T1706-C

THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION 2017

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Between

ASAMURA INTERNATIONAL DEVELOPMENT CO., LTD
…. Claimant

And

SHWE PWINT THONE CO., LTD
… Respondent

MEMORIAL FOR CLAIMANT

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II. STATEMENT OF JURISDICTION

1. 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").

2. Article 35, paragraph 1 of the KLRCA i-Arbitration Rules states that the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Clause 10 of the Partnership Agreement[1] between AID and SPT stipulates that everything will be in accordance with and interpreted under the law of Myanmar. Accordingly, the law of Myanmar will apply to this dispute.

[1] Annexure 1, Moot Problem

III. QUESTIONS PRESENTED

A

1. Whether the Respondent's termination of the Partnership Agreement is valid:

    a. whether the partnership is at will; or

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    b. whether the Respondent may terminate for breach of contract; or

    c. whether the Respondent is estopped from terminating the contract.

2. Whether the Claimant owns the jade-mining machinery and equipment:

C

    a. whether the parties intended for the machinery and equipment to be separately owned by the Claimant; or

    b. whether the Claimant is entitled to receive the monetary value of the machinery and equipment.

D

3. Whether any copyright subsists for the JADEYE software in Myanmar law and whether the Respondent owns the rights to the software:

    a. whether copyright is protected under the Burma Copyright Act; and

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    b. who the first owner of the copyright was; and

    c. who owns the copyright now.

IV. STATEMENT OF FACTS

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The partners

1. The Claimant, AID, is a private international development company based in Japan and under the leadership of Dr, Yugi Asamura. The company specializes in crisis relief and has managed rehabilitation and rebuilding projects in various developing countries.

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2. The Respondent, SPT, is a Burmese company that empowers students through secular and vocational training in teashops, and jade carving and polishing studios. The company is led by U Thein Kyaw.

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The beginning of the partnership

3. In 2007, the Myanmar government gifted the Respondent with 80 acres of land in Hpakant, Kachin State, for their contribution to the community. The land contained jade deposits. To create sustainable jobs for the Hpakant community, the Respondent decided to explore jade-mining. However, being conscious of their own lack of experience in jade exploration and production, the Respondent approached the Claimant, whose workers had experience that would be valuable to the jade-mining business.

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4. The Claimant and the Respondent entered into a Partnership Agreement[2] on 9 September 2008. The Claimant and the Respondent were to split the profits from the jade-mining business in Hpakant 35% to 65% respectively.

[2] Annexure 1, Moot Problem

Clause 8 of the Partnership Agreement stated that the partnership was intended to be a long term one – any disputes were to be settled in a polite manner in accordance to the law of Myanmar, and neither party was to say anything that would harm the national interest of the other party's home country. According to clauses 4 and 6 of the agreement, AID was in charge of the extracting and cutting of the jade, and was to provide all the machinery and equipment to be used in the business. However, since SPT was the local company, they were tasked with importing the machinery and obtaining the permits from the government of Myanmar.

5. In March of 2009, the Claimant started to feel the burden of the operational costs, having contributed around USD 1 million in capital to the partnership by that point. The Claimant and Respondent injected a further USD 1.5 million and USD 2.5 million respectively into the partnership.

The creation of the JADEYE software

6. While working in Myanmar, one of AID's financial executives, Joe Yamashita, created a computer software named "JADEYE" that improved the efficiency of the jade mining business. He informed Dr. Asamura that it was ready for use on 11 April 2012, and Dr. Asamura installed the software in all the computers and equipment used at the mining sites. When U Thein Kyaw noticed the results JADEYE was producing, he was pleased and offered USD 18,000 to Joe Yamashita for his invention, but Joe declined the cash. Instead, Joe handed over the source code of JADEYE to the Head of finance of AID on his last day of work on 4 January 2013.

Increasing tension between the parties

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7. Relationships between the parties were amicable until 2016, when Dr. Asamura attended an interview by Asian Influencer's Magazine with his wife, Dr. Lum, who was a non-executive director of AID. Dr Lum rallied the magazine's readers to "end the persecution of the Rohingyas" and called on the newly-elected Myanmar government to do so. She also stated that the ethnic cleansing of the Rohingyas should be stopped as it deprived them of basic human rights.

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8. Unfortunately, the published interview triggered negative responses by many of the Respondent's employees and students because they believed that Dr Lum's statements implied that the government was involved in ethnic cleansing. 102 of the Respondent's workers went on strike for a week and requested for both Dr. Lum and Dr. Asamura to apologise and retract their statements. The couple did not do so. U Thein Kyaw took it upon himself to personally persuade his workers to resume their duties.

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Cutting separate deals and suggestion for termination of partnership

9. In 2016, both the Claimant and the Respondent were separately approached by different companies intending to work with them on the jade business. The Claimant was approached by Hashimoto Co., Ltd (HCL), who wanted the Claimant to supply jade from the Hpakant mine for them. When the Claimant consulted the Respondent, the Respondent encouraged the Claimant to pursue the venture, which was to last for a year from 1

November 2016.

10. The Respondent was approached by Patrick Green, who invited the Respondent to enter into a partnership where the Respondent would receive 85% of the profits. About a month later, the Respondent decided to end the partnership with the Claimant.

V. SUMMARY OF PLEADINGS

A

A. The Respondent's termination of the partnership is invalid.

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Applying section 7 of the Burma Partnership Act 1932, the Partnership Agreement is not silent on either duration or determination, and thus the partnership cannot be at will. The Respondent cannot terminate it by mere notice as per section 43(1).

