

THE 12<sup>TH</sup> LAWASIA INTERNATIONAL MOOT COMPETITION 2017

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

# MEMORIAL FOR THE RESPONDENT

On behalf of

SHWE PWINT THONE Co., Ltd.

(SPT)

**RESPONDENT**

Against

ASAMURA INTERNATIONAL DEVELOPMENT Co., Ltd.

(AID)

**CLAIMANT**

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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 VALID**

Under Section 44 of Partnership Act,<sup>1</sup> the Respondent's termination of the Partnership is valid as the Claimant has willfully committed a breach of the Agreement. Even if there was no breach, given the nature of the jadeite venture, the misconduct of the Claimant prejudicially affects the carrying on of the business. The Respondent's termination of the Agreement is reasonable and not in bad faith.

### **II. THE RESPONDENT IS THE CO-OWNER OF THE JADE-MINING MACHINERY AND EQUIPMENT**

The Respondent is the co-owner of the jade-mining machinery and equipment as the jade-mining machinery and equipment is the Claimant's capital contribution to the partnership. Further, the Claimant has intended to transfer the jade-mining machinery and equipment to the firm. Even if the Claimant did not intend to do so, these machinery and equipment is used and treated as partnership property.

### **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. However, in the absence of domestic law, the contents of International Conventions

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<sup>1</sup> Partnership Act (No 9 of 1932) (Myanmar) (hereinafter "Partnership Act").

and norms are significant for the interpretation of the court. Concerning both Myanmar and Japan are parties to the TRIPS Agreement,<sup>2</sup> 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<sup>3</sup> and Copyright Act.<sup>4</sup>

#### **IV. THE RESPONDENT HOLDS THE OWNERSHIP OF COPYRIGHT SUBSISTING IN JADEYE**

In the present case, Mr. Yamashita is the author of JADEYE. The services of Mr. Yamashita and other employees of the Claimant being seconded to Myanmar were contributed by the Claimant to the joint venture, making Mr. Yamashita to be in the employment of both the Claimant and the Respondent. Furthermore, as JADEYE was made in the course of his employment by the joint venture and no contrary agreement has been made, the Claimant and the Respondent thus, are jointly the first owners of copyright in JADEYE.

Even if the Tribunal renders that the Claimant is the only first owner of copyright in JADEYE, the Respondent still holds the ownership of the said copyright because such right has become property of the joint venture.

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<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994 (hereinafter “TRIPS”).

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works (1971 Paris Act plus Appendix) (hereinafter “Berne Convention”).

<sup>4</sup> Copyright Act (No 3 of 1914) (Myanmar) (hereinafter “Copyright Act”).

## PLEADINGS

### I. THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY SPT IS VALID

1. Terminating a partnership agreement is the first step in the process where a partner wishes to have the partnership firm dissolved.<sup>5</sup> Under the Partnership Act, a partnership firm can be dissolved on the basis of many grounds, based on which the validity of the termination of a partnership can be determined. These grounds do not control one another.<sup>6</sup> Therefore, the Respondent bases solely on Section 44 of the Act to prove its termination of the Agreement is valid. Though under Section 44, dissolution of partnership firm is for the court to decide, it is permissible for the court to refer to arbitration this right where parties choose arbitration to settle their differences.<sup>7</sup>
2. Pursuant to Section 44, the Respondent's termination of the Partnership is valid as the Claimant has willfully committed a breach of the Partnership Agreement ("the Agreement") (**A**). Even if there was no breach, given the nature of the jadeite venture, the misconduct of the Claimant prejudicially affects the carrying on of the business (**B**). The Respondent's termination of the Agreement is reasonable and not in bad faith (**C**).

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<sup>5</sup> *Partnership Act*, Section 4: "Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name"."

<sup>6</sup> *Lilabati Rana v Lalit Mohan*, AIR 1952 Cal 499; *Partnership Act*, Section 44.

<sup>7</sup> *Jagdish Chandra v Hari Narayan*, (2010); *Partnership Act*, Section 44.

