the permit expires in 2019.

6. Applying the reasoning above, in consequence, the Partnership cannot be terminated at the Respondent's will until 31 March 2019.

B. Even if the Partnership is at will, the Respondent cannot terminate the Agreement by a mere oral notice of the intention of termination

7. Under Section 43 of the Partnership Act, even if the partnership might be deemed to be one determinable at will, under Section 43 of the Partnership Act, a notice in writing containing the intention to dissolve the firm has to be given to the partners.[13] This provision contends that unless a notice in writing is served on all the other partners, a suit brought by a partner for dissolution of the partnership would not be competent.[14]

8. In the present case, Mr. U Thein Kyaw, however did not inform Dr. Asamura by writing about his decision to end the partnership.[15] Thus, even if the Respondent has the right to terminate the Partnership at its will, the termination is invalid as it was not properly executed by writing notice.

[13] *Partnership Act*, Section 43: "*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*."
[14] *Sm. LilabatiRana v Lalit Mohan Dey and Ors,* [1952], Cal 499.
[15] *Moot Problem*, para. 40; *Clarification*, Q. 13.

C. Dr. Lum's answer to the interview with Asian Influencer shall not be a cause to terminate the Agreement

9. The Respondent failed to give any legal ground for its termination of the Agreement; thus, it also failed to prove that its cause meets the relevant legal provisions

10. By explaining the reason to terminate the Agreement, was because the workers and students of the Respondent were unable to look past the interview of the Asamuras with the Asian Influencers,[16] the Respondent might have relied on Section 44 of the Partnership Act to claim its right to terminate the Partnership. Specifically, Section 44(d) provides that the Court may dissolve a partnership if a partner, other than the partner suing, willfully breaches of agreement, making it not reasonably practicable for the other partners to carry on the business in partnership with him.[17]

11. Having said that, such reasoning cannot be held reasonable. Dr. Lum's statement did not breach Clause 5 and/or Clause 11 of the Agreement, and cannot be a cause that may prejudicially affect the carrying on of the business regard either in terms of the Agreement or the nature of the business.[18]

[16] *Moot Problem*, para. 41.
[17] *Partnership Act*, Section 44(d).
[18] *Partnership Act*, Section 44(c).

12. Clause 5 of the Agreement binds the Parties to always prioritize helping the local Myanmar employees and the students.[19] Dr. Lum's statement has no relation to this contractual duty of the Claimant. The Claimant's technical help has really fulfilled this duty and thus, there is no breach of Clause 5 of the Agreement.

13. In terms of Clause 11 regarding the prohibition of any action or statement harmful to the national interest and solidarity of Myanmar,[20] Dr. Lum's subjective will and position in regard to the Claimant should be taken into consideration, rather than purely reliance on the afterward consequences.

14. Moreover, as a non-executive director of the Claimant,[21] who is usually referred to as independent directors appointed by shareholders in order to represent their interests on company boards,[22] Dr. Lum's statements or actions are not representing the Claimant at a whole, but only to those whose interests she represents for in the company's board of directors. In this case, the couple were asked about their view on the plea of the Rohingya minority, given not only their existing business involvement in Myanmar and but also Dr. Lum's position in the Second Life.[23] Therefore, considering Dr. Lum's will and her relationship towards the Claimant, her statement cannot be considered to be a breach of Clause 11 of the Agreement.

[19] *Moot Problem*, Annexure 1, Clause 5.
[20] *Moot Problem*, Annexure 1, Clause 11.
[21] *Additional Clarification*, Q.3.
[22] The *Association of Chartered Certified Accountants ("ACCA"), Independence as a concept in corporate governance*, 2011, p.1.
[23] *Moot Problem*, para. 5: Second Life is a regional organization which champions for human rights.

15. At the interview, Dr. Lum was expressing her expect that Myanmar Government would find ways to solve the ethnic cleansing which was actually happening then, rather than blaming the Government of involving in such conduct.[24] What she said was aimed to protect the human right of the local Myanmar people, especially the ethnic, given her position as the President of the Second Life who champions for human rights.[25]

16. While no reasonable cause has been found to terminate the Partnership, the Respondent's effort to take the venture to the end should not be considered.

