

THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2017

BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT CO., LTD

(CLAIMANT)

AND

SHWE PWINT THONE CO., LTD

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

The parties, Asamura International Development Co., Ltd and Shwe Pwint Thone Co., Ltd, have agreed to submit the present dispute to arbitration in Tokyo in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

QUESTIONS PRESENTED

1. Whether Myanmar law is the law governing all substantive disputes in the arbitration:
 - a. Whether Myanmar law governs all substantive disputes in the arbitration pursuant to the parties' choice of law in the agreement between SPT and AID (“**Agreement**”); and
 - b. Even if parties' choice of law does not apply to all substantive disputes, whether the applicable choice-of-law rules indicate that Myanmar law governs the disputes that do not fall within the parties' choice of law clause.
2. Whether the Agreement was validly terminated:
 - a. Whether the parties were in a purely contractual relationship or were otherwise in a partnership;
 - b. If the parties were in a purely contractual relationship, whether SPT validly terminated the Agreement under the Myanmar Contract Act; and
 - c. If a partnership is found to exist between the parties, whether the partnership between SPT and AID was validly dissolved.
3. Whether AID is the legal owner of the jade-mining machinery and equipment:
 - a. Whether AID had ownership over the jade-mining machinery and equipment at the point of purchase; and
 - b. Whether AID ever transferred ownership of the jade-mining machinery and equipment to SPT.
 - c. In the event that a partnership is found to exist between the parties, whether the jade-mining machinery and equipment constituted partnership property.
4. Whether the issues of subsistence and ownership of rights in JADEYE are arbitrable:

- a. Whether the curial law governing the arbitration is that of Japanese law;
and
 - b. Whether intellectual property issues are arbitrable under Japanese law.
5. Whether JADEYE is protected by a copyright in Myanmar:
 - a. Whether JADEYE is protected under the Myanmar Copyright Act as a literary work; and
 - b. Whether JADEYE was published in Myanmar or authored when Joe Yamashita was a resident of Myanmar.
6. Whether AID owns the copyright to JADEYE:
 - a. Whether Joe Yamashita was an employee of AID;
 - b. Whether Joe Yamashita authored JADEYE in the course of his employment;
and
 - c. If a partnership is found to exist between the parties, whether the copyright belongs to AID.
7. Whether AID's copyright would be infringed if SPT reverse engineered JADEYE.

STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd (“**AID**”), is a private international development company specialising in crisis relief and development. Over the years, it has been involved in various rehabilitation and rebuilding projects across the world, the most recent being a rebuilding project in Labutta, Myanmar. AID is managed by Dr Yugi Asamura (“**Asamura**”). Asamura is married to Dr Fiona Lum (“**Lum**”), a non-executive director of AID and the President of Second Life, a regional organisation which champions for human rights.
2. The Respondent, Shwe Pwint Thone Co., Ltd (“**SPT**”) is a Myanmar company which aims to provide secular and vocational training to students from underprivileged families, offering them an alternative pathway to monastic schools. SPT is owned by U Thein Kyaw (“**Kyaw**”).
3. On 9 September 2008, AID and SPT (collectively “**Parties**”) entered into an agreement (“**Agreement**”) in relation to a jade-mining venture (“**Venture**”) between the two companies. The Agreement contained several clauses of note. Clause 3, 4 and 6 list the delegation of duties between the Parties for the Venture. Clause 5 emphasises the Parties’ obligation to prioritise the employees and students of SPT, while Clause 11 states that AID “cannot do or say anything harmful to the national interest and solidarity of Myanmar”. Clause 10 states the Parties’ choice of law as Myanmar law.
4. In accordance with the Agreement, AID sourced, purchased and reconditioned the required jade-mining machinery and equipment (“**Equipment**”) consisting, of among other things, dump trucks, excavators and drilling machines. SPT subsequently imported the Equipment into Myanmar in January 2009. In addition to providing the

Equipment using their own money, AID provided 25 employees, including Joe Yamashita (“**Yamashita**”), on secondment from Japan to assist in the technical aspects of the Venture and impart knowledge to SPT’s employees and students. SPT handled the paperwork and accommodation required for the AID employees and obtained the necessary government permits.

