T1706-R

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 RESPONDENT

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II. STATEMENT OF JURISDICTION

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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").

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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.

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[1] Annexure 1, Moot Problem

III. QUESTIONS PRESENTED

1. Whether the termination of the Partnership Agreement is valid:

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   a. whether the partnership is at will; or

   b. whether the breach of Clause 11 entitles the Respondent to terminate.

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2. Whether the jade-mining machinery and equipment are owned by the Respondent:

   a. whether the machinery and equipment are the Respondent's separate property; or

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   b. whether the Respondent is entitled to 65% of the machinery and equipment.

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

D

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

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   b. whether the Respondent is the first owner of the copyright; or

   c. whether the copyright has been implicitly assigned to the Respondent; or

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   d. whether the copyright belongs to partnership asset.

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IV. STATEMENT OF FACTS

The partners

1. The Claimant, AID, is a private international development company incorporated in Tokyo, Japan. The company specializes in crisis relief and development in various developing countries across the world. The company is led by Dr. Yugi Asamura.

2. The Respondent, SPT, is a Myanmar company that empowers students through secular and vocational training in teashops, and jade carving and polishing studios. U Thein Kyaw is the owner of the company.

The beginning of the partnership

3. In 2007, the Myanmar government gifted 80 acres of land in Hpakant, Kachin State, to U Thein Kyaw for his contribution to the community. The land contained jade deposits. To create 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, U Thein Kyaw approached Dr Asamura to discuss possibilities of a partnership between two companies.

4. The Claimant and the Respondent entered into a Partnership Agreement (Annexure 1) on 9 September 2008 for the jade-mining business in the Hpakant mines. The partnership will also prioritize training new skillsets

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for the local people of Myanmar such that they can be independent[2] and competitive[3].

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5. Under the Partnership Agreement, the Claimant will provide all the equipment required, while the Respondent will obtain the permits and requirements by the government of Myanmar. On the issue of property ownership, both parties only set aside Clause 2 of the Partnership Agreement which stated that U Thein Kyaw will continue to own the land used for the business. Both parties also agreed that the partnership will be "for the long term" and the Respondent will be entitled to 65% of the profits, while the Claimant will be entitled to 35%. They further agreed to settled all differences by peaceful means, and apply Myanmar laws for all disputes.

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6. Soon after they entered into the partnership, Dr. Asamura suggested that parties make capital contributions the partnership. The Respondent agreed and injected capital contributions of USD 2.5 million, while the Claimant USD 1.5 million. The funds were used for further operational funds for the partnership.

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The creation of the JADEYE software

7. On 11 April 2012, Joe Yamashita, an AID finance executive posted to the partnership in Myanmar, created the "JADEYE" software to optimize the jade extraction process at the Hpakant mines. The software was created to

[2] [4], Moot Problem
[3] [5], Moot Problem

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expedite assessment work of the jade quality and determine the scalability and economic value of the site. The partnership conducted trials on the software. After the trial tests yielded positive results, the software was installed on all the computers and equipment onsite. U Thein Kyaw was pleased with the software and offered Joe Yamashita USD$18,000 in cash. However, Joe Yamashita declined and said that the software JADEYE "was for the benefit of all of us".

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8. A year later, Joe Yamashita resigned. During his exit clearance conducted in Tokyo, he left behind the source code of the JADEYE software in a hard disk drive, along with his other documents.

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Increasing tensions between the parties

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9. However, tensions started to arise between the Respondent and the Claimant companies.

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10. At an interview with the Asian Influencer's Magazine, Dr Asamura's wife, Dr. Fiona Lum, rallied the magazine's readers to "end the persecution of the Rohingyas", described it as "ethnic cleansing", and called on the newly-elected Myanmar government to "end the problem immediately". Dr Asamura was present when the interview was given.

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11. Unfortunately, the published interview triggered negative response in many of the Respondent's employees and students because 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 refused to do so. U Thein Kyaw personally coaxed the angry workers back to work to get the workers to resume their duties.

Termination of the partnership

12. In 2016, both the Claimant and the Respondent were separately approached by different companies intending to work with them on the jade business. Seeing that they were independent enough to carry on their businesses, and that their working relation was hindered by unresolved tensions from Dr Lum's comments, the Respondents suggested to terminate the Partnership Agreement, and offered to bear the relocation costs for AID's employees. The Claimants objected to the termination. Both parties decided to submit the dispute to binding arbitration.

V. SUMMARY OF PLEADINGS

A. The Respondent's termination of the agreement is valid.

The Partnership Agreement had neither express duration nor determination. The conduct of the parties also showed that they had intended for the partnership to be at-will. With a service of an arbitration notice, the Respondent is able to validly terminate the partnership under Section 43(1) of the Burma Partnership Act 1932.