**A. The Claimant has willfully breached Clause 11 of the Agreement, making it not reasonably practicable for the Respondent to carry on the business**

3. Under Section 44(d) of the Partnership Act, when a partner willfully commits breach of agreement relating to business, it becomes a ground for getting the partnership firm dissolved. Under such a situation it becomes difficult to carry on the business smoothly, and the other partner will be entitled to apply to the court for a decree of dissolution of the partnership firm. The phrase “not reasonably practicable” under the section is not defined by law, but it is broad enough to include partners that cannot continue working together.
4. Clause 11 of the Agreement requires both Parties not to say or do anything harmful to the national interest and solidarity of Myanmar.<sup>8</sup> The term “national interest” refers to the self-interest of nations, how states envision their defense and protection of power beyond their borders. In this regard, it includes interests that states consider core or vital, such as security.<sup>9</sup>
5. Dr. Lum’s answer to the interview with the Asian Influencers implied that the Myanmar government was involved in ethnic cleansing and had upset many of the Respondent’s employees and students and even caused a strike in seven days.<sup>10</sup> The statement, regardless of its true meaning, was made on not only her personal position at the Second Life but also on behalf of her husband, Dr. Asamura and their business involvement

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<sup>8</sup>*Moot Problem*, Annexure 1, Clause 11.

<sup>9</sup> Jean-Marc Coicaud and Nicholas J. Wheeler, *National Interest and International Solidarity Particular and Universal Ethics in International Life*, United Nations University Press 2008, at 2.

<sup>10</sup>*Moot Problem*, para.28, 29.

existing in Myanmar, including the Claimant's business in joint venture with the Respondent.<sup>11</sup> Therefore, as Dr. Lum's statement did cause chaos in the local residence, it shall be considered a prejudicial impact on Myanmar's national interest and solidarity.

6. More importantly, the couple had never reacted to the local anger. By giving such a statement which can be differently interpreted,<sup>12</sup> and even after witnessing the local protests, Dr. Asamura and Dr. Lum chose to keep silent without any further explanation on what they really meant.<sup>13</sup> That being said, the couple willfully neglect the scandal, which they must have known that such an act would only worsen the situation. Given the nature of the jadeite venture, which was formed to help the local Myanmar, the business can hardly continue as the morale of the local workers were getting low, and they have lost respect for the Claimant after the interview.<sup>14</sup>
7. Taking the Claimant's obligation under the mentioned Clause 11 towards Myanmar and its people into consideration, it shall be inferred that the Claimant intentionally breached this clause, thus the Respondent's termination of the Agreement is valid.

**B. Even if Dr. Lum did not mean by what was interpreted by the local, the jadeite venture cannot continue to be carried out**

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<sup>11</sup>*Moot Problem*, para.27.

<sup>12</sup>*Moot Problem*, para.28, 29: *Dr. Fiona Lum answered that "Everyone must work together to end the persecution of the Rohingyas, and the new Myanmar government under the leadership of Daw Su must end the problem immediately, especially the ethnic cleansing. They should not be deprived of their basic human rights. We will continue to champion for their rights."*

<sup>13</sup>*Moot Problem*, para.30.

<sup>14</sup>*Moot Problem*, para.38, 41.

8. Under Section 44(c) of the Partnership Act, the court will have to consider the nature of the partnership business in determining whether such conduct, in the opinion of the court, is calculated to prejudicially affect the operations of the business. It is not necessary that misconduct must relate to the conduct of the business. If the conduct of a partner is such that partners may lose faith in each other, the firm may be dissolved.<sup>15</sup>
9. Undoubtedly in some cases the moral conduct of a person may prejudicially affect the business of a firm. For example, if a doctor enters into a partnership with another doctor to run the clinic and it is found that he is immoral towards some patients, partnership firm may be dissolved on this ground.
10. In the present case, the jadeite business is for the local Myanmar enhancement of their livelihoods, their independence and competition in the evolving economy.<sup>16</sup> Dr. Lum gave an answer to the public interview, which later caused the local workers in the Respondent lose faith in the Claimant's business involvement in Myanmar. Regardless of whether such an answer could be interpreted in a different way in comparison to the way the local inherited it, it is a reasonable cause under the law to terminate the Partnership.
11. Therefore, even if there was no willful breach of the Agreement, the statement of Dr. Fiona Lumhas made the Respondent's workers and students lose faith in the Claimant. Thus, given the nature of the jadeite business which is for human development, such statement shall be a sustainable cause to have the Partnership terminated.