C

B. There was also no breach of Clause 11 of the Agreement to entitle the Respondent to elect termination.

D

Clause 11 of the Partnership Agreement has not been breached as Dr Fiona Lum was not a representative of a company. Hence, her views cannot be synonymous with those of the company. In any event, applying section 39 of the Burma Contract Act, the breach was not sufficiently serious to give the Respondent the right to terminate.

E

C. The Respondent is estopped from terminating the partnership.

The Claimant has relied on an implicit promise made by the Respondent, of a continuing partnership, by contracting with Hashimoto Co., Ltd until 1 November 2017. Terminating the partnership would be to the Claimant's detriment. Thus, the Respondent is estopped from doing so.

D. The Claimant is the rightful owner of the machinery and equipment.

The Claimant has acquired the machinery and equipment using their individual funds. It would follow that the presumption under section 14 of the Burma Partnership Act 1932 does not apply. Given the manner of purchase and the absence of ownership assignment, the parties have implicitly agreed for the machinery and equipment to remain the Claimant's separate property.

E. The copyright of the JADEYE subsists.

The JADEYE software is protected under the Burma Copyright Act 1914 as literary work. The definition of literary word under the first schedule of the Copyright Act is not intended to be exhaustive. In light of the Draft Copyright Act 2005 and similar measures taken in other jurisdictions, the Myanmar courts have implicitly acknowledged the subsistence of computer software.

F. In any event, the copyright vested in the JADEYE program has been assigned to the Claimant.

Applying the doctrine of equitable assignment, even if the rights over the JADEYE program were initially vested in Joe Yamashita, the Claimant is nevertheless entitled to beneficial interest in the copyright. The JADEYE program was created solely for the purpose of the business of the Claimant, by an employee who has received consideration, with the understanding that the

Claimant would ultimately be the owner of the copyright.

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VI. PLEADINGS

A. The Respondent's termination of the Partnership Agreement is invalid.

1. Since parties have agreed to settle all disputes arising from the Partnership by applying the law of Myanmar[3], the first port of call is the Burma Partnership Act 1932. As a partnership is a relationship that arises from contract[4], the Contract Act 1872 applies as well. Under these two statutes, there are three possible routes for the Respondent to terminate the partnership: (1) termination by giving notice if it were a partnership-at-will, (2) putting an end to the contract in the case of breach, and (3) applying to the Court to dissolve the firm. As the Respondent has not made any application to a Court for termination of the partnership, the Respondent's termination could only be valid if it was done by giving notice or in the case of breach.

2. The Burma Partnership Act 1932 and the Contracts Act 1872 originate from the Indian Partnership Act 1932 and Contracts Act 1872 respectively. In 1886 when Myanmar became one of the provinces of British India, these statutory laws were extended to Myanmar. Hence, Indian cases interpreting provisions of the Indian Partnership Act 1932 and the Indian Contracts Act 1872 are persuasive in Myanmar law. The Indian statutes were intended to

[3] Clause 10, Annexure 1, Moot Problem
[4] Section 5, Partnership Act 1932

be a codification of common law principles of the respective subjects[5] and hence English cases illustrating the common law principles of provisions in the two acts are also highly persuasive. The importance of cases from the United Kingdom ("UK") are emphasised in *U Ba Yi v Mahant Singh*[6], where the court found that English common law principles are to be applied where there is a gap in Myanmar law.

1. The partnership was not at will and cannot be terminated simply by giving notice.

a) <u>UK courts have been hesitant to find that a partnership is at will, and Myanmar courts are even less likely to do so.</u>

3. If the partnership is at will, the firm may be dissolved by either partner giving written notice of his intention to dissolve the firm[7]. A partnership is only a partnership at will if no contractual provision is made for the duration of the partnership or its determination[8].

4. The UK courts have generally been reluctant to hold that a partnership is at will, unless the contract is completely silent on the duration or the determination. Thus, any indication that there is a fixed duration or a mechanism for determination would go towards showing that the

[5] Andrew Burrows and Adrian Briggs, The Law of Contract in Myanmar (OUP 2017)
[6] AIR (1937) Ran. 303
[7] Section 43(1), Partnership Act 1932
[8] Section 7, Partnership Act 1932

partnership is not at will. For instance, in *Moss v Elphick*[9] the plaintiff argued that since a clause stating that the partnership was to be for "the joint lives of the parties" was not a definite, ascertained period of time, it was not a fixed term for the purposes of section 26(1) of the UK Partnership Act 1890, and the partnership was at will. However, this was rejected by all three justices of the Court of Appeal, who held that section 26(1) only applies to situations where the partnership agreement is completely silent as to the duration of the partnership, and have not made any provision as to the duration of the partnership[10].

5. Myanmar courts are likely to be even more reluctant than the UK courts to declare that a partnership is at will. Under section 26(1) of the UK Partnership Act, a partnership is at will if parties have not agreed on a 'fixed term' for the duration of the partnership. In contrast, under the Burma Partnership Act a partnership will only be at will if there to be no provision on the duration or determination of the partnership whatsoever. Given the comparatively less formal nature of Burmese contracts to UK contracts, it is likely that parties may have intended a partnership to not be at-will even if no fixed term was agreed on. This may hence explain the difference in provisions between the two Acts and the comparatively more stringent interpretation by the Myanmar courts.

[9] [1910] 1 KB 846
[10] Ibid at 849, per Fletcher Moulton LJ

A

b) It is implied by course of dealing that the parties intended for the partnership to last for the duration of the jade-mining activities.

B

6. Reading section 7 of the Burma Partnership Act with section 11(1), a 'contract' between the partners for the duration or determination of the partnership is one that may be 'express or implied by a course of dealing'. Section 11(1) further states that this contract may be varied based on the consent of the partners that may be implied by a course of dealing.