Alternatively, the Claimant has breached Clause 11 of the Partnership Agreement, which entitles the Respondent to terminate it under Section 39 of the Burma Contract Act 1872. Dr Asamura, representing the Claimant, had refused to apologise to the Respondent's employees when his wife had made remarks that harmed Myanmar's 'national interest and solidarity'. This breach has undermined mutual trust and confidence in the partnership, going to the root of the Partnership Agreement.

B. The Respondent owns the jade-mining machinery and equipment.

The conduct of both parties showed that the ownership of the machinery and equipment has been transferred to the Respondent. The Respondent is recorded as the owner and operator of the machinery and equipment on the import permits. The Claimant has also indicated the Respondent as the consignee in the Bill of Lading when delivering the machinery to the Respondent. The Claimant has not retained any proof of title.

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Even if the machinery and equipment are considered to be brought into the stock of the partnership, the Respondent owns 65% of the partnership asset by virtue of Clause 7 of the Agreement.

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C. The JADEYE Software is not copyrighted.

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Interpreting the Burma Copyright Act 1914 literally and contextually, computer software is not protected as literary work. Also, the principle of copyright protection protects the expression of a piece of work and not a software's functionality. The provisions of the 1914 Act are also not developed to deal with controversial issues such as the scope of copyright protection

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As the parties have agreed to submit all matters to Myanmar law, only Myanmar law, which is unlike the law in other jurisdictions, should be applied. The Draft Copyright Act 2005 has not been passed by the Myanmar government and is thus inapplicable.

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Alternatively, if the JADEYE software was protected by copyright, the Respondent has beneficial interest in the software, as Joe Yamashita has implicitly assigned the rights to the partnership. Thus, the Respondent is entitled to 65% of the rights.

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In any event, the copyright of the JADEYE software is brought to the pool of partnership assets. Both the Claimant and the Respondent are legal owners of the copyright. The Respondent would still be entitled to 65% of the rights.

VI. PLEADINGS

A. The Respondent's termination of the agreement is valid.

13. Since parties have agreed to settle all disputes arising from the partnership by applying the law of Myanmar, the first port of call is the Burma Partnership Act of 1932. As a partnership is a relationship that arises from contract, the Contract Act 1872 applies as well. Under these two statutes, there are three possible routes for the Respondent to terminating 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 termination is valid if it was done by giving notice or by accepting the Claimant's breach.

14. The Burma Partnership Act 1932 and the Contract Act 1872 originate from the Indian Partnership Act and Contract Act respectively and are *in pari materia* with their Indian counterparts. 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 Contract Act 1872 are highly persuasive in Myanmar law. The Indian statutes were intended to be a codification of common law principles laid out in the various areas of law[4], and hence cases from the United Kingdom illustrating the common law principles of provisions in the two acts are also highly persuasive. The

[4] Andrew Burrows and Adrian Briggs, *The Law of Contract in Myanmar* (OUP, 2017)

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importance of English common law was emphasised in *U Ba Yi v Mahant Singh*[5], where the court found that English common law principles are to be applied where there is a gap in Myanmar law.

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1. The partnership was at will, and the Respondent was entitled to terminate the partnership by giving written notice under section 43(1) of the Partnership Act 1932.

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15. Section 7 of the Burma Partnership Act 1932 states that a partnership without a provision for the duration or the determination of the partnership is a partnership-at-will. A partnership-at-will allows the Respondent to terminate the partnership upon giving notice in writing[6]. As the Partnership Agreement between the Respondent and the Claimant does not have a provision for the duration or the determination of the partnership, the partnership was a partnership-at-will, which can be dissolved by giving notice in writing. Thus, the Respondent's termination of the contract was valid.

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a) <u>The partnership was at will as there is no contractual provision for a definite duration or a determination of the partnership.</u>

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16. According to section 7 of the Burma Partnership Act, a partnership is at will if the parties have not expressly or impliedly included any provisions

[5] AIR (1937) Ran. 303
[6] Section 43(1), Partnership Act 1932

regarding the duration of the partnership or for the determination of the partnership[7]. A term for the duration of the partnership refers to one which specifies that the partnership will continue for a "definite period or during the continuance of a definite work"[8], while a term for the determination of the partnership is one which states that the partnership will come to an end once certain conditions are fulfilled. For example, in the case of *Karumuthu Thiagarajan Chettiar v E.M. Muthappa Chettiar*[9], the India Supreme Court found that there was a determination of the partnership as the partnership which was created solely for the management of the mills and it was agreed that the partnership would exist only while the management agency existed.