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<sup>15</sup>*BasanthlalJalan vChiranjilalsarawgi*, (1968) AIR Pat 96.

<sup>16</sup>*Moot Problem*, Annexure 1, Clause 5.

**C. The Respondent's termination of the Agreement is reasonable and not in bad faith**

12. The relationship between partners is not the same as that between arm's-length parties to a commercial contract. Partners owe duties of absolute good faith to each other, which underpin all of their dealings with each other.<sup>17</sup> Under Section 44(g) of the Partnership Agreement, the court will grant a decree of dissolution where circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.
13. In deciding whether a partnership ought to be dissolved on just and equitable grounds the court will scrutinize wholly.<sup>18</sup> The court may order for dissolution on any other ground which court think is just, fair and equitable. Just and equitable can include the loss of mutual confidence between the partners rendering continuation of the business impossible, e.g. breach of duties of utmost good faith.<sup>19</sup>
14. In this case, Dr. Lum's statement indeed made the Respondent's local workers lose belief in the Respondent. The Respondent not only actively took it upon himself to coax the angry workers to resume their duties, but also carefully considered the practical situation and relationship between the Respondent and the Claimant before terminating the Partnership. The Respondent's aim was to help the local community in Myanmar by creating jobs and develop their skills when the Respondent decided to form the

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<sup>17</sup> The same is not true of members of a limited liability partnership (LLP), unless such a duty is expressly included in their LLP agreement; see *F&C Alternative Investment (Holdings) Limited v Barthelemy* [2011] EWHC 1731.

<sup>18</sup> *Lee LayLay v Wong Yiik Tai* [2007] MLJU 585.

<sup>19</sup> *Atwood v Maule* (1868) 3 Ch.App.369, 373.

Partnership, which was also agreed in the Agreement itself. As this could not be carried any more due to Dr. Lum's statement, the Respondent has to consider and look for other chance where its aim can continue to proceed. Being said that, the Respondent did not take advantage of the Claimant's joining the Partnership to turn to Patrick Green and his company, New Ventures Corporation for better ratio of profit shared. The Respondent was only considering what benefits the most for the local people, which can be executed by forming a new partnership with Green for more chances offered to the local Myanmar.

15. Thus, the Respondent was not in bad faith terminating the Partnership.

16. In conclusion, the Respondent's termination of the Partnership should be rendered valid as the Claimant willfully breached the Agreement, otherwise Dr. Lum's statement had made the business difficult to be carried on smoothly and the Respondent was not acting in bad faith.

## **II. THE RESPONDENT IS THE CO-OWNER OF THE JADE-MINING MACHINERY AND EQUIPMENT**

17. As the jade-mining machinery and equipment is the Claimant's capital contribution (**A**), the Claimant has intended to transfer the jade-mining machinery and equipment to the firm (**B**). Even if the Claimant did not intend to do so, these machinery and equipment is used and treated as partnership property (**C**). Therefore, the Respondent is the co-owner of the jade-mining machinery and equipment.

**A. The jade-mining machinery and equipment are the capital the Claimant has contributed to the partnership**

18. Neither does the Myanmar Partnership Act 1932 give any definition of capital nor does there seem to be a judicial definition of it. According to Lindley, the term “capital” means the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in the business. The capital of a partnership is not therefore the same as its property. The capital is a sum fixed the agreement of the partners; whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value.<sup>20</sup> This description limits capital to money and further, distinguishes between capital and partnership property.<sup>21</sup> On the other hand, *Joseph Story* does not attempt to define the term “capital” but when speaking of contributions to a partnership uses the term “capital stock” in which he includes money as well as other types of property.<sup>22</sup> But whether the term capital be limited to money or not, it would seem to be clear that it is merely another word for a partner's individual contribution to the partnership which is to be at the disposal of the partnership.<sup>23</sup>

19. Applying to the case at hand, before the commencement of the partnership, under the arrangement, the Claimant for second hand machinery and equipment from Japan, purchased them, and reconditioned them.<sup>24</sup> Such machinery and equipment were then

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<sup>20</sup>1 NATHANIEL LINDLEY, TREATISE ON THE LAW OF PARTNERSHIP 541 (1888).