D. The Respondent was terminating the Partnership in bad faith

17. In the absence of express stipulation, the decision in *Yam Seng Pte Limited v International Trade Corporation Limited* demonstrated its willingness to imply a duty of good faith and fair dealing in contractual relationships, especially in those involving a longer term relationship, such as joint venture agreements, franchise agreements and long-term distributorship agreements.[26]

18. What is regarded as "bad faith" extends beyond dishonest conduct to conduct which is improper, commercially unacceptable and unconscionable. What this means precisely is judged objectively and will depend on the background to the agreement, the context of the

[24] *Moot Problem*, para. 28. Dr. Lum answered that "Everyone must work together to end the persecution of the Rohingyas, and the new Myanmar government under the leadership of Daw Su must end the problem immediately. Especially the ethnic cleansing. They should not be deprived of their basic human rights. We will continue to champion for their rights."
[25] *Moot Problem*, para. 5.
[26] *Yam Seng Pte Limited v International Trade Corporation Limited* [2013], EWHC 111 (QB).

conduct in question, facts known to the parties, and shared values and norms, whether general or specific, relevant to the trade the parties are in.[27]

19. Moreover, it is an established law that the franchiser cannot have arbitrary power to terminate the franchise agreement at his will and fancy without cause or in bad faith and that the franchiser must exercise his right of termination in accordance with the principles of justice, equity and good conscience.[28] Interpreting this typical principle of common law[29] together with Section 44(g) of the Partnership Act, where the Court may dissolve a firm on any other ground which renders it just and equitable that the firm should be dissolved, a partnership cannot be terminated if either partner was acting in bad faith towards the other.[30]

20. Applying to the case at hand, an implied duty of acting in good faith between the Parties can be inferred from Clause 8 of the Agreement where the Claimant and the Respondent considered themselves not only as partners but also as brothers.[31] This indicates both parties' trust and loyalty to their partnership. The Respondent's termination of the partnership is in bad faith by taking advantage of the Claimant's technical training and equipment to cooperate with a new partner for more beneficiary ratio of profit shared.[32] Meanwhile, the Claimant may be entitled to damages for such termination as receiving nothing back rather

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[27] *Id.*
[28] *Classic Motors Ltd. v MarutiUdyog Ltd.* [1997], DRJ 462; House of Lords, *Director, Llanelly Railway & Dock Company v Directors, London & North Western Railway Co.*, reported in 1875 English and Irish Appeals (Vol. 7), p. 564, 565.
[29] *The Burma Laws Act 1898*, Section 13.3 reads: "*In cases not provided for by subsection (1), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.*"; Duncan Derrett, *Justice, Equity and Good Conscience in India' in Essays in Classical and Modern Hindu Law*, (1978), p. 8-27.
[30] Justia US Supreme Court, *Howell v Harvey*, Volume 5 Arkansas Reports, p. 270, 376.
[31] *Moot Problem*, Annexure 1, Clause 8.
[32] *Moot Problem*, para.37.

than an amount of compensation.[33] Thus, the Respondent's reason to end the Partnership is in bad faith and should not be considered as any ground by law for the Tribunal to dissolve the Partnership.

21. Drawing support from the aforementioned reasoning, the Respondent cannot terminate the Partnership until the relevant permit granted for the jadeite business expires. Otherwise, there is no reasonable ground for the Respondent to end such a relationship.

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

22. Under the Agreement, no definition of partnership property has been provided. The Claimant purchased the jade-mining machinery and equipment by its own money (**A**) and there is no tacit expression between Parties providing that all the rights of ownership the machinery and equipment were transferred to the Respondent as a matter of contractual obligation. Furthermore, as a matter of fact, during the course of the business, such machineries were not used and treated as partnership property by both Parties (**B**), the Claimant is therefore the owner of the jade-mining machinery and equipment.

A. The Claimant purchased the jade-mining machinery and equipment by its own money

[33] *Moot Problem*, para.41, 42.