C

7. It can be implied that the partners had agreed on the determination of the partnership through their course of dealing. In the present case, the partners had entered a jade-mining business, knowing that it will not be one that will continue for an indeterminately long-term. It can hence be implied that the parties would have intended for the partnership to last for the duration of the mining activities. Hence, while the parties have not explicitly set out the end-date of the agreement, the contract should be viewed as one with a fixed determination based on the duration of the mining activities. This is similar to the case of *Karumuthu Thiagarajan Chettiar v E.M. Muthappa Chettiar*[11], where the court viewed that since the partnership was set up to manage the management agencies of the mills, the partnership would end when the management agencies cease to exist. The determination of the partnership in that case, would be the duration in which the management

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[11] AIR (1961) SC 1225

agency exists.

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8. Furthermore, it would also not be commercially-viable for the parties to set out the exact end-date of the partnership given that they may not have full information of the amount of jade deposits available for mining at the Hpakant mines. They would also not be able to foresee rate at which they may mine these jades as this is subject to the market demand of the jade.

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c) Alternatively, it can be implied, by parties' course of dealing, that the partnership may be determined by the duration of the import permits.

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9. Even if the tribunal were to find it untenable that the partnership would last for as long as the jade mining permits, the partnership's operations also allow for a short-term determination of the partnership. In fact, the Respondent acknowledged this when it said in paragraph 39 of the Statement of Facts that the end of the permit given to the jade-mining business means that the Claimant "needs to find new things to do"[12]. This goes towards showing that the Respondent could foresee the short-term duration of the partnership, which implies that the partnership may be determined with each expiration of the import permits. Hence, it could not have been a partnership-at-will that continues for an indeterminately long period.

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[12][39], Moot Problem

d) Alternatively, the parties have implicitly consented to vary the contract to last at least until the Claimant has finished supplying Hashimoto Co. Ltd with jade from the Hpakant mines.

10. Even if the tribunal finds that it is insufficient to imply an agreement on the determination of the partnership, the partners have implicitly consented to a variation of the contract for it to last at least until 1 November 2017. The Claimant had consulted the Respondent on whether he should enter into a contract to supply jades from the Hpakant mines with Hashimoto Co. Ltd (HCL). The Respondent, fully aware of the source of the jade, and that the Claimant had consulted them because he intended to continue supplying the jade from the partnership, had encouraged the deal. The Respondent had also known that this contract would last from 1 November 2016 to 2017. Based on the Respondent's knowledge of the terms of the contract and his encouragement for the Claimant to take it up, the Respondent has, by his conduct, consented to a variation on the duration of the contract.

e) It was not the intentions of the parties for the partnership to be at-will.

11. In his treatise on partnerships, Lord Lindley stated that the attainment of the objects which the partners have declared they had in view is always

regarded as of the first importance[13]. This is consistent with the principles of contract law, where the objective is to give effect to the intentions that have been objectively expressed by the parties. Lord Lindley went on to state that however general the language of the partnership agreement may be, they will be construed with reference to the designed end and given a generous interpretation. This was the approach taken in *Chapple v Cadell* [14], where the strict wordings of the provisions of the partnership were not followed religiously, and the Lord Chancellor interpreted said provisions based on the conduct of the majority of the partners.

12. In the Indian case of *Suresh Kumar Sanghi v Amrit Kumar Sanghi and another* ('*Suresh Kumar')*[15], the court examined the partnership clauses that prevented partners from dissolving the partnership and requesting for a settlement of assets on the death of one of the partners. It interpreted this removal of partners' rights to dissolve a partnership as being inconsistent with providing partners with a right to terminate the partnership without seeking the other partners' consent in a partnership-at-will. In that case, the partnership was held to not be at will.

13. The present case is similar to *Suresh Kumar*[16] as the way in which the partners conducted their business was based on mutual consent, and is inconsistent with allowing any one of the party to leave the partnership

[13] Banks & Roderick I'Anson, *Lindley and Banks on Partnership*, 19th ed (Sweet & Maxwell, 2010) at para 10-05
[14] (1822) Jac 537
[15] AIR 1982 Dehli 131
[16] *Ibid*

without the other's consent. First, Clause 8 of the Partnership Agreement makes it abundantly clear that the partnership was also founded on the brotherhood ties between the two firms, and is intended to be a lasting one. Second, Clause 9 speaks of how the partners would try to resolve any conflict in a polite manner, to preserve the partnership. Furthermore, U Thein Kyaw and Dr Asamura have both resorted to compromising, and seeking each other's consent in their dealings. This can be seen when U Thein Kyaw agreed to draft the Partnership Agreement with Dr Asamura, despite being convinced that that was not how businesses in Myanmar was being conducted. This was also seen when Dr Asamura consulted U Thein Kyaw about the entering a contract with HCL that excluded the Respondent. The express clauses in the partnership governing their conduct of business through mutual consent, and the implied agreement to do so through U Thein Kyaw and Dr Asamura's actions, is hence inconsistent with providing either party with a right to unilaterally withdraw from the partnership without seeking the consent of the other party.

14. The two parties' common intentions to achieve long term purposes is also inconsistent with allowing either party to abruptly terminate the partnership unilaterally. Within the Partnership Agreement, both the Claimant and Respondent have articulated their long-term purposes in the partnership. In Clause 4, the Claimant had declared its strong will to train the local people of Myanmar so that they can 'learn new skills and be independent'. The Respondent, on the other hand, has articulated its goal to help the local Myanmar people to 'be competitive and compatible with the evolving

world and economy' in Clause 3. Such purposes cannot be achieved within a short timeframe, and the partnership would at least require both parties' mutual consent to abandon these purposes before termination can take place.