<sup>21</sup> B. Beinart, *Capital in partnership*, AJ. 118, 119 (1961).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 120.

<sup>24</sup>*Moot Problem*, para. 16.

imported into Myanmar by the Respondent in January 2009, where the jade extraction and production business officially began.<sup>25</sup> On the other hand, the Respondent provided the land which was believed to contain a huge amount of jade deposits in Hpakant, Kachin State.<sup>26</sup> It can be inferred that, in this case, the Claimant and the Respondent have respectively contributed the machinery and equipment together with the land for the purpose of commencing and carrying on the partnership business. Such machineries and the land are the capital contributions in establishing the partnership.

**B. The Claimant has intended to transfer the jade-mining machinery and equipment to the firm**

20. The question whether or not the capital contributions become the partnership property must be determined according to the agreement by the partners and the circumstances.<sup>27</sup> In the absence of a tacit expression, the implication, intention and conduct of the partners will be considered.<sup>28</sup> Thus, if one partner alone supplies goods and joins with another in a joint venture or voyage abroad, such an arrangement by itself would not produce community in the goods – that is, of course, the capital – services partnership. But if both partners contribute services and materials for manufacture of articles for trade, the capital is joint property.<sup>29</sup>

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<sup>25</sup>*Moot Problem*, para. 16.

<sup>26</sup>*Moot Proplem*, para.9; *Annexure 1*, Clause 2.

<sup>27</sup>Beinart, *supra* note 18, at 143.

<sup>28</sup>Beinart, *supra* note 18, at 136.

<sup>29</sup>JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP 37 (1859), S.27.

21. In the present case, as both partners has made an expression, the jade fields as well as the land will continue to belong to the Respondent.<sup>30</sup> However, no expression to determine the owner of the jade-mining machinery and equipment was made. Therefore, the intention and acts of both partners shall be considered.
22. Since the Respondent is the trustee of the firm and held the title to the jade-mining machinery and equipment by the Claimant's consent, the Claimant has intended to transfer such machinery and equipment to the firm. As such, these machinery and equipment is partnership property owned by both the Claimant and the Respondent.
23. The trustee of the firm is the person that has control of money or property that has been put into a trust for somebody.<sup>31</sup> Under partnership law, land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust and signed by the partner to whom the land has been conveyed.<sup>32</sup> If shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only.<sup>33</sup> It can be inferred that such partner is deemed to hold the property in trust for the firm.<sup>34</sup>

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<sup>30</sup>*Moot Problem, Annexure 1*, Clause 2.

<sup>31</sup>Oxford Advanced Learner's Dictionary, Ed. 8.

<sup>32</sup>*Forster v. Hale* (1800) 5 Ves. 308.

<sup>33</sup>LINDLEY, *supra* note 17, at 546-547.

<sup>34</sup>*Id.*

24. In the present case, the Respondent held the title to all jade-mining machinery and equipment and was recorded as the owner and operator of them on the permits.<sup>35</sup> Moreover, as the Claimant started to feel the burden of the operational costs borne by it, it suggested for both partners to make capital contributions to the partnership so that further operational costs will be derived from this fund.<sup>36</sup> The funds were held in the Respondent's bank account.<sup>37</sup> Therefore, the Respondent held the property in trust for the firm.

25. The mere fact that the Claimant was in knowledge of the Respondent's holding the legal title to the machinery and equipment has indicated that the Claimant obviously intended to transfer such machineries and equipment to firm.<sup>38</sup> Thus, the jade-mining machinery and equipment are partnership property.

**C. The jade-mining machinery and equipment is used and treated as partnership properties**

26. Even if the Claimant did not intend to transfer the jade-mining machinery and equipment to the firm, such machinery and equipment are used and treated as partnership's properties during the course of the business and thus, are partnership property.

27. 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.

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<sup>35</sup>*Moot Problem*, para. 43.

<sup>36</sup>*Moot Problem*, para. 17.