5. Asamura soon started to feel the burden of the operational costs borne by AID. In March 2009, at Asamura’s suggestion, AID and SPT injected capital contributions of USD 1.5 million and USD 2.5 million respectively to fund the Venture’s operating costs until the end of the first financial year, which was held in SPT’s bank account.
6. Three years later, Yamashita developed a process optimisation and operations management software named “JADEYE” which could expedite assessment work for jade-mining operations. After a successful trial period, Asamura immediately ordered Yamashita to install the software on all computers and equipment used on-site. Kyaw was delighted with JADEYE, and attempted to pay Yamashita for the software, but Yamashita declined payment.
7. Throughout this time, the Venture was largely successful. However, problems arose after an interview with Asian Influencers Magazine involving Asamura and Lum was published in September 2016. During the interview, the couple were questioned on their views concerning the Rohingya minority in the Rakhine State, given their existing business involvement in Myanmar and Lum’s position as President of Second Life. In response, Lum expressed her views that the Myanmar government should take action to end the persecution of the Rohingyas. Some of SPT’s employees and students were upset by Lum’s statement, as they viewed the statement to suggest that the Myanmar government was taking part in ethnic cleansing, and went on strike.

Kyaw eventually managed to coax the employees and students to resume their duties, and the Venture resumed normal operations.

8. Subsequently, on 10 January 2017, Kyaw, influenced by the promise of a more favourable partnership agreement with Patrick Green, a successful American businessman, informed Asamura that SPT wanted to end the Venture with AID. Kyaw cited the interview as a reason for being unable to continue working with AID. However, Asamura protested that SPT had no right to terminate the Agreement.
9. Additionally, Kyaw claimed that SPT is the owner of the Equipment and the JADEYE software, as SPT imported the Equipment into Myanmar and were recorded as the owner and operator of the Equipment on the government permits required to operate them in Myanmar. Asamura disputed these claims and refused to provide Kyaw with the JADEYE source code. Kyaw informed Asamura that SPT would reverse engineer or create their own version of JADEYE.
10. Unable to resolve the matter, the Parties have submitted the disputes to binding arbitration. The place of arbitration is Tokyo, Japan, and the arbitration is to be conducted in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

SUMMARY OF PLEADINGS

A. The law governing the substantive disputes contested in this arbitration is Myanmar law

Shwe Pwint Thone Co., Ltd (“**SPT**”) and Asamura International Development Co., Ltd (“**AID**”, collectively “**Parties**”) chose Myanmar law to govern all substantive disputes arising from their relationship. Alternatively, should the Parties’ choice of law only apply to contractual disputes arising from the “Partnership Agreement” (“**Agreement**”), Myanmar law applies under the relevant choice-of-law rules.

B. The Agreement between the Parties was not validly terminated

The relationship between the Parties is purely contractual, and there were no grounds to terminate the Agreement. AID did not breach the Agreement as the statement made by Dr. Fiona Lum during the Asian Influencers Magazine interview is not attributable to AID. Even if it is attributable to AID, the statement is not in breach of the Agreement. Furthermore, SPT subsequently affirmed the continuance of the Agreement. Even if a partnership exists between the Parties, the partnership would only be dissolved through notice in writing and SPT did not provide the necessary notice to dissolve the partnership.

C. AID is the legal owner of the jade-mining machinery and equipment

AID became the legal owner of the jade-mining machinery and equipment (“**Equipment**”) at the point of purchase. AID remains the legal owner of the Equipment since AID did not subsequently transfer ownership of the Equipment to SPT. The documents obtained by SPT in order to import and operate the Equipment have no legal implications on the ownership of the Equipment. Even if a partnership

exists between the Parties, the Equipment does not constitute partnership property and remains the property of AID as there was no agreement between the parties that the Equipment was to constitute partnership property.