15. There were no lawyers involved or consulted in the drafting of the agreement, and these clauses are exactly what one would expect a layman to include if he did not expect the other party to be able to terminate the agreement on short notice. To hold that the partnership was at-will would be to defeat the objectives of the parties at the time the agreement was drafted.

f) <u>On a practical level, it is commercially unrealistic for a large-scale partnership to be at will.</u>

16. A purpose of a partnership is to allow partners to share in the profits of a joint business enterprise. In most partnerships, parties will have to make preparations, inject capital into the partnership and reallocate manpower. Allowing either party to walk away from the partnership at any time simply by giving notice would put important projects at risk of being significantly delayed and potentially lead to huge losses on investments for the other partners, especially for partnerships for businesses which are on a large scale. In *Econ Piling Pte Ltd v NCC International AB*[17], millions of dollars had been invested in construction works; the parties had agreed on a date of

[17] [2008] SGHC 26 at [67]

completion for the construction with compensation to be paid for each day completion of the project was delayed. The court rejected the assertion that the partnership was at will, deeming it "not commercially-sensible and wholly unrealistic" that partners working on such a large-scale project could walk out of the undertaking simply by serving notice of dissolution of the partnership to the other partner.

17. To hold that the partnership between the Claimant and the Respondent was at will would be commercially unrealistic. The jade mining business was on a scale which required them to apply for a "large scale" permit for their mining activities[18], and it would not be sensible for the Respondent to be able to terminate the partnership on a whim. The Claimant's workers had to be flown in from Japan, millions of dollars were injected into the partnership in capital contributions, expensive mining equipment and machinery had to be purchased and imported, and the Claimant was responsible for imparting new skills to students from the Respondent, which would have to take place over an extended period of time. It is thus unthinkable that the partnership could be terminated at the will of either party, putting all these preparations to waste.

18. Therefore, the partnership between could not have been a partnership-at-will. The Respondent's termination by giving notice was invalid.

[18] Question 7, Clarifications

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2. The partnership could not have been terminated by way of breach of contract.

a) <u>Dr. Lum was acting in her own capacity and not as a representative of the company, hence the Claimant could not have been in breach of Clause 11.</u>

19. Clause 11 of the Partnership Agreement only says that AID cannot do or say anything harmful to the national interest and solidarity of Myanmar. As a non-executive director[19] of the firm, Dr. Lum did not act as a representative of the Claimant company in receiving an interview. In common law, an individual director has no authority to represent or bind the company, even if he is the chairman of the board of directors[20]. Slade J held in *Rama Corporation LD v Proved Tin and General Investments LD*[21] that an ordinary director had no authority to represent or bind the company, and it is immaterial that any third party assumed that the director had such authority. Since the English common law principles apply in the absence of Myanmar statutory laws,[22] this would likewise be the law in Myanmar. Thus, Dr. Fiona's comment on the state of the Rohingyas in Myanmar could not have been a breach of Clause 11.

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[19] Question 3, Additional Clarifications
[20] Cheng Han Tan & Walter C M Woon, *Walter Woon on Company Law*, Rev 3rd Ed (Sweet & Maxwell, 2009) at 89
[21] [1952] 2 QB 147 at 155
[22] Claimant's Memorial at [10]

b) In any event, the Dr. Lum's comments were not harmful to the national interest and solidarity of Myanmar.

20. Dr. Lum's comments were not offensive in the least. She had two main messages: (1) that the Burmese people, including the new government must work together to end the persecution of the Rohingyas, and (2) the ethnic cleansing was an especially serious area of concern. Her statement does not imply that the government was responsible in any way for the ethnic cleansing, simply that they must be involved in the solution. As President of Second Life, an organisation that actively champions human rights, it was natural for her to condemn ethnic cleansing, a euphemism for the killing of minority groups, and to try and gain the support of the government in putting an end to this process. Her words, far from being harmful, were commendable.

21. Even if the comments may be taken to be offensive, they were not serious to an extent of being "harmful to the national interest and solidarity of Myanmar", so as to amount to a breach of Clause 11. The clause pertains specifically to comments or actions that in its effect did harm the 'interests' and 'solidarity' of the entire nation. Dr. Lum's comments attracted the unhappiness of only one-third of SPT's workers, and who even though were unhappy, were still able to return to work. Thus, Dr. Lum's comment did not attract ire from the other Myanmar people to an extent of injuring the solidarity of Myanmar. Prominent English dictionaries define

'solidarity' as 'unity of interests'[23] or 'agreement of feeling or action, especially among individuals with a common interest'[24]. Dr. Lum's statement about everyone "working together" to champion for human rights is to encourage solidarity, instead of injuring it. Despite her words being published in the Asian Influencers Magazine, it also did not invoke a nation-wide uproar about the loss of national solidarity.

22. Hence, to hold the Claimant in breach of clause 11 in this situation would be to view the effects of Dr. Lum's comments disproportionate to both its intentions and its actual effect.

c) <u>Even if there was a breach of Clause 11, the breach does not give rise to a right to terminate the partnership.</u>

23. Under section 39 of the Burma Contract Act 1872, the law on terminating contracts states that the aggrieved party may only put an end to the contract if the promisor has refused or is unable to perform his obligations in their entirety.

24. While s 39 should not be read literally to mean that the promisee may only terminate the contract if the promisor has not performed a single one of his obligations, it should be interpreted as that any breach of contract must be sufficiently serious in order for the promisee to terminate the contract. This

[23] Cambridge Dictionary (Online) *sub verbo* solidarity
[24] The Oxford English Dictionary (Online) *sub verbo* solidarity

is supported by illustration (b) to s 39, where the promisee was entitled to terminate the contract because the promisor had an 8-week contract and substantially breached the contract by refusing to continue performance at the end of the third week. Thus, only a breach that is sufficiently serious as to prevent parties' continual performance of partnership obligations can entitle the aggrieved party to terminate. This interpretation is supported by the Delhi High Court in *Classic Motors Ltd v Maruti Udyog Ltd* and ors[25].