<sup>37</sup>*Moot Problem*, para. 17.

<sup>38</sup>*Clarifications*, Q.14.

28. In the absence of an express agreement to the contrary, property will be regarded as partnership property if it is treated as an essential part of the firm's property by the partners; but the mere fact that the property is used in the business is not enough to transfer that property to the firm.<sup>39</sup> The court will ascertain the intent through the conduct of the parties and the general purpose and use of the said property with respect to the partnership business.<sup>40</sup> However, whether such property retains its character as individual property or has been integrated into partnership property is a matter of fact. The courts would favor integration where property was actually used in partnership business until a contrary intention is proven.<sup>41</sup> Moreover, it is to be observed that property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it, for the presumption in such a case is rather that the property in question was his contribution to the common stock.<sup>42</sup>

29. Attention must also be paid to the source where the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with.<sup>43</sup> For example, it seems that land acquired, whether gratuitously or not, for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership but that land which is not so acquired, but which, belonging to several persons jointly or in common, is employed by them for their common profit, does not

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<sup>39</sup> KEENAN & RICHES & VIDA ALLEN, BUSINESS LAW 124 (2009), 9<sup>th</sup>ed, Pearson Longman; *Miles v Clarke* [1953] 1 WLR 537.

<sup>40</sup> THOMAS S. KERR, BUSINESS LAW: PRINCIPLES AND CASES 533.

<sup>41</sup> *Waterer v Waterer* (1873) LR 15 Eq 402; *David v Games* (1879) 12 Ch D 813.

<sup>42</sup> LINDLEY, *supra* note 17, at 548; *Burnard v Rodocanachi* (1882) 7 App. Cas. 333; *Moffatt v. Farquharson* (1788) 2 Bro. C. C. 338.

<sup>43</sup> LINDLEY, *supra* note 17, at 554.

become partnership property unless there is some evidence to show that it has been treated by them as ancillary to the partnership business, and as part of the common stock of the firm.<sup>44</sup>

30. In the present case, although the Respondent did not make any payment to the Claimant regarding to the jade-mining machinery and equipment, the Claimant still knew and agreed of the Respondent's holding the legal title to such machineries.<sup>45</sup> The Claimant also bought these machinery and equipment for the sole purpose of carrying the partnership business.<sup>46</sup> During the course of the partnership, such machinery and equipment is only used for partnership business, particularly for exploration and extraction jades by the employees of both the Claimant and the Respondent.<sup>47</sup> Since Myanmar did not have these machinery and equipment in the local<sup>48</sup>, the jade-mining machinery and equipment are treated as ancillary and play a vital part to the partnership business. Without such machineries, the exploration and extraction jades in particular and the jade venture in general cannot be carried on.

31. Therefore, the jade-mining machinery and equipment shall be used and treated as partnership property by both parties. The partners in any firm are owners in common of all partnership property.<sup>49</sup> As such, both the Respondent and the Claimant are co-owners of the jade-mining machinery and equipment.

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<sup>44</sup>*Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

<sup>45</sup>*Clarifications*, Q.19.

<sup>46</sup>*Moot Problem*, para. 16.

<sup>47</sup>*Moot Problem*, para.16; *Additional Clarifications*, Q.11.

<sup>48</sup>*Additional Clarifications*, Q.6.

<sup>49</sup>FREDERICK POLLOCK, A DIGEST OF THE LAW OF PARTNERSHIP 45 (1877).

32. For these foregoing reasons, the Respondent is the owner of the jade-mining machinery and equipment.

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

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.<sup>50</sup> Concerning both Myanmar and Japan are parties to the 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 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”.

35. According to WIPO Model Provisions on the Protection of Computer Programs, “‘computer program’ means a set of instructions capable, when incorporated in a

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<sup>50</sup> Helmut Philipp Aus& Georg Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, Oxford University Press, 2016; *Vishaka v State Of Rajasthan* (1997) AIR SC. 3011.

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 quality and viability of the jade.<sup>51</sup> JADEYE is therefore, a computer program as described in the TRIPS Agreement 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<sup>52</sup> and patent.<sup>53</sup> In respect of patent, an application is required to be filled.<sup>54</sup> However, in the present case, no patent records were filed in either Myanmar or Japan.<sup>55</sup> 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**

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<sup>51</sup>*Moot Problem*, para.22.