D. The issues regarding the subsistence and ownership of rights in the JADEYE software are arbitrable

The issues of subsistence and ownership of rights over the JADEYE software are arbitrable as the curial law governing this arbitration is that of Japan, and copyright issues are arbitrable under Japanese law.

E. The JADEYE software is protected by a copyright in Myanmar

The JADEYE software is protected under the Myanmar Copyright Act. JADEYE is protected as a literary work, and Yamashita made JADEYE whilst he was a resident in Myanmar.

F. AID owns the copyright to JADEYE

Even though JADEYE was made by Yamashita, it was made in the course of his employment with AID, and hence AID owns the copyright. Further, JADEYE's copyright does not belong to the Venture as there was neither an assignment nor any intention of the Parties for the JADEYE copyright to be partnership property.

G. SPT would infringe on AID's copyright by reverse engineering JADEYE

SPT would infringe on AID's copyright in JADEYE should SPT reverse engineer JADEYE. Reverse engineering JADEYE would entail SPT translating JADEYE's object code to an understandable source code which would constitute a breach of the JADEYE copyright.

PLEADINGS

I. ALL SUBSTANTIVE DISPUTES IN THIS ARBITRATION ARE GOVERNED BY MYANMAR LAW

1. Asamura International Development Co., Ltd (“**AID**”) and Shwe Pwint Thone Co., Ltd (“**SPT**”, collectively “**Parties**”) chose Myanmar law to govern all substantive disputes arising from their relationship (**A**). Alternatively, should the Parties’ choice of law only apply to contractual disputes arising from the “Partnership Agreement” (“**Agreement**”), Myanmar law applies to the remaining substantive disputes under the applicable choice-of-law rules (**B**).

A. The Parties chose Myanmar law to govern all substantive disputes arising from their relationship

2. The KLRCA i-Arbitration Rules (“**KLRCA Rules**”) apply to this arbitration.¹ Under Article 35(1) of the KLRCA Rules, parties to the arbitration are free to select the substantive law applicable to their disputes.² The Parties have stipulated a choice-of-law clause in the Agreement which provides that “everything will be in accordance with and interpreted” under Myanmar law.³

3. Under Myanmar law, contractual clauses are interpreted based on the parties’ intentions at the point of contracting, objectively ascertained through the circumstances.⁴ Where there is a written contract, the intention of the parties is to be

¹ Moot Problem at [47].

² Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014, 2nd Ed) (“Born”) at 2670.

³ Moot Problem, Annexure 1, Clause 10.

⁴ *Mohamed Valli Patel v The East Asiatic Co Ltd* AIR 1936 Ran 319, discussed in Adrian Briggs, Andrew Burrows, *The Law of Contract in Myanmar* (Ashford Colour Press, 2017) at 133.

assessed by giving every term its ordinary meaning.⁵ Thus, when a choice-of-law clause is phrased broadly, the clause would have been intended by the parties to govern all substantive disputes arising from their relationship.⁶

4. Given the expansiveness of the term “everything”, clause 10 of the Agreement evidences the Parties’ intention for Myanmar law to govern all aspects of their relationship. Therefore, in accordance with parties’ intentions and the terms of the Agreement, Myanmar law governs all substantive disputes arising from their relationship.

B. Alternatively, should the Parties’ choice of law only apply to contractual disputes arising from the Agreement, Myanmar law applies to the remaining substantive disputes under the applicable choice-of-law rules

5. Should a choice-of-law clause be limited to contractual disputes arising from the contract, the law governing any remaining substantive disputes is determined by the relevant choice-of-law rules.⁷ Here, Japanese choice-of-law rules apply to determine the law governing the remaining substantive disputes in this arbitration (1) and Japanese choice-of-law rules indicate that the remaining disputes in this arbitration are governed by Myanmar law (2).