17. In the present case, the express wording of the Partnership Agreement does not specify a definite period of time for which the partnership should subsist. Clause 8 of the Agreement uses the subjective descriptor of "long term", in describing the partnership period. It is uncertain what "long term" refers to, or how it should be defined.

18. There is also no definite implied duration that can be inferred from the conduct of the parties since both parties seem to be working towards the indistinct 'long term' until either of them ends the partnership. The Respondent's aims to develop new skill sets for its students and to ensure a 'sustainable' extraction of the jade[10], and the Claimant's aim to expand its

[7] *Karumuthu Thiagarajan Chettiar v E.M. Muthappa Chettiar*, AIR (1961) SC 1225
[8] Chakravarti Rajagopalachari, *Raja Gopalachari's Commentaries on the Indian Partnership Act 1932* (Law Publishers, 1998, 2nd Ed, Vol 1) at p175
[9] AIR (1961) SC 1225
[10] [10], Moot Problem

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influence and impact of its private international work[11]. The partnership has not defined a deadline by which to achieve these aims.

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19. Furthermore, there is no express mechanism for determination. Despite there being potential dates where the partnership could end, such as the expiration of the machinery permits on 31 March 2019[12] or the end of the

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Claimant's contract with HCL on 1 November 201713, the parties never did agree to make use of these dates to determine the partnership. These circumstances are insufficient for a term on the determination of the

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partnership to be implied as well. The House of Lords in *Syers v Syers*[14] held that a lease for a fixed term is not in itself sufficient evidence of an implied agreement to continue the partnership for a definite period,

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especially when the lease is for a long period, since there is often no guarantee that the partnership will last for the full duration of the permit. Similarly, in the present case, the Partnership Agreement was entered into on 9 September 2008. This means that by the time the permit expired, the

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partnership would have had gone on for approximately ten and a half years. This is a long period of time during which there could be substantial changes to the nature of the business or the relationship between parties.

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There is no guarantee that the Claimant and Respondent would have remained partners for this period of time. Thus, it is akin to the case of *Syers v Syers*, that the permit is not a method of determination. Hence the partnership must be at will, since the absence of mechanism for

[11] [13], Moot Problem
[12] [18], Moot Problem
[13] [35], Moot Problem
[14] (1876) 1 App Cas 174 at 189 per Lord Hatherley

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determination must be taken to mean that parties intended their partnership to go on indefinitely.

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20. Further, the goals of the partnership was to provide for transfer of knowledge from the Claimant to the Respondent's employees. As parties have agreed in the Agreement, these goals are to be prioritized over the subject matter of jade-mining.[15] Thus, it is irrelevant that the nature of jade mine is exhaustive. What is crucial is that the parties' primary objective was to achieve transfer of knowledge, and did not set a definite timeline.

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21. Thus, the contract is silent on both the duration and determination, and should be treated as partnership-at-will.

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b) <u>The Respondent has served written notice to the Claimant via the notice of arbitration required under the KLRCA i-Arbitration rules.</u>

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22. Under section 43(1) of the 1932 Burma Partnership Act, a partnership-at-will may be dissolved upon the service of notice in writing. Such a notice in writing may take the form of a plaint for a suit of dissolution[16]. Given that the parties have elected for their disputes to be settled before an arbitral tribunal instead of a court, a notice of arbitration pursuant to Article 4 of the KLRCA i-Arbitration rules which similarly outlines the claims by the Respondent in the arbitration should be treated as the equivalent of a plaint

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[15] Clause 5, Annexure 1, Moot Problem
[16] *Banarsi Das v Seth Kanshiram* [1964] 1 SCR 316, affirmed in *Arunachalam & Co. v M. Sadasivam* AIR (1985) Mad 354

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in a court suit. The requirement for notice in writing has therefore been satisfied.

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2. Even if the partnership was not at will, the Claimant may put an end to the Partnership since the Claimant has breached Clause 11 of the Partnership Agreement.

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23. The Respondent can terminate the partnership agreement through section 39 of the Contract Act 1872. Section 39 states that the aggrieved party may put an end to the contract if the promisor has refused or is unable to perform his obligations in their entirety. In illustration (b) to s 39, the promisee was entitled to terminate the contract even though the promisor had already performed on five of the sixteen nights he was supposed to perform, simply because the promisor refused to perform on one night, the sixth night. While partners should not be allowed to terminate the partnership for trivial breaches, breaches that signify either party's refusal or inability to continue performing their obligations, as illustrated in s39(b), should allow the aggrieved party to terminate the contract. To similar effect is *Loscombe v Russel*[17], where it was held that the partnership may be ended when the breach is "of such a character as to sh[o]w that the parties cannot continue partners".