<sup>52</sup>*TRIPS Agreement*, Article 9, 10.

<sup>53</sup>*TRIPS Agreement*, Article 27.

<sup>54</sup>*TRIPS Agreement*, Article 29.

<sup>55</sup>*Clarifications*, Q.10, 15; *Additional Clarifications*, Q.2, 24, 29.

38. Being member of TRIPS, Myanmar shall comply with Article 1 through 21 of Berne Convention and the Appendix.<sup>56</sup> Myanmar thus, constitutes a country of the Union for the protection of the rights of authors in literary works under Berne Convention.<sup>57</sup>
39. Under Berne Convention, the protection of works shall apply to authors for their works first published in the countries of the Union.<sup>58</sup> “Published works” under Article 3(3) of the Convention is defined as copies of the works is manufactured by any means, with the 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, Joe 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.<sup>59</sup> 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<sup>60</sup> 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**

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<sup>56</sup> *TRIPS*, Article 9.1.

<sup>57</sup> *Berne Convention*, Article 1.

<sup>58</sup> *Berne Convention*, Article 3(1)(b).

<sup>59</sup> *Moot Problem*, paragraph 22, 23.

<sup>60</sup> *Berne Convention*, Article 5.1.

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

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

#### **IV. THE RESPONDENT HOLDS THE OWNERSHIP OF COPYRIGHT SUBSISTING IN JADEYE**

44. As the Copyright Act applies in the present dispute, the ownership of copyright shall be determined in accordance with Section 5(1)(b) of the Act which provides that “where the author was in the employment of some other person under a contract of service 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. In the case at hand, Mr. Yamashita is the author of JADEYE.<sup>63</sup> The services of Mr. Yamashita and other employees of the Claimant being seconded to Myanmar were contributed by the Claimant to the joint venture (A), making Mr. Yamashita to be in the employment of both the Claimant and the Respondent (B). Furthermore, as JADEYE was

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<sup>61</sup> *Berne Convention*, Article 5.4(a).

<sup>62</sup> *Berne Convention*, Article 5.3.

<sup>63</sup> *Memorial for Respondent*, para.40.

made in the course of his employment by the joint venture (C) and no contrary agreement has been made, the Claimant and the Respondent thus, are jointly the first owners of copyright in JADEYE (D).

46. Even if the Tribunal renders that the Claimant is the only first owner of copyright in JADEYE, the Respondent still holds the ownership of the said copyright because such right has become property of the joint venture (E).

**A. The Claimant has contributed the services of the 25 employees including Mr. Yamashita on secondment to Myanmar to the joint venture**

47. According to *Wing Commander J. Kumar vs. Union of India and Others*, “secondment” of an officer-Whether constitutes a transfer.<sup>64</sup> In the present case, Mr. Yamashita is among the 25 of the Claimant’s employees on secondment from Japan placed in the Respondent’s base and at the jade fields in Hpakant.<sup>65</sup> In other words, the Claimant has transferred their 25 employees to work for the joint venture.

48. For purposes of creating a partnership, one partner’s contribution may consist of labor and expertise,<sup>66</sup> if such contribution is integral to the business operations.<sup>67</sup> In the present case, both Parties agreed in the Partnership Agreement that the Claimant would provide the joint venture with technical expertise and in fact, the Claimant has seconded 25 employees including Mr. Yamashita taking charge of operating equipment, geological

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<sup>64</sup>*Wing Commander J. Kumar v Union Of India* (1982) AIR 1064.

<sup>65</sup>*Moot Problem*, para.16; *Additional Clarifications*, Q.17.

<sup>66</sup>ANUKUL CHANDRA MOITRA & K.C. CHUNDER, THE INDIAN PARTNERSHIP ACT 14 (1932).

<sup>67</sup>*Vohland v Sweet* (1982)433 N.E.2d 860.

surveys and strategic prospecting, while imparting technical knowledge to the Respondent's employees and students.<sup>68</sup> The service of the Claimant's employees on secondment to Myanmar which includes of Mr. Yamashita is thus the contribution of the Claimant for the business of the partnership.