25. Allowing one party to terminate based on a minor imperfection would be contrary to the emphasis on commercial practicality in Myanmar courts. As highlighted in the Court in *Maung Po Lun v. Ma E Mai*[26], "it is the duty of the Courts to administer justice taking a broad view and not to allow litigants to take advantage of legal technicalities".

26. In the present case, the alleged breach due to Dr. Lum's extraneous statement is not sufficiently fundamental. The Claimant's key obligations in the partnership as set out in Clause 4 and 6[27] are to provide all equipment and technical expertise, extract and cut jade. These obligations have been discharged in their entirety. The alleged breach is auxiliary to the primary obligations of the Claimant. Further, the breach was not sufficiently serious to lead to loss of confidence, since parties still continued with jade-mining until the Respondent had a better offer with Mr Patrick Green.

[25] 1995 IIAD (Delhi) 997; 57 (1995) DLT 677 at [33]
[26] [1964] 1 BLK 111 at 116
[27] Annexure 1, Moot Problem

27. Thus, the breach of Clause 11 does not go to the root of the contract and does not give rise to a valid ground for termination.

28. Further, the fact that the workers could continue to resume their duties[28] shows that even if there was a breach of Clause 11, the breach was not fundamental to make the partnership impossible.

d) Even if the Claimant has failed to perform the contract 'in its entirety' under s39, the Respondent has acquiesced to the continuance of the contract by its conduct.

29. Section 39 of the Contract Act 1872 precludes the aggrieved party from putting an end to the contract due to breach if they have signified acquiescence in the continuance of the contract by words or conduct. This is demonstrated by illustration (b) to section 39 – when the theatre manager consents to the singer A's continual performance, it is taken that he has affirmed the contract and "cannot now put an end to it". There are several requirements for this affirmation of the contract to be binding. First, the election to affirm the contract must be done with full knowledge of the facts giving rise to the breach and of one's right to elect between acceptance of repudiation and affirmation of the contract[29]. Second, the words or conduct which constitute the election must be unequivocal, such that they are

[28] [30], Moot Problem
[29] *Kendall v Hamilton* [1879] 4 AC 504

inconsistent with the exercise of the aggrieved party's rights to terminate the contract[30].

30. U Thein Kyaw elected to affirm the partnership on behalf of the Respondent in September 2016 by persuading the workers to resume their duty[31]. Being the owner and leader of SPT, he would have known all the facts giving rise to the breach. As someone with sufficient business acumen to start his own business at the age of 30, it is more likely than not that he would have known about something as fundamental as the right to terminate or affirm a contract. Since then, the Claimant has not been in breach of any of the terms of the Partnership Agreement and there is nothing to indicate that the situation has worsened. The Respondent's attempt to terminate the partnership in January 2017, some 4 months after affirming the contract, is therefore invalid.

3. The doctrine of promissory estoppel precludes the Respondent from terminating the partnership.

31. Applying the doctrine of promissory estoppel in equity, the Respondent should be estopped from terminating the partnership agreement. Promissory estoppel operates when the promisor makes a clear and unequivocal promise[32], which is intended to affect the legal relationship between the parties.[33] The promisor made the promise knowing that it will be relied

[30] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646, per Stephen J
[31] *Ibid*
[32] *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co. Ltd* [1972] AC 741
[33] *Chitty on Contracts* (Sweet & Maxwell, 2015, 32nd ed) at para 4-090

upon and the promise has in fact been relied upon by the promisee[34], such that it would be inequitable for the promisor to go back on his promise.

32. All the requirements for applying the doctrine of promissory estoppel have been met in the present case. U Thein Kyaw must have known the details of the contract the Claimant entered into with HCL, since the profits from the contract were being shared with the Respondent[35]. Thus when he told the Claimant to proceed with the engagement with HCL, it was a clear and unequivocal promise that the partnership between the Claimant and Respondent would last at least until 1 November 2017[36], the end of the contract with HCL, since the contract specifically stated that the jade was to be from the Hpakant mines. The Claimant relied on the promise in signing the USD 1.2 million contract, and will fulfil his contractual obligations without the partnership with the Respondent, something the Respondent knows full well. Furthermore, the Respondent only decided to terminate the partnership with the Claimant once he was approached with a better deal that would give him 85% of the profits. It is inequitable for the Respondent, who encouraged the Claimant to contract with HCL and has been benefitting from that contract, to end the Partnership now that he has found a better deal with Patrick Green.

33. Since the requirements to invoke the doctrine of promissory estoppel have been met, the Respondent should be estopped from terminating the

[34] *W.J. Alan& Co. Ltd v El Nasr Export and Import Co.* [1972] 2 QB 189
[35] Question 5, Additional Clarifications
[36] [35], Moot Problem

partnership. Allowing the Respondent to terminate would be detrimental to the Claimant who has relied on parties' sustained partnership to proceed with a contract with HCL.

A

B. The Claimant owns the jade mining equipment and machinery.

B

1. Both the manner of purchase and the Partnership Agreement itself indicate that the parties intended for AID to be the owner of the equipment and machinery.

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34. The effect of section 14 of the Partnership Act 1932 is that property purchased by one party only becomes the property of the firm if it is bought for the purposes of the business of the firm and there is no contrary intention displayed by the parties, by contract or otherwise. Further, the wording of section 14 suggests that when the property is bought with partnership fund, it is presumed that the property belongs to the partnership. Thus, it would follow that property purchased using individual fund does not trigger the same presumption. Instead, such property may likely belong to the individuals. In the present case, though the machinery was used in the course of the partnership, mere use did not change the status of the machinery. The machinery was intended to be the Claimant's separate property by virtue of the manner of purchase.