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[17] (1830) 4 Sim 8

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24. It should be noted that the court may dissolve a firm if there are grounds which make it just and equitable to do so[18]. In *Hardutt Singh v Mukha Singh*[19] the court dissolved the firm on this ground because the partners had lost mutual confidence in one another. It was found that although the partnership had earned profits in the past, the loss of confidence was such that it could not be carried on save at a loss. Though this Tribunal cannot dissolve a firm under Section 44(g)[20], the test of "loss of confidence" may still be instructive as to the degree of seriousness required to terminate a contract. Thus, it follows that any breach of a term which causes a breakdown of relations and a loss of confidence between partners should entitle the aggrieved party to terminate the partnership.

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25. In the present case, the Claimant has breached Clause 11 of the Partnership Agreement through comments made about the "ethnic cleansing" of Rohingyas, causing the Respondent and its workers to lose confidence and respect for the Claimant. This breach went to the root of the partnership contract as it was no longer tenable for the Respondent to continue the partnership with the Claimant, especially since that parties formed the partnership on the basis of trust and brotherhood[21].

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26. Clause 11 of the Partnership Agreement prohibits the Claimant from doing or saying anything harmful to the national interest and solidarity of

[18] Section 44(g), Burma Partnership Act 1932
[19] AIR 1973 J&K 46 at [2]
[20] *Narinder Singh Randhawa & Anr v Hardial Singh Dhillon Ors* AIR 1985 P&H 41
[21] [14], Moot Problem

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Myanmar, and this clause was breached when Dr Yugi Asamura, the Chief Executive Officer of AID and a man with the authority to represent the company, implicitly assented to Dr Fiona Lum's inflammatory remarks. He did so by appearing alongside Dr Lum when she made the statements, and by refusing to apologise to SPT's workers who were offended by it.[22]

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27. Dr Lum's statement implied that the current government was complicit in the persecution of Rohingyas, injuring the national interest and solidarity of the Myanmar people. Firstly, the use of the term "ethnic cleansing" denotes a serious allegation that the Myanmar government's act can constitute crimes against humanity. It is noted by the United Nations Commission of Experts the practice of ethnic cleansing can "constitute crimes against humanity and can be assimilated to specific war crimes." and can also "fall within the meaning of the Genocide Convention.".[23] Such strong allegations deeply injure the national pride of the Myanmar people, affecting their confidence in the Japanese counterparts.

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28. Secondly, Dr Lum's accusation concerning such a divisive issue is deemed interventionist in light of Myanmar's long-standing history confronting human rights issues. Myanmar has had a tumultuous political history. The government of the time often responded to people's unhappiness with the regime with violent means. As a result, Myanmar was seen as the lowest

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[22] [30], Moot Problem

[23] UN Security Council, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 26 January 1993, S/25274 , available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/25274 [accessed 11 August 2017] and UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/674 [accessed 11 August 2017]

common denominator in ASEAN for civil and political rights as well as human development[24], and in September 2007, the ASEAN foreign ministers publicly condemned the Burmese government's use of automatic weapons on demonstrators[25]. Read in this context, Dr Lum's statement that Daw Su's government was involved in the ethnic cleansing of the Rohingyas implied that Myanmar has not progressed at all since regaining democracy and is still a third-rate nation. This comment is thus an unwarranted criticism of delicate domestic issues. Such a statement is bound to offend the Burmese people and adversely impacts the national interest of Myanmar.

29. Although Dr Lum is only a non-executive director[26] of the company, her statements were made during an interview for an article on "Asia's Power Couples" with her husband Dr Asamura present, and it would be natural for the readers of the article to assume that the views expressed in the interview reflected the view of the couple, rather than either husband or wife alone. By failing to clarify what his position was during the interview, Dr Asamura allowed the public to believe that his wife's statements on the Rohingyas reflected his own position, and by extension, the position of the Claimant. This is all the more so since the couple was asked to give their views in light of their existing business involvement in Myanmar[27]. To make matters worse, despite being directly asked to apologise to the

[24] Eugene KB Tan, "*The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*", (2008) 12 SYBIL 171 at 192
[25] *Ibid*
[26] Question 3, Additional Clarifications
[27] [27], Moot Problem

offended the Respondent's employees, Dr Asamura refused to do so[28]. His refusal to do so can also be seen as further support for Dr Lum's remarks.

30. Hence while Dr Asamura might not have intended to act as an agent of the Claimant, the apparent authority he possesses, deriving from his position as the highest ranking executive officer of the company is sufficient for the Claimant to be seen as sanctioning Dr Asamura and Dr Lum's remarks, and to have breached Clause 11.