## **B. Mr. Yamashita was in the employment by the Claimant and the Respondent**

49. Under Section 5(1)(b) of the Copyright Act, the first element to determine a person being the first owner of copyright shall base on that the author of the work was in the employment of that person under a contract of service. According to *Dharmangadha Commercial Works vs. State of Saurashtra*, 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.<sup>69</sup> The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition.<sup>70</sup> Furthermore, follow the wording in *Simmons v. Health Laundry Company*, it is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service.<sup>71</sup>

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<sup>68</sup>*Moot Problem*, para. 16.

<sup>69</sup>*Dharmangadha Commercial Works v State of Saurashtra* [1957] SCR 152.

<sup>70</sup>*Dharmangadha Commercial Works v State of Saurashtra* [1957] SCR 152.

<sup>71</sup>*Simmons v. Health Laundry Co.* [1910] 2 KB 549.

50. Having regard to the present case, where the author, Mr. Yamashita was in the employment by the joint venture, the nature of control shall be interpreted in accordance with Section 12(a) of the Partnership Act providing that subject to contract between the partners, every partner has a right to take part in the conduct of the business. Such a right of the partners is further explained by Anukul Chandra Moitra as the right of management. In the absence of an express agreement to the contrary, the powers of the members of an ordinary partnership are in all respects equal, even although their shares may be unequal; and there is not right on the part of one or more to exclude another from an equal management in the concern.<sup>72</sup>

51. In the case at hand, Mr. Yamashita was in the position of a finance executive.<sup>73</sup> Meanwhile, according to the Agreement, for financial and money decisions, both the Claimant and the Respondent will decide together.<sup>74</sup> In other words, both Parties shared the right of management or control over financial issues in the joint venture and thus, it is reasonable to say that a finance executive as Mr. Yamashita is included in the people who receive direct control from both the Claimant and the Respondent.

52. For all the reason above, the Respondent submits that Mr. Yamashita was in the employment by the Claimant and the Respondent under a contract of service and the Respondent thusly satisfied the first element to determine itself the first owner of copyright subsisting in the JADEYE software.

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<sup>72</sup>MOITRA, *supra* note 66, at 48.

<sup>73</sup>*Moot Problem*, para.21.

<sup>74</sup>*Moot Problem, Annex 1*, Clause 6.

**C. JADEYE was created by Mr. Yamashita in the course of his employment by the Claimant and the Respondent**

53. 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. In turn, this depends on the scope of the employee's duties.<sup>75</sup>
54. In the present case, the Claimant may argue that the work of JADEYE falls solely within the activities of exploration and extraction, which under the control of the Claimant. However, according to jade experts, evaluating jades is complicated and based on various factors of its quality such as the color, the translucency, the texture, the clarity.<sup>76</sup> Given the functionality of JADEYE which assists user in testing the quality and viability of the jade,<sup>77</sup> the software thusly also assists the activity of determining the value of jades or the sales of the jade, which is under the control of the Respondent.<sup>78</sup>
55. The JADEYE software was therefore, created by Mr. Yamashita in the course of his employment by The Respondent.
56. In conclusion, Mr. Yamashita, the author of the JADEYE software was in the employment of the Respondent under a contract of service and the work was made in the course of his employment by the Respondent. Moreover, given the facts of the present

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<sup>75</sup>Bently & Sherman, INTELLECTUAL PROPERTY LAW 125(2004).

<sup>76</sup>Richard W. Hughes, *Burma Jade: The Inscrutable Gem*.

<sup>77</sup>*Moot Problem*, para.22.

<sup>78</sup>*Moot Problem, Annexure 1*, Clause 6.

case, no agreement has been made to the contrary, and the Respondent therefore shall be the first owner of copyright subsisting in the JADEYE software under Section 5(1)(b) of the Copyright Act.