23. Under Section 4 of the Partnership Act, people maybe partners either generally or in some particular business or isolated transaction, though all or part of the property used for the purpose of such business transaction may not be the subject of joint ownership but may belong to some or one of them individually.[34] For example, where two people carried on the business of running a stage coach, or a stage wagon, each supplying his own horses for part of the journey and dividing the profits according to the mileage worked by their teams, they were held to be partners.[35] In the case *Fromont v. Coupland* in 1824, the fares were received by one partner, who accounted to the other, but there was no partnership as regards the horses; and therefore the horses are separate property of each partner. [36]

24. The referred cases share similar fact with the present case where the Claimant supplied the jade-mining machinery and equipment while the Respondent contributed the land to run the business. Thus, the holding of the above cited cases that the contributions supplied by each partner are separate property of the partners unless there is a contrary intention between them, should be taken into consideration when deciding the merit of the case at hand.

25. In the present case, the Claimant sourced for second hand machinery and equipment from Japan, purchased them, and reconditioned them. This included dump trucks, excavators, and drilling machines.[37] The Claimant was the only one who spent money on purchasing these

[34] ANUKUL CHANDRA MOITRA & K.C. CHUNDER, the Partnership Act.
[35] 22 HALSBURY, THE LAW OF ENGLAND 7 (1912), para. 9.
[36] *Fromont v. Coupland* [1824], 2 Bing. 170.
[37] *Moot Problem*, para. 16.

machineries.[38] The Respondent did not make any payment to the Claimant in respect of these machineries.[39]

26. Therefore, the Claimant purchased the jade-mining machinery and equipment by its own money and thus, was the owner of the jade-mining machinery and equipment bought before the commencement of the jade business.

B. The jade-mining machinery and equipment were not used and treated as partnership properties by both Parties

27. Whether the property of a partner becomes partnership property depends on the agreement of the parties. Without any clear agreement between the parties, the acts and intention of the parties will ultimately determine whether property owned by a partner becomes partnership property.[40]

28. Under Section 14 of the Partnership Act, the property of the firm includes all property acquired for the firm for the purposes and in the course of the business of the firm.

[38] *Additional Clarifications*, Q9.
[39] *Clarifications*, Q5.
[40] Gaurac Mehta, *Universal's Master Guide Judicial Service Examinations*, p. 419.

29. In the present case, there is no list of partnership properties.[41] To determine whether the jade-mining machinery and equipment are brought into the stock of the firm or not, the acts and intention of the Parties shall be considered.

30. Under the Agreement, the Claimant only involved in two parts of the business: extraction and cutting.[42] Moreover, the Claimant did not directly extract jades at the fields but only provided technical support such as giving the direction and instructions and conducting geological surveys as well as strategic prospecting.[43] The machinery and equipment were only used for exploration, extraction, breaking and cutting and did not involve in the other two parts of processing and selling, taken charge by the Respondent.[44] There is also no tacit expression that the Claimant transferred its properties to the firm's property. Besides, as the Claimant started to feel the burden of the operational costs, it suggested for both Parties to make capital contributions to the partnership so that operational costs will be derived from this fund.[45] It can be inferred that both Parties only intended to create partnership capital since then.

31. As has been often said, a partnership might exist in the profits without entitling the partners to the material producing those profits.[46] It can be said that the property, or the machinery and equipment, itself is not capital, only its use is contributed as capital.[47] In the

[41] *Additional Clarifications*, Q. 28.
[42] *Moot Problem, Annexure 1*, Clause 8.
[43] *Moot Problem*, para. 16.
[44] *Additional Clarifications*, Q. 11.
[45] *Moot Problem*, para. 17.
[46] JOSEPH STORY, COMMENTARIES ON PARTNERSHIP 41 (5td ed. 1859).
[47] B. Beinart, *Capital In partnership*, AJ. 118, 122 (1961).

case *Miles v. Clarke*, the plaintiff and the defendant constituted a partnership of professional photographers.[48] The defendant had no skill in photography and invited the plaintiff, a successful free-lance photographer, to join him as partner, the firm to use the premises leased by the defendant and all his equipment. The plaintiff agreed and brought with him a considerable trade connection but few assets. The judges held that "the lease, furniture and fittings, and the equipment of the studio did not form part of the partnership property, but remained the separate property of the defendant" and only "consumable chattels ought to be treated as partnership property brought in by the defendant."[49]

32. Applying to the case at hand, the Claimant only contributed the use of these equipment and its services as technical experts to the common of partnership with the Respondent. The Respondent had the share of using and exploiting the equipment and had no ownership of the equipment.