⁵ *Tan Byan Seng v Ellermans Arracan Rice & Trading Co Ltd* (1948) BLR 148 at 151-152.

⁶ *Travel Servs. Network, Inc. v. Presidential Fin. Corp.* (1997) 959 F.Supp. 135 at 146; Born, *supra* n 2, at 2741.

⁷ Born, *supra* n 2, at 2624.

(1) *Japanese choice-of-law rules apply to determine the law governing the remaining substantive disputes in this arbitration*

6. Where parties have not indicated the applicable substantive law, the choice-of-law rules stated in the institutional rules chosen by the parties should apply.⁸ Article 35(1) of the KLRCA Rules provides that the tribunal is to apply the substantive law it deems “appropriate”, by selecting a choice-of-law rule.⁹

7. In selecting a choice-of-law rule, the choice-of-law rule of the arbitral seat should be applied.¹⁰ The parties’ choice of arbitral seat constitutes an implied acceptance of the choice-of-law rules of that state.¹¹ Subject to contrary agreement, the place of arbitration is taken to be the arbitral seat.¹² Here, the Parties agreed for the place of arbitration to be Tokyo and did not draw a distinction between the place and seat of arbitration.¹³ Therefore, Japan is deemed as the arbitral seat and Japanese choice-of-law rules apply to the remaining substantive disputes in this arbitration.

(2) *The remaining substantive disputes in this arbitration are governed by Myanmar law*

8. There are two remaining substantive disputes in this arbitration. First, the ownership of rights in the jade-mining machinery and equipment (“**Equipment Dispute**”) and secondly, the ownership and subsistence of rights in the JADEYE software (“**JADEYE Dispute**”).

⁸ *Id.*, at 2634–2635.

⁹ *Id.*, at 2643.

¹⁰ *Id.*, at 2658; Award in *ICC Case No. 9771*, IXXX YB Comm Arb 46 (2004) at 52-53; Franco Ferrari, Stefan Kröll, *Conflict of Laws in International Arbitration* (Sellier European Law Publishers, 2010) at 286.

¹¹ Award in *ICC Case No. 8619*, discussed in Grigera Naón, Horacio A., *Choice-of-Law Problems in International Commercial Arbitration* (Volume 289) (The Hague Academy of International Law, 2001) at 230.

¹² Preliminary Award in *ICC Case No. 5505*, XIII Y. B. Comm. Arb. 110 (1988) at [9]-[14]; *Dicey, Morris and Collins on The Conflict of Laws* (L. Collins Gen. Ed.) (Sweet & Maxwell, 2006, 14th Ed) (“*Dicey*”) at [16-035]; Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015, 6th Ed) (“*Blackaby*”) at [3.53].

¹³ Moot Problem at [47].

9. Under Japan’s choice-of-law rules, both disputes are governed by Myanmar law. Japan’s Arbitration Law provides that barring an agreement on the substantive law applicable, the substantive law of the state most closely connected to the dispute should be applied.¹⁴ This rule identifies the facts of the dispute connected to the various states, weighs their significance, and applies the laws of the prevailing state.¹⁵
10. Regarding the Equipment Dispute, the state of closest connection for property disputes should be the state where the property was situated at the time of the alleged transfer.¹⁶ Any alleged transfer of the jade-mining machinery and equipment (“**Equipment**”) between the Parties would have occurred in Myanmar.¹⁷ Additionally, the Equipment was situated and employed in Myanmar for the past 8 years.¹⁸
11. Regarding the JADEYE Dispute, the state of closest connection for intellectual property disputes is either the state where the intellectual property originated from or is to be protected.¹⁹ JADEYE was created mainly in Myanmar by Joe Yamashita (“**Yamashita**”),²⁰ and was first tested and implemented on the jade-mining equipment and computers in Myanmar.²¹ JADEYE is also to be protected in Myanmar as the Parties are contesting the rights to JADEYE in Myanmar. SPT threatened to reverse engineer JADEYE²² whilst AID seeks to enforce a copyright against SPT in Myanmar.²³

¹⁴ Arbitration Law (Law No. 138 of 2003) (Japan) (“Japan Arbitration Law”), Art 36(2).