**D. Even if only the Claimant is the first owner of copyright subsisting in JADEYE, the Respondent still holds the ownership because the copyright in JADEYE has become partnership property**

57. Under the Partnership Act, subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.<sup>79</sup>

58. A gloss on this is set out in *Lindley & Banks on Partnership* at §18-06: “Whatever at the commencement of a partnership is thrown into the common stock, and whatever has from time to time during the continuance of the partnership been added thereto or obtained by means thereof, whether directly, by purchase or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown.”<sup>80</sup>

59. In the present case, even if the Tribunal rules that the Claimant is the only first owner of copyright subsisting in JADEYE, such right has become the property of the partnership because JADEYE was acquired in the course of the business of the joint venture [I] and

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<sup>79</sup>*Partnership Act*, Section 14.

<sup>80</sup>*Coward v Phaestos Ltd & Ors* [2013] EWHC 1292 (Ch).

treated as partnership property for the purposes of the joint business and includes the goodwill of the business [2].

1. *JADEYE was created in the course of the business of the joint venture for the purpose of the joint business*

60. In the present case, both Parties entered in to the Partnership Agreement in 2008 and on April 2012, Mr. Yamashita announced that JADEYE was ready to be used. JADEYE was tested and immediately installed on the computer system and equipment on the site in Myanmar.<sup>81</sup> It is thus, undisputed that JADEYE was created in the course of the business of the joint venture.

2. *JADEYE was treated as property of the partnership*

61. In *Lindley & Banks on Partnership*, whether an asset has been brought into the partnership therefore, is a question of fact. Where an asset belonging to one partner has been used by the partnership and treated as its property, there is a presumption that it has been brought into the common stock.<sup>82</sup>

62. In *Coward v Phaestos Ltd &Ors*, despite the fact that there is no reference to the software in the December Partnership Deed, nor does it appear in the list of assets contributed, *Mrs Justice Asplin* held that an asset is not prevented from being partnership property as a result of a lack of a transfer of the legal title. As in the case of *Don King Productions Inc*

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<sup>81</sup>*Moot Problem*, para. 21-23.

<sup>82</sup>*Coward v Phaestos Ltd &Ors*[2013] EWHC 1292 (Ch).

*v Warren*, if necessary, the legal owner of the asset will be found to hold the legal title upon trust for the partnership. The fact that express permission was given (by Dr. Coward) to Mr. Robertson to use the software which he had created whilst both he and his company were partners in IKOS Partners is indicative of it having been treated as a partnership asset despite the fact that it was not expressly stated to be so.<sup>83</sup>

63. Furthermore, at the heart of any partnership is the fundamental duty of good faith which each partner owes each other partner. A partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people, and in which the firm is in honour and conscience entitled to participate.<sup>84</sup>

64. In the present case, even if the Claimant is the only first owner of the copyright subsisting in JADEYE, it should be taken in consideration that the Claimant had given the permission to the Respondent to use JADEYE as when Dr. Asamura himself ordered the software to be installed in all the computers and equipment used on the sites.<sup>85</sup>

65. On the other hand, the software assisted the users to test the quality and viability of the jade at 99% accuracy. Such functionality valued greatly and exclusively to the success of the joint venture.<sup>86</sup> As a partner of the joint venture, the Claimant holds the duty of good faith and shall share the benefit from JADEYE to the joint venture. Furthermore it should

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<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>*Moot Problem*, para. 23.

<sup>86</sup>*Moot Problem*, para. 22-26.

be taken in consideration the statement of Mr. Yamashita that JADEYE was “for the benefit of all of us”<sup>87</sup> which concerning the circumstances of the present case, he meant for the benefit of the joint venture.

66. In conclusion, the work of JADEYE was created in the course of the business of the joint venture and treated as property of the joint venture. The Respondent therefore, in any event, rightfully holds the ownership of copyright subsisting in JADEYE.

67. Under Section 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 Respondent accordingly submits that even when the Claimant refuses to provide the Respondent with the source code to JADEYE, the Respondent shall remain the right to reproduce the work by reverse engineering or creating its own version of JADEYE.

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<sup>87</sup>*Moot Problem*, para. 24.

### **PRAYER FOR RELIEF**

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

1. The termination of the partnership agreement by the Respondent is valid;
2. The Respondent is the co-owner of the jade-mining machinery and equipment; and
3. The Respondent holds the ownership of copyright subsisting in the JADEYE software.