3. The Respondent has not signified acquiescence in the continuance of the partnership.

31. In cases of breach, the aggrieved party may be precluded from terminating the contract if they had previously signified, by words or conduct, their acquiescence in the continuance of the partnership. However, 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 inconsistent with the exercise of the aggrieved party's rights to terminate the contract[30]. For this reason, mere inactivity on its own may not amount to affirmation[31].

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[28] [30], Moot Problem
[29] *Kendall v Hamilton* [1879] 4 AC 504
[30] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 per Stephen J at 646

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32. U Thein Kyaw did not affirm the partnership by coaxing the Respondent's workers to resume their duties. As U Thein Kyaw was not legally trained, it is questionable whether he was aware of his rights to either terminate the contract or affirm it. Even if he did, his actions were not unequivocal. The jade mining business with the Claimant was a large one which had gone on for about 8 years by that point. It would have an impact not only on the Respondent's profits, but the lives of the students and the Claimant's employees as well. U Thein Kyaw would not have terminated the partnership without taking the time to give it serious thought and discuss it with other employees of the Respondent. The Respondent's workers went on strike immediately after the breach was committed, thus by making his workers resume their duties, U Thein Kyaw was merely preventing chaos from spreading within his company and disrupting his business, while giving himself more time to make a final decision on how to proceed.

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33. Moreover, it is acknowledged in *Stocznia Gdanska v Latvian Shipping Company (No. 2)*[32] that innocent parties may have a period of time to make up his mind as to what to do. There must be a middle ground between acceptance of repudiation and affirmation of the contract.

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34. Thus, the Respondent's action should not be taken as affirmation of the breach. The Respondent is entitled to terminate the contract based on the breach of Clause 11.

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[31] *Cranleigh Precision Engg Ltd v Bryant* [1965] 1 WLR 1293
[32] [2002] 2 Lloyd's Rep 436, [2002] EWCA Civ 889 at [87]

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B. The Respondent owns the machinery and equipment

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1. The intention of the parties was to allow the Respondent to own the machinery and equipment.

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a) <u>The parties intended for the machinery and equipment to remain separate from the assets of the firm.</u>

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35. From section 11(1) of the Burma Partnership Act 1932, a 'contract' 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.

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36. In the present case, the parties have established a business practice of retaining separate ownership of the contributions they have made to the partnership. This can be seen in Clause 2 of the Agreement, which made provision for the land to belong to U Thein Kyaw despite it being the location for the mining business of the partnership. Both the Respondent and the Claimant's employees are under the employment of their individual companies despite working solely for the purpose of the partnership. This is similar to the High Court of Australia case of *Kelly v Kelly*[33]. In that case, the partners collaborated over various ventures, with abalone diving providing most of the partnership income. The abalone fishing permit was

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[33] (1990) 92 ALR 74; 64 ALJR 234

obtained by one of the partners prior to the formation of the partnership. While it was used in the partnership when it was formed, the court considered two other clauses in the contract which allowed separate properties owned by each of the partners to be used by the partnership, and inferred that the abalone licence was likely to remain separate property too. It is hence consistent for the partnership to have considered the machinery and equipment as separate property.

b) <u>There was an implicit agreement by conduct that the Respondent should own the machinery and equipment.</u>

37. The partnership must have intended for the Respondent to have legal ownership over the machinery. The Claimant had not claimed ownership over their machinery, despite the fact that it has a registered company in Myanmar[34]. Instead, the Claimant has repeatedly allowed the Respondent to do so. This is as the Claimant, in transporting the the machinery, had indicated SPT as the consignee in the Bill of Lading[35]. The Bill of Lading is defined as a document of title to goods under section 2(4) of the Burmese Sales of Goods Act 1930 that can be used to prove ownership and control. It had also neglected to insert a clause in the Agreement to lay claim over the machinery in the same way the Respondents had protected the land under Clause 2.

[34] Question 33, Additional Clarifications
[35] Question 25, Clarifications

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38. Furthermore, the Respondents are recorded as the legal owners of all the machinery and equipment in Myanmar. This is reflected in all the permits and licenses, which states the Respondents as the 'owner and operator' of the machineries. While the Claimant might not have been familiar with the Burmese registration procedures for imported machinery, Dr Asamura had experience handling rebuilding projects across different countries, and would have known to protect his property under the Partnership Agreement if that was what he really intended from the outset. From the Claimant's actions and the recorded title of ownership belonging to the Respondent, the partnership must have intended for the Respondent to own the machinery.

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2. Even if the Respondent is not the sole owner, the Respondent is entitled to 65% of the machinery and equipment as they are partnership assets.