33. For these foregoing reasons, the jade-mining machinery and equipment are separate property of the Claimant in this partnership.

III. COPYRIGHT SUBSISTING IN JADEYE AND IS PROTECTED UNDER THE BERNE CONVENTION AND MYANMAR COPYRIGHT ACT

[48] Miles v. Clarke, [1953] 1 A.E.R. 779.
[49] *Id.*

33. Subsistence of copyright in computer software has not been provided under Myanmar domestic law system. However, in the absence of domestic law, the contents of International Conventions and norms are significant for the interpretation of the court.[50] Concerning both Myanmar and Japan are parties to TRIPS, regulation under TRIPS shall be used as a mean of interpretation in this case. Accordingly, JADEYE is a computer program (**A)** and copyright subsists in it pursuant to TRIPS (**B**). In the meantime, such right in JADEYE is protected under the Berne Convention (**C)** and Myanmar Copyright Act (**D**).

A. JADEYE is a computer program under TRIPS

34. Article 10 of TRIPS provides that "computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)".

35. According to *WIPO Model Provisions on the Protection of Computer Programs*, "'computer program' means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result".

36. In the present case, JADEYE is software with source code comprising of computer instructions, which is installed on the computer systems and mining equipment to test the

[50] HELMUT PHILIPP AUS & GEORG NOLTE, THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE, Oxford University Press, 2016; *Vishaka & Orsvs State Of Rajasthan & Ors* AIR[1997] SC. 3011.

quality and viability of the jade.[51] JADEYE is therefore, a computer program as described in TRIPS and is protected as literary works under Article 2(1) of Berne Convention.

B. The right subsisting in JADEYE is copyright

37. Under TRIPS, computer program is subject to copyright[52] and patent.[53] In respect of patent, an application is required to be filled.[54] However, in the present case, no patent recordals were filed in either Myanmar or Japan.[55] On the contrary, copyright does not arise out of registration and therefore, becomes the sole right subsisting in JADEYE in the present case.

C. Copyright of JADEYE is under the protection of Berne Convention

38. Being member of TRIPS, Myanmar shall comply with Article 1 through 21 of Berne Convention and the Appendix.[56] Myanmar thus, constitutes a country of the Union for the protection of the rights of authors in literary works under Berne Convention.[57]

39. Under Berne Convention, the protection of works shall apply to authors for their works first published in the countries of the Union.[58] "Published works" under Article 3(3) of the Convention is defined as copies of the works is manufactured by any means, with the

[51] *Moot Problem*, paragraph 22.
[52] *TRIPS*, Article 9, 10.
[53] *TRIPS*, Article 27.
[54] *TRIPS*, Article 29.
[55] *Clarification*, Q10, 15; *Additional Clarification*, Q2, 24, 29.
[56] *TRIPS*, Article 9.1.
[57] *Berne Convention*, Article 1.
[58] *Berne Convention*, Article 3.1(b).

consent of their authors, provided that the availability of such copies has been to satisfy the requirement of the public, as regard to the nature of the work.

40. In the present case, Mr. Yamashita had been working on JADEYE and is the author of it. JADEYE was first installed in computers and equipment used on the site in Myanmar for function of testing the jades.[59] JADEYE therefore, shall be considered as a works first published in a country of the Union and thus is eligible for protection under the Berne Convention.

41. More importantly, the authors shall enjoy the rights granted by the Convention[60] which includes copyright as provided in Article 2(5). Consequently, in the present case, copyright subsisting in JADEYE is well protected under Berne Convention.

D. Copyright of JADEYE is also under the protection of Myanmar law

42. Under Berne Convention, the country where the work is first published shall be considered to be the country of origin[61] and protection in such country is governed by domestic law.[62]

43. In the present case, JADEYE was first published in Myanmar and thus, the protection of its copyright shall be governed by Myanmar Law. Accordingly, copyright under the Copyright

[59] *Moot Problem*, paragraph 22, 23.
[60] *Berne Convention,* Article 5.1.
[61] *Berne Convention,* Article 5.4(a).
[62] *Berne Convention,* Article 5.3.