¹⁵ Final Award in *ICC Case No. 14667*, XL Y. B. Comm. Arb. 51 (2011) at [121]-[122].

¹⁶ *Dicey, supra* n 12, at [24R-001].

¹⁷ Moot Problem at [43].

¹⁸ *Id* at [16] and [50].

¹⁹ Trevor Cook and Alejandro L. Garcia, *International Intellectual Property Arbitration* (Kluwer Law International, 2010) (“Cook”) at 98.

²⁰ Additional Clarification, Question 15.

²¹ Moot Problem at [23].

²² *Id* at [44].

²³ *Id* at [48].

12. Therefore, Myanmar law governs both disputes under the choice-of-law rules of Japan. Accordingly, Myanmar law governs all substantive disputes contested in this arbitration.

II. THE AGREEMENT BETWEEN THE PARTIES WAS NOT VALIDLY TERMINATED

13. The relationship between the Parties is purely contractual as a partnership did not exist (A). SPT did not have sufficient grounds to terminate the Agreement (B). Even if there was a partnership, SPT did not validly dissolve the partnership (C).

A. *The relationship between the Parties is purely contractual as a partnership did not exist*

14. Given that a partnership is based on a contract, where a partnership is not found, the relationship between the parties is purely contractual.²⁴ In determining whether a partnership exists, the substance rather than the label of the contract is determinative.²⁵ Here, even though the Parties labelled the Agreement “Partnership Agreement”, this label is not determinative and the substance of the Agreement must be examined.

15. As s 4 of both the India Partnership Act²⁶ and Myanmar Partnership Act²⁷ are identical, Indian case law is persuasive. Under Myanmar law, a partnership exists if three elements are met:²⁸

- a. an agreement entered into by two or more persons;

²⁴ *McPhail v Bourne* [2008] EWHC 1235 (Ch) at [256].

²⁵ *Laxmibai And Anr. vs Roshan Lal* AIR 1972 Raj 288 at [9].

²⁶ Partnership Act 1932 (Act No. IX of 1932) (India) (“India Partnership Act”).

²⁷ The Partnership Act (Burma Code Vol. IX Part XIV) (Myanmar) (“Myanmar Partnership Act”).

²⁸ *Dulichand Lakshminarayana v The Commissioner of Income Tax, Nagpur* AIR 1956 SC 354 at [14].

- b. an agreement to share the profits of a business; and
 - c. a business carried on by all persons, or any of those persons acting for all.
16. There was no partnership between the Parties as the Agreement was not entered into by two or more persons (1) and the jadeite venture (“**Venture**”) was not carried on by all persons (2).
- (1) *The Agreement was not entered into by two or more persons*
17. For companies to be considered “persons” under s 4 of the Myanmar Partnership Act, express authorisation from their articles or memorandum of association (“**MOA**”) to enter a partnership is required.²⁹ This is to safeguard against shareholders being subject to obligations they did not agree to. Without such authorisation, the board of directors can bind the company to the liabilities of another, or grant third parties access to the company’s books and funds, without approval from the company’s shareholders.³⁰
18. Here, the Parties are incorporated companies, as evidenced by their registered names.³¹ The facts do not suggest that the Parties had express authorisation by their MOAs to enter into a partnership. Therefore, the Parties cannot be “persons” capable of entering into a partnership.

²⁹ *Ganga Metal Refining Co. Pr. Ltd. vs Commissioner of Income Tax* AIR 1967 Cal 429 at [20]-[22].

³⁰ *Id.*, at [17]-[21].

³¹ Moot Problem at [1], [7] and Annexure 1, Clause 1.

(2) *The Venture was not carried on by all persons*

19. For a partnership to be carried on by all persons, it is required to operate as a single business entity.³² In ascertaining whether a business operates as a single entity, two factors are indicative:³³

- a. the business possesses its own capital; and
- b. the business possesses its own employees.