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39. Property and rights in property acquired "for the purpose and in the course of the business of the firm"[36] are deemed as partnership assets, unless contrary intention appears. To determine whether property forms part of the partnership assets, the courts examine the intention of the parties as gathered by the partnership agreement and all the circumstances in which the property was purchased[37]. If the property is treated as a partnership asset, the property would be divided in proportion to parties' shares after

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[36] Section 14, Burma Partnership Act 1932
[37] *Lachmandas v Gulab Devi* AIR 1936 All 270

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the dissolution of the partnership.[38]

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40. Even if the machinery and equipment are not considered the separate property of the Respondent, they are still considered partnership assets. The machinery and equipment were acquired in the course of the partnership, for the purpose of the partnership (a). The Agreement implicitly allow the machinery and equipment to be treated as partnership property (b). This is further buttressed by parties' subsequent conduct, indicating an intention to treat the property as partnership assets

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a) The machinery and equipment were acquired in the course of the partnership.

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41. Prior to the partnership, the Claimant was a company that focuses on generic rebuilding projects around the world. The wording of Section 14 of the Burma Partnership Act would suggest that the machinery and equipment acquired in the course of the partnership, and for the purpose of the partnership are to be deemed as partnership assets.

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42. In *Ng Chu Chong t/a Grand Am Fashion Enterprise v Ng Swee Choon*[39], the Singapore High Court held that even though the defendant created the trademark 'McBlue', the trademark was to be considered as partnership asset as it was created after the formation of the partnership, for the benefit of the partnership. Professor Yeo Hwee Ying, Associate Professor at the

[38] Section 46, Burma Partnership Act 1932
[39] [2002] SGHC 39

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National University of Singapore, endorses this view that "if the property is acquired for the firm's benefit and is actually used and treated as partnership property, it will be deemed to be partnership asset even though it was paid for by the individual partner."[40] Thus, this Tribunal should consider the real intent of parties that override the issue of who paid for the assets.

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43. Therefore, given that the machinery and equipment were acquired not just for making profits in the jade-mining business, but also for the benefit of the local Myanmar people, such properties should be deemed as partnership asset.

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b) <u>There is an implied agreement that the machinery and equipment belong to the partnership.</u>

44. Since the Partnership Agreement is silent on the issue of the ownership of the machinery and equipment, it can be implied that the machinery and equipment would belong to the partnership. Laws on implication of term in contract are not laid out in the Myanmar Contract Act 1872. However, as suggested in the case of *Dr Daw Mya Swe v The Union of Burma Airways*[41], English common law applies in the absence of statutory provisions in Myanmar. Thus, the test of "officious bystander"[42] would apply.

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[40] Yeo Hwee Ying, *Law of Partnerships in Singapore - including LLP and LP* (Lexis Nexis, 2015) at para 9.26
[41] [1964] BLR 279
[42] *Shirlaw v Southern Foundries* [1940] AC 701; [1939] 2 KB 206

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45. Applying the "officious bystander" test, a reasonable person looking at parties' intent at the time of contract would deem the machinery and equipment as partnership assets. While the Claimant's obligation was to acquire the assets, the Respondent's was to acquire the permits necessary. Both contributed to the acquisition of the capital. Further, despite that parties have explicitly laid out in Clause 2 of the Agreement that the land would continue to belong to U Thein Kyaw, parties did not include a similar clause for the machinery and equipment. The facts in their totality would impress upon an officious bystander that parties intended to treat the equipment as joint property.

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46. This implication is corroborated by the Respondent's conduct in paying for all the expenses to import the equipment to Myanmar[43], as well as long-term continual usage of the machinery by the Respondent in Hpakant mine which suggests that parties have brought it into the common stock[44]. Therefore, the jade-mining machinery and equipment are to be treated as partnership assets, of which the Respondent is entitled to 65%.

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[43] Question 30, Clarifications
[44] Banks & Roderick I'Anson, *Lindley and Banks on Partnership* (Sweet & Maxwell, 2010, 19th Ed)

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C. The JADEYE Software is not copyrighted.

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1. The Burma Copyright Act 1914 does not recognise the subsistence of copyright in computer programs.

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47. Under section 35(1) of the Burma Copyright Act 1914, which extracts the same section from the 1911 UK Copyright Act, literary work is defined as any "maps, charts, plans, tables and compilations". On plain reading, the definition of literary work does not encompass computer programs. Furthermore, computer programs are dissimilar to the other 'literary works' listed under the first schedule of the Burma Copyright Act. In section 3(1)(b) of the 1988 UK Copyright, Designs and Patents Act, which is also adapted from the First Schedule of the 1911 UK Copyright Act, 'computer programs'[45] were listed as a separate item from 'tables and compilations'[46]. The UK Parliament thus recognized the difference of computer programs comparing to 'tables and compilations'. Further, applying the canon of *ejusdem generis* to the list in the First Schedule, computer programs should also not be interpreted as belonging to the same group of works as "maps and charts".