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35. If the asset was purchased through an individual partner's fund, instead of the joint funds of the partnership, it would follow that the asset was

intended to be the property of that partner.[37] This would likewise be the case in Myanmar, given that the commercial laws of Myanmar are similar to other former British colonies that adopted similar acts.[38] The Claimant purchased the machinery and equipment using its own funds, and no payment was made by the Respondent to the Claimant for the machinery and equipment, a strong indication that the machinery and equipment were to remain in the possession of the Claimant.

36. Section 20(1) of the UK Partnership Act 1890 is similar to s 14 of the Burma Partnership Act 1932, and in the case of *Miles v Clarke*[39], two partners conducted a business as commercial and fashion photographers in a studio, and did not agree on any of the terms, save that the profits would be split equally. It was held that the lease, furniture, fittings and the equipment of a studio were not part of the partnership property but remained the separate property of the defendant, the one who had purchased them, notwithstanding the finding that the parties contemplated and even indicated that the property should be brought into the common pool of partnership assets. Without a final agreement, only the consumable items of stock-in-trade were considered partnership assets – the law would not make any imaginary agreement between the parties and imply a term that was not essential to business efficacy.

37. Applying these principles to the current dispute, the machinery and

[37] Yeo Hwee Ying, *Law of Partnerships in Singapore - including LLP and LP*, (Lexis Nexis, 2015)
[38] Alec Christie, "The Rule of Law and Commercial Litigation in Myanmar" (2000) Pacific Rim Law & Policy Journal Vol. 10 No. 1 47
[39] [1953] 1 WLR 537

equipment used for jade mining are not consumables, and the court should not imply a term that would bring them into the partnership assets of the firm since it is not necessary as a matter of business efficacy. This is all the more so when the intention expressed was to the contrary – that the property should remain separate. Mere use of the equipment and machinery for the purpose of the partnership does not change the ownership of the property from separate to partnership property[40].

2. Even if the machinery is a partnership asset, the Claimant will receive its monetary value once the firm has been dissolved.

38. Section 48(b)(iii) of the Partnership Act states that following dissolution of a firm, each partner will receive what is rateably due to him on account of capital before the leftover profits are divided among the partners. A capital asset is defined by the Oxford English Dictionary as an "asset intended for continuing use, such as land, machinery, a patent or trademark, etc.". In *Garner v Murray*[41], the parties entered into a partnership with the understanding that each party would contribute to capital in unequal shares, but share the profits of the partnership equally. However, the court held that upon dissolution of the partnership each partner had to contribute an equal share to make up for the deficiency in capital, and the assets would be used to pay each partner back for what they had contributed to the partnership in

[40] *Boda Narayana Murthy & Sons v Velluri Venkata* (1977) 2 An WR 480: AIR 1978 AP 257
[41] (1904) 1 Ch 57

respect of the capital. Only after that would any remaining profits be split equally among the partners.

39. The machinery and equipment purchased by the Claimant would fall under the category of capital since they were not consumables, but acquired by the Claimant at the outset of the partnership and used continually for the jade mining operations. It is also known that both parties made capital contributions of approximately USD 2.5 million each for the operational cost of running the jade mining business[42]. The cost of the machinery and equipment is thus the difference in capital contribution made by the Claimant and Respondent, and before the profits of the business are split between the partners in the agreed ratio of 35% to 65%, the cost of the machinery must be returned to the Claimant.

C. The JADEYE software is protected by copyright, and these rights belong to the Claimant.

1. Computer software is protected by copyright under Burma Laws.

a) Computer software can be protected as a form of literary work.

40. As defined in the first schedule of the Burma Copyright Act, literary work

[42] [17], Moot Problem; Question 12, Additional Clarifications

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'includes maps, charts, plans, tables and compilations'. The use of 'includes' denotes that the definition is not intended to be exhaustive. Given the technological advances since the drafting of this act, this Court should acknowledge that the definition of 'literary works' has expanded and can encompass computer programs, as is the case in most other jurisdictions. Acknowledging computer programs as protected under the Copyright Act brings the Myanmar law close to the international standards, and is in accordance with the principles of "equity, justice and good conscience" in section 13(3) of the Burma Laws Act 1898.

41. In the United Kingdom, where the Burma Copyright Act originates, the Copyright, Designs and Patents Act 1988 protects computer software as literary works under section 3(1). The Australian Parliament has also enacted the Australian Copyright Amendment Act 1984 to confirm that computer programs were protected by copyright, whatever their form.[43] In the Berne Copyright Convention, literary works are defined as productions in the literary, scientific and artistic domain. Likewise, the Myanmar Copyright Act needs to take into account of the technological advancement since 1911. Acknowledging the subsistence of computer software is in line with global development in copyright protection.

42. Further, Myanmar is a founding member of WTO who has an obligation to implement the provisions of Trade-Related Related Aspects of Intellectual Property Rights (TRIPS Agreement)[44], which explicitly protects computer

[43] David Bainbridge, *Software Copyright Law*, 4th ed, (Butterworths, 1999)
[44] WIPO, "Myanmar, IP Laws and Treaties", online: <http://www.wipo.int/wipolex/en/profile.jsp?code=MM>

software in accordance with the definitions in the Berne Convention. In fact, Myanmar has already taken steps to comply with its obligations as a signatory to the TRIPS Agreement. In the Draft Copyright Act 2005, computer programs are recognized under section 2(q). The legislative intent is clear that computer software is to be recognized and protected.