Act applies to literary work first published within the Union of Burma, thus firmly cover software as JADEYE.

IV. THE CLAIMANT IS THE OWNER OF COPYRIGHT SUBSISTING IN JADEYE

A. The Claimant was the first the owner of copyright subsisting in JADEYE

44. Section 5.1(b) of the Copyright Act provides that where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright.

45. Applying to the case at hand, Mr. Yamashita, the author of JADEYE was in the employment of the Claimant under a contract of service (1) and JADEYE was made in the course of his employment (2). Additionally, there was no agreement between The Claimant and Mr. Yamashita determining the owner of JADEYE and the Claimant is therefore the first owner of JADEYE.

1. Mr. Yamashita was in the employment of the Claimant under a contract of service

46. Under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business.[63] In this case, Mr. Yamashita was employed by the Claimant and he was one of 25 The Claimant's employees that worked at the jade fields on secondment from Japan.[64] It can be inferred that there was a secondment agreement on using the Claimant's employees between The Claimant and the joint venture. Secondment agreements are used to require the 'lending' of employees of the joint venture partners to the joint venture.[65] It is important to determine whether these employees treated as independent contractors or employees of the joint venture.[66]

47. In the case *M/S. Abbey Business Services v Assessee*, the court stated that to decide who can be regarded as employer under secondment agreement, the relation between employer and employee must be considered. The correct method of approach for determination of employer-employee relationship is to consider whether having regard to the nature of work, there was due control and supervision by the employer.[67]

48. In the present case, according to Clause 4 of the Agreement, The Claimant's duties included buying and providing all equipment required, providing technical expertise for the term of the agreement and training the local people of Myanmar so that they can learn new skill sets and be independent. In fact, Mr. Yamashita was employed for operating some of the equipment, taking charge of geological surveys and strategic prospecting, while imparting

[63] *Mukundavs Managing Director*, ILR 1986 KAR 769, (1986) ILLJ 470 Kant.
[64] *Moot problem*, para 16; *Additional Clafication*, Q.17.
[65] LARRY A. DIMATTEO, LAW OF INTERNATIONAL CONTRACTING 396 (2009).
[66] *Id*.
[67] *Dharmangadha Commercial Works v State of Saurashtra*, (1957) SCR 152.

technical knowledge to the Respondent's employees and students.[68] Mr. Yamashita's mentioned works only contributed to the Claimant's duties in the joint venture and nature of his work was a part of the Claimant's business during the secondment.

49. Furthermore, the Claimant not only provided Mr. Yamashita with work to do and controlled him in the venture, but also controlled JADEYE's installation in all the computers and equipment used on the sites.[69] More importantly, it should be noted that the source code of JADEYE was saved and handed to the Head of Finance of The Claimant in Tokyo[70] which strongly indicates that the work Mr. Yamashita created eventually being controlled by The Claimant.

50. Thus, Mr. Yamashita was in the employment of The Claimant under a contract of service.

2. JADEYE was made in course of Mr. Yamashita's employment

51. An important factor which has influenced the courts when determining if a work has been made in the course of employment is whether the making of the work falls within the types of activities that an employer could reasonably expect or demand from an employer.[71] In turn, this depends on the scope of the employee's duties.[72]

[68] *Moot problem*, para 16.
[69] *Moot problem*, para 23.
[70] *Moot problem*, para 25.
[71] BENTLY & SHERMAN, INTELLECTUAL PROPERTY LAW 125 (2004).
[72] *Ibid.*

52. In the present case, Mr. Yamashita's duties did not comprise writing computer program. However, when looking at the functionality of JADEYE which is mainly used for exploration and extraction[73], JADEYE mainly contributed to the Claimant's duties in the partnership. On the other hand, while Mr. Yamashita was working on the development of JADEYE, he informed Dr. Asamura and right after that, the Claimant made trial tests in JADEYE. It can be referred that the Claimant wanted to develop JADEYE and creating JADEYE fell within the works that The Claimant expected from Mr. Yamashita. Thus, JADEYE was made in course of Mr. Yamashita's employment.

53. Before and after Mr. Yamashita successfully created JADEYE, there was no mention of any agreements between him and The Claimant regarding the ownership of JADEYE. In conclusion, regarding all the foregoing reasons, the Claimant was the first the owner of copyright subsisting in JADEYE.