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48. Moreover, it is against the general principle that copyright protection to recognize computer software. Myanmar copyright law is derived from the UK doctrine of copyright protection, which serves to protect the form of

[45] section 3(1)(b) of the UK Copyright, Designs and Patent Act 1988
[46] *Ibid* at s3(1)(a)

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expression and not the idea behind the expression. In the House of Lords case of *Jeffreys v Boosey*[47], Justice Erie reiterated that copyright law seeks to protect the "order of words in the author's composition… not the words themselves… nor the ideas behind the words". This is because ideas essentially "exist in the mind (and) … are not available for appropriation".[48] The case of *University of London Press Ltd v University Tutorial Press Ltd*[49], in interpreting the 1911 UK Copyright Act, has gone further to express the need for the work to be expressed in some 'visible form'.

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49. Thus, applying this interpretation of the doctrine of copyright protection, computer programs should not be considered as a form of expression under 'literary works' in section 35(1) of the 1914 Act. This is because the crux of a computer program is its functionality – many different forms of coding are able to achieve the exact same result, just as altering the sequence of the numbers in a mathematical equation would not change the end result. It is the idea behind the computer software that needs to be protected, rather than its form of expression.

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50. This is why foreign jurisdictions that used to have copyright laws which were *in pari materia* to the Burmese Copyright Act 1914 have had to explicitly change the phrasing in section 35(1) to include computer programs within the definition of 'literary works', and not merely read the meaning of computer programs into 'literary works' in section 35(1).

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[47] [1854] EngR 816
[48] *Ibid* at P867
[49] [1916] 2 Ch. 601 (1916)

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Computer programs are not a form of expression protected under 'literary works', but are an exceptional group that is allowed protection with legislative reforms in other jurisdictions.

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51. Computer programs do not fall under the ambit of literary work under the applicable Myanmar Copyright Act of 1914, and hence are not protected by Burmese law.

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2. The Copyright Law (Draft) 2005 has not been passed by the Myanmar government and should not be applied.

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52. The Burmese government is currently in the process of reforming the law pertaining to intellectual property in Myanmar, and while the latest iterations of the Draft Myanmar Copyright Act[50] allows protection for computer programs, the Bill is still being discussed by the Myanmar government and should not be prematurely applied in the present case.

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53. The slow development of Myanmar law in this area is a known fact across the international community. In fact, the World Trade Organisation has granted Less Developed Countries, which include Myanmar, a delayed implementation of copyright legislation that is aligned to obligations under the Berne Convention pursuant to the TRIPS Agreement up till 2021[51]. This may be due to the 'lack of awareness (and)... lack of administration

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[51] World Trade Organisation and the TRIPS Agreement (n.d.) World Health Organisation, online: http://www.who.int/medicines/areas/policy/wto_trips/en/

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and management by the relevant Ministries', as acknowledged by U Khin Maung Win, Deputy Director of the Attorney General's Office[52].

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54. Furthermore, complications in providing copyright protection to computer programs have not been completely agreed on across jurisdictions, and remains an issue of the law that will have to be discussed by the Myanmar government. For instance, the courts in the United States still struggle with the extent to which computer software is protected, whether only the source code and object code merit protection, or whether the structure of the program is also protected[53]. For Australia, it was only after the Australian Copyright Amendment Act 1984 did the courts confirm that computer programs were protected by copyright, regardless of their forms. Therefore, given such controversies in the copyright protection of computer software, this Tribunal should not rush to make laws in the absence of new legislations.

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55. Both the Claimant and the Respondent agreed to subject the arbitration to Myanmar law in the knowledge that Myanmar's copyright law has not been reviewed to protect computer software as the other jurisdictions have. As such, the Respondents highlight the importance of giving effect to the risk allocation agreed upon by the two parties in Clause 10 of the Partnership Agreement that only current Myanmar law should be applied.

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[52] U Khin Maung Win, "*Copyright in Myanmar Since 1994*" (National Workshop for Copyright Awareness and Production and Utilitization of Myanmar Version of "Asian Copyright Handbook" delivered in Yangon, Myanmar, 7-9 September 2005)

[53] *Whelan Associates Inc v Jaslow Dental Laboratory Inc* [1987] FSR 1

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D. Alternatively, if the JADEYE software was protected by copyright, SPT has ownership over the copyright.

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1. Joe Yamashita was the first owner of the JADEYE software.