43. Thus, it is highly likely that the Myanmar courts will recognize the copyright in computer software. This Tribunal should thus apply the rules of law parties have designated.[45]

b) <u>Recognizing the subsistence of the copyright in computer software is in line with section 13 of the Burma Laws Act.</u>

44. Section 13 of the Burma Laws Act requires the courts to decide based on "equity, justice and good conscience". In the present case, the JADEYE is a source code program that requires considerable skills and judgment. It allows users to test jade quality at 99% accuracy.[46] Denying protection of this complex program would be contrary to the notions of equity and justice.

[45] Article 35, KLRCA
[46] [22], Moot Problem

A

2. The rights to the software are owned by the Claimant.

B

a) <u>The JADEYE software was created by Joe Yamashita in the course of his employment under AID for the purposes of the company.</u>

C

45. In section 5(1)(b) of the First Schedule of the Burma Copyright Act, when the author working under a contract of service creates work "in the course of his employment", the first owner of the copyright is the "person by whom the author is employed", unless there has been agreement to the contrary. As demonstrated in the case of *Ray v Classic FM Plc*[47], in the context of copyright the pertinent question one must ask to determine whether a work is made in the course of employment is simply whether there was a contract of employment. It does not matter whether the employee was specifically hired to create the resulting work. If there is a contract of employment, the statutory presumption is that the copyright belongs to the employer.

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46. In the present case, the software was created in the course of Joe Yamashita's employment with the Claimant as a financial executive[48], and there were no agreement to the contrary. Joe Yamashita created the JADEYE for the purpose of optimizing the company's jade extraction processes. It was in all likelihood done with the use of AID's resources,

[47] [1988] ECC 488 at [36]
[48] [21], Moot Problem

namely the company's computer and jade, since it would be exceedingly difficult to create a software like JADEYE without conducting any experiments on real jade. The software was also installed on all the company's computers and equipment that were used at the mining site, at the order of Dr. Yugi Asamura. Furthermore, Joe Yamashita's conduct, by showing Dr. Yugi Asamura the JADEYE program immediately when the program was ready to be used[49], and by handing the source code of the JADEYE to the Head of Finance after he resigned, showed no agreement to the contrary. Rather, such conduct is an acquiescence to the fact that the Claimant is the owner of the copyright of the JADEYE. The Claimant is therefore the rightful owner of the copyright of the JADEYE.

b) Alternatively, Joe Yamashita had assigned the copyright of the JADEYE to the Claimant in equity.

47. Even if Joe Yamashita was the first owner of the copyright, there was an equitable assignment of the copyright to the Claimant. Joe merely held the copyright on trust for the Claimant, with the understanding that the JADEYE would eventually belong to the Claimant. While section 5(2) to Schedule 1 of the Burma Copyright Act 1914 requires a written assignment for the legal transfer of rights, there is no such requirement for an equitable transfer[50]. If an equitable assignment which purports to assign the whole of the copyright is made out, it does not become a partial assignment merely

[49] [21], Moot Problem
[50] Lord Mackay of Clashfern, *Halsbury's Laws of England vol 23*, 5th ed, (LexisNexis, 2016) at 434

because it is equitable[51]. The notion of equitable assignment of copyright is enshrined in the common law case of *John Richardson v Flanders*[52]. Although the Burma Copyright Act is silent on the issue of implicit equitable assignment, there is good reason for the statute not to explicitly provide for such assignment, as pointed out in an article by Richard Taylor[53]. He writes that however the law is framed, some poor business person will unwittingly fail to comply with its strict black letter. A written assignment is ideal, but the law should not set traps for the unwary by refusing relief to those who have failed to comply with the strict letter of the law. The well-established common law doctrine of equitable assignment should thus to prevent injustice.

48. In Malaysia where the Copyright Act 1987 is in pari materia with the Burma Copyright Act, courts accept that the statute does not prohibit equitable assignment of copyright. The High Court of Kuala Lumpur in *Prism Bahad v Measat Broadcast Network System Sdn Bhd*[54] held that there was no principle or policy why equitable assignment cannot be recognized. Thus, the doctrine of equitable assignment can be applied to the current case.

49. In *John Richardson Computers Ltd v Flanders (No. 2)*[55], the court held that the independent contractor, Mr Worthington, who authored the program

[51] *Performing Right Society v London Theatre of Varieties* [1924] AC 1 at 28
[52] [1993] FSR 497
[53] Richard Taylor, "*Against an integrated intellectual property code: a response to "Reforming intellectual property law: an obvious and not-so-obvious agenda*" (2009) 3 IPQ 281 at 284
[54] [2017] MLJU 511
[55] [1993] FSR 497

held the copyright of the program on trust for the employer, Mr Richardson. Mr Worthington expressed clearly in evidence that he created the program with the understanding that Mr Richardson would be the owner of the right. It is observed by David Bainbridge that when difficulties arise as to the ownership of commissioned work, especially due to the lack of express agreement, courts would apply the concept of beneficial ownership. The beneficial owner would then retain the right to use the work.[56]

50. In *Fresh Trading Ltd v Deepend Fresh Recovery Ltd*[57], it was *intimated* in obiter dicta that the rights to a logo created by the Defendant had been impliedly assigned to the Claimant, even though the Defendant was not an employee of the Claimant. The logo had been created specifically for the Claimant, and it had been approved by the Claimant for the purposes of the Claimant's business. The court stated further that "it would be wholly unrealistic to envisage [the Defendant] using works which were employed as [the Claimant's] marketing materials for themselves or other clients", hence there is good reason to believe that the Claimant would have been assigned the rights to the logo had the matter been before the court.