B. The Claimant did not contribute the ownership of copyright in JADEYE to the joint venture

54. Pursuant to Article 5.2 of the Copyright Act, owner of the copyright in any work may assign the right or grant any interest in the right by license. It is sometimes appropriate to commit

[73] *Additional Clarification*, Q.16.

the parties to contribute intellectual property rights automatically during the life of the joint venture, whether by outright assignment or by licensing.[74]

55. Applying to this case, the Claimant did not assign copyright in JADEYE to the joint venture (1). Instead, they granted an implied license to the joint venture to use the copyright in JADEYE (2).

1. The Claimant did not assign copyright in JADEYE to the joint venture

56. An assignment is a transfer of ownership of the copyright[75]. Such assignment must in writing signed by the owner of the right.[76] An assignment serves two purposes. For the assignee, it confers the right of exploitation for a specified period in a specified territory. For the assignee, it confers the right to receive royalty.[77]

57. In the case at hand, after being the first owner of copyright in JADEYE, The Claimant did not make any assignment in writing to assign the copyright in JADEYE. Further, when the joint venture used JADEYE on the sites, the Claimant was not the Claimant for a royalty or receive a fixed sum from the joint venture or The Respondent. Thus, The Claimant did not intend to assign the copyright in JADEYE to the joint venture.

[74] Nigel Parker, *Intellectual property issues in joint ventures and collaborations*, 2 J.Intell. Prop. L. &Pract. 729, 736 (2007).
[75] BENTLY & SHERMAN, INTELLECTUAL PROPERTY LAW 252 (2004).
[76] *Myanmar Copyright Act*, Section 5.2.
[77] *SreeGokulam Chit v JohnySagariga Cinema Square*, MIPR 2010 (2)40; 2011 (46) PTC (Mad).

2. The Claimant granted an implied license to the joint venture to use the copyright in JADEYE

58. A license is, in essence, permission granted by the owner of a right or interest to another person allowing him to do something in respect of that right or interest.[78] A basic level a license is merely a permission to do an act that would otherwise be prohibited without the consent of the proprietor of the copyright.[79] Where the court are implying terms for particular cases, they look at the existing express terms and the surrounding context.[80] It has been said Claimant that for a term to be implied it must be reasonable and equitable, necessary to give business efficacy to the contract, obvious that it 'goes without saying', capable of clear expression, and must not contradict any express term of the contract.[81]

59. In this case, there was no mention of any term in the Partnership Agreement providing that the joint venture can use the copyright in JADEYE. However, JADEYE was ordered to be installed in all the computers and equipment used on the sites[82] was only an act of impliedly granted the joint venture permission to use the copyright in JADEYE by The Claimant. Further, as the functionality of JADEYE was contributed to the operation of the joint venture, the Claimant's mentioned act was reasonable and necessary to give business efficacy to the Partnership. That is to say, the joint venture can use the copyright in JADEYE as the Claimant granted an implied license to it.

[78] DAVID I. BAINBRIDGE, INTELLECTUAL PROPERTY 108 (2010).
[79]BENTLY & SHERMAN, supra note 71 at 254.
[80]BENTLY & SHERMAN, supra note 71 at 256.
[81]*BP Refinery (Westernport) v. Hastings Shire Council* (1977) 16 ALR 363, 376 (Lord Simon of Glaisdale approved in *Ray v. Classic FM* [1998] FSR 622.
[82]*Moot problem*, para 23.

60. In conclusion, as the first owner of copyright in JADEYE, The Claimant did not contribute the ownership of copyright in JADEYE to the joint venture but only granted an implied license to the joint venture to use the copyright in JADEYE. In any event, the Claimant is the sole owner of copyright subsisting in JADEYE.

61. Under Article 1.2 of the Copyright Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any form whatsoever. The Claimant accordingly submits that the Respondent has no right to reproduce the work by reverse engineering or creating its own version of JADEYE.

PRAYER FOR RELIEF

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

1. The termination of the partnership agreement by the Respondent is invalid;
2. The Claimant is the owner of the jade-mining machinery and equipment; and
3. The Claimant is the owner of copyright subsisting in JADEYE.