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56. Section 5(1) of Schedule 1 of the Burma Copyright Act 1914 provides that the author of a work shall be the first owner of the copyright therein. An exception to this rule is where the author was employed by someone else. and the work was made in the course of his employment. In this case, the copyright would belong to the author's employer, in the absence of any agreement to the contrary[54].

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57. In *Stephenson Jordan & Harrison Ltd v MacDonald*[55], the employee was employed as an accountant but not to give public lectures. Thus, it was not created in the ordinary course of his employment. The copyright over the book created by the employee is vested in him, and not his employer.

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58. In the same vein, the nature of Joe Yamashita's work as a financial executive was not to create computer software. Therefore, the ownership of JADEYE would be vested in Joe Yamashita, as it was not a part of the ordinary course of his employment to create a computer software.

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[54] Section 5(1)(b) of Schedule 1 to the Burma Copyright Act (1914)
[55] [1952] 1 TLR 101

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2. The copyright has been implicitly assigned to the partnership.

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59. Joe Yamashita has however, implicitly assigned the equitable ownership of JADEYE to the partnership. Under s5(2) of Schedule 1 of the Burma Copyright Act 1914, an express assignment of rights must be done in writing. The statute is silent on an implied assignment of rights. Referring to the UK cases examining the same section in the *in pari materia* UK Act however, the courts have considered the possibility of an implied assignment of equitable ownership. In this case, the Respondent has beneficial interest in the JADEYE software.

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60. In the case of *Merchant Adventurers Ltd v M Grew & Co Ltd (t/a Emess Lighting)*[56] ("*Merchant*"), the UK Court of Chancery considered the plaintiffs, who had paid an independent designer for his artwork, the equitable owners of the art. This is even though he worked under a contract for service, instead of a contract of service. This was because the designer had designed the artwork for the plaintiff's purposes.

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61. In the present case, just as the designer in *Merchant* had designed the artwork for the plaintiffs' purposes, Joe Yamashita had created the JADEYE software for the purposes of the partnership, to conduct 'expediting assessment work' onsite at the Hpakant mines. Through this,

[56] [1972] Ch. 242

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the Respondent would have equitable interest in the JADEYE software since it was created with an understanding that the partnership would ultimately benefit from it. Joe Yamashita had also declared to the Respondent that the work was 'for the benefit of us all'[57]. This indicated that he did not view the Claimant as an exclusive user of the JADEYE software even as he himself was an employee of the Claimant.

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62. Thus, according to section 48(b)(iv), the residue of the partnership assets should be split according to profit-sharing agreement parties have. Thus, the Respondent is entitled to 65% of the rights in the JADEYE program.

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E. Alternatively, the software was created for the partnership, and both partners, SPT and AID, should be considered owners of JADEYE.

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63. Copyright of a software may be considered partnership property if it can be inferred that the software itself was employed wholly for the use of the partnership.

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64. In the case of *Coward v Phaestos Ltd*[58]*,* the court considered a range of factors, including whether the software was the 'essential bedrock of the (partnership) business', the uniqueness of the software, the extent of its positive effect on the trading records and consequent value, and how essential it was for the partnership to prevent anyone outside of the

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[57] [24], Moot Problem
[58] [2013] EWHC 1292

partnership from using it. In that case, the court held that the Gauss software which was created for the partnership, and the 'central tool by which the trading and investment business was carried out', must have belonged to the partnership.

65. On the facts, Joe Yamashita had created the software 'in the course of the business of the (partnership firm)'[59] for the use on the machinery and equipment of the partnership. Similar to the Gauss Software, the JADEYE was also harnessed as the 'central tool' of the jade-mining business. It was installed on the machines that were exclusively used in the Hpakant mines. The uniqueness of the software can also be seen by how it will allow the user to test the quality and viability of the jade at 99% accuracy. This also contributed to the success of the jade-mining business amounting to USD 7.5 million per year, contributing to the partnership's trading records and value. Hence, the JADEYE software, should be likewise regarded as a partnership asset, just as the Gauss Software.

66. As long as the partnership subsists, both parties should be considered legal owners of the copyright. On the dissolution of the partnership, section 48(b)(iv) of the Burma Partnership Act then provides that partnership assets should be divided amongst the partners in the proportions in which they were entitled to share profits. In this case, with the dissolution of the partnership, the copyright can be liquidated and the Respondent should be entitled to 65% of the proceeds.

[59] Section 14, Burma Partnership Act 1932

VII. PRAYER FOR RELIEF

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

a. The termination of the Partnership Agreement is valid, and

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

c. There is no subsisting copyright for the JADEYE software, or

d. In the case where the JADEYE software is copyrighted, that the Respondent owns the rights to the software.

Dated this 11th day of August 2017