51. The JADEYE was created by Joe Yamashita specifically for the purposes of the Claimant's business. Joe Yamashita was more than an independent contractor. Instead, he was working under a contract of service for which he was given consideration. His conduct, by leaving the Claimant the hard disk containing the source code of program, shows an understanding that the

[56] David Bainbridge, *Intellectual Property*, 9th ed (Pearson, 2012)
[57] [2015] EWHC 52 (Ch) at [54]

JADEYE was created for the Claimant, acknowledging the Claimant as the beneficial owner of the software.

52. Moreover, similar to the author in Fresh Trading, Joe Yamashita informed Dr. Yugi upon completion of the JADEYE software[58], who then approved it and had it installed on all the machinery and computers used in the Claimant's business[59]. It is also difficult to see how Joe would have a personal use for JADEYE, especially since he made it clear that he had no intention of leveraging the software for personal profit[60]. Thus, there are ample grounds to conclude that the copyright to JADEYE was impliedly assigned to the claimant.

c) <u>The JADEYE was never brought into the common stock of the partnership.</u>

53. Copyright as a bundle of rights[61] to allow the owner to 'produce or reproduce,… to convert…(and) to record'[62] any work, is considered an intangible property that may be owned by a legal entity, just like any other tangible property. As such, in the case of determining whether the copyright has been transferred to the partnership or remains separate property, section 14 of the Burma Partnership Act as applied in the previous issue[63], also applies in the present case.

[58] [21], Moot Problem
[59] [23], Moot Problem
[60] [24], Moot Problem
[61] Ben McFarlane, *The Structure of Property Law*, 1st ed, (Hart Publishing, 2008)
[62] First Schedule, section 2 of the Burma Copyright Act 1914
[63] Claimant's Memorial at [39]

A

54. As stated above, a property is considered partnership property if it was 'acquired… in the course of the business of the firm', subject to contract or any other contrary intention of both parties. The intentions of the parties have to be viewed in their totality based on factors such as the how the property was acquired or created, the purpose the property was acquired to serve, and if the property was subsequently treated as partnership property. The mere use of the property in the partnership does not make a property belong to the partnership. Evidence will have to be adduced to show that parties had intended for the property to be considered partnership asset.[64]

B

C

55. While the purpose of the JADEYE software was intended to enhance the business of the partnership at the Hpakant mines, it was not intended to be transferred into the common stock of the partnership. As seen under Clause 4 of the Partnership Agreement, the intention of the parties is that the Claimant provides technical expertise for the term of the partnership. The JADEYE software, created by the Claimant's employee, is considered part of the technical expertise the Claimant has offered. The provision of technical expertise does not include the transferring the rights of these expertise, as to do so would be to unfairly allow the Respondent to encroach on the Claimant's own right to its business. Thus, it would follow that the Claimant retains the rights over its technical expertise, including the copyright over the technology.

D

E

56. Further, the subsequent treatment of the copyright corroborates this

[64] *Boda Narayana Murthy & Sons v Velluri Venkata* (1977) 2 An WR 480: AIR 1978 AP 257

intention to keep the copyright as the Claimant's separate property. The Respondent was not involved in the installation of the JADEYE software on all the machinery being used for the jade-mining business, and the source code of JADEYE was never shared with the Respondent. Therefore, there was never any act to provide an assignment of the copyright to the Respondents, which is required under section 5(2) of the Burma Copyright Act 1914. The Respondent as a Burma company would have been aware of such a requirement in Burmese copyright law, which also exists across other commonwealth jurisdictions. Had the parties intended for the software to be owned by the Respondent, they would have made an assignment in writing.

57. Hence, it should follow that upon the termination of the partnership, the Respondents will no longer be able to make use of the JADEYE software without infringing JADEYE's copyright as they do not own the copyright and the consent to use the software, provided by the Claimant only for the duration of the partnership, would have been revoked.

d) <u>Even if the JADEYE software was brought into the stock of the firm as a partnership asset, there was no transfer of legal title.</u>

58. Section 5(2) to schedule 1 of the Burma Copyright Act makes it such that no transfer of legal title to copyright can be done without a signed written agreement. However, the court in *Premraj Brahmin and ors v Bhaniram Brahmin and ors*[65] stated that under the provisions of the Indian Contract

[65] 49CWN799 at [4]

Act and the Partnership Act, a written agreement is not needed to bring the separate property of a partner into the stock of the firm. The reason for this may be observed from the reasoning in *Coward v Phaestos*[66], where it was clarified that bringing property into the stock of the company does not mean that there has been any transfer of legal title.

59. In *Coward v Phaestos*[67], the English High Court reasoned that if a software is unique or has a positive effect upon the business which impacts the value of the business, it would be more likely to be considered partnership property. JADEYE was a unique creation by Joe Yamashita and which made the partnership significantly more profitable. If the JADEYE software was considered part of the partnership assets, the partners would have had the right to use the JADEYE software while the partnership agreement was still in place. However, since there was never any transfer of legal title, once the partnership is dissolved the rights of the software would return to the original owner of the copyright, along with whoever had been assigned rights in equity. In this case, it would be Joe or the Claimant, depending on the findings of the tribunal on the earlier issues.

VII. PRAYER FOR RELIEF

60. For the foregoing reasons, the Respondent respectfully requests the Tribunal's ruling that:

a. The termination of the Partnership Agreement by the Respondent is invalid, and

[66] [2013] EWHC 1292 (Ch) at [219]
[67] [2013] EWHC 1292 (Ch) at [214]

b. The machinery and equipment are owned by the Claimant, and

c. The JADEYE software is protected by copyright, and the rights are owned by the Claimant.

Dated this 11th day of August 2017.

COUNSEL FOR THE CLAIMANT