20. The Venture did not possess its own capital. While the Parties injected capital contributions into the Venture in March 2009,³⁴ such contributions were only made to fund the Venture's operational costs for the first financial year.³⁵ Further, the funds advanced were held in SPT's bank account,³⁶ and not one belonging to the Venture.

21. Additionally, the Venture did not have its own employees. In ascertaining whether one is an employee of a party, two factors are indicative:³⁷

- a. the party's control and management over the employee; and
- b. the nature of payments made to the employee.

22. The Venture did not exercise control over the employees as the Parties only exercised control over their own respective employees. AID seconded their employees from Japan to Myanmar³⁸ and Yamashita implemented the JADEYE software on-site only

³² *Sitaram Kalani v Manmal* AIR 1956 MP 60 at [8].

³³ *Ibid.*

³⁴ Moot Problem at [17].

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (“*Market Investigations*”) at 184-185.

³⁸ Moot Problem at [16].

on instruction from Yugi Asamura (“**Asamura**”).³⁹ Further, the salaries of the AID employees working for the Venture were paid by AID.⁴⁰ Similarly, SPT, through U Thein Kyaw (“**Kyaw**”), managed to convince its employees to cease the strike, despite them remaining unhappy about working with AID.⁴¹ Kyaw also recognised that the employees worked for SPT alone.⁴²

23. As the Venture did not possess its own capital or employees, it was not carried on by all persons. Therefore, the Venture was not operating as a single business entity. Accordingly, there was no partnership and the relationship between the Parties is purely contractual.

B. SPT does not have sufficient grounds to terminate the Agreement

24. Given that the relationship between the Parties is purely contractual, termination of the Agreement is governed by the Myanmar Contract Act.⁴³
25. During an interview with the Asian Influencers Magazine, Dr. Fiona Lum (“**Lum**”) stated that “[e]veryone must work together to end the persecution of the Rohingyas, and the new Myanmar government... must end the problem immediately. Especially the ethnic cleansing...” (“**Statement**”).⁴⁴ SPT relied on the Statement made by Lum to terminate the Agreement.⁴⁵
26. In this regard, SPT cannot terminate the Agreement under Section 39 of the Myanmar Contract Act (“**Section 39**”) as the Statement is not attributable to AID (1). Even if

³⁹ *Id* at [23]; Additional Clarifications, Question 32.

⁴⁰ Additional Clarifications, Question 14.

⁴¹ Moot Problem at [30] and [38].

⁴² *Id* at [41].

⁴³ The Contract Act (Burma Code Vol. IX Part XI) (Myanmar) (“Myanmar Contract Act”).

⁴⁴ Moot Problem at [27]-[28].

⁴⁵ Moot Problem at [41].

the Statement is attributable to AID, AID did not breach either clause 5 or clause 11 of the Agreement (“**Clause 5**” and “**Clause 11**” respectively) (2). Even if AID breached either Clause 5 or Clause 11 of the Agreement, SPT had waived its right to terminate the Agreement (3).

(1) *The Statement is not attributable to AID*

27. An act by an individual can only be attributed to a company if the individual purports to act on behalf of the company.⁴⁶ Whether an individual purports to act on behalf of the company depends on the representations made by that individual whilst carrying out the act.⁴⁷ Here, Lum made the Statement in her capacity as President of Second Life and not in her capacity as non-executive director of AID.
28. First, Lum made the Statement after being questioned about her views on the Rohingya given their business involvement in Myanmar and specifically her position as President of Second Life.⁴⁸ Any reply by Lum would therefore have been made in her capacity as President of Second Life.
29. Secondly, Lum answered “we will continue to champion for their rights”, referring to the Rohingyas’ human rights.⁴⁹ Second Life is a regional organization which champions human rights.⁵⁰ Lum's reference to the continued championing of the Rohingya’s human rights indicates that the Statement was made in her capacity as the President of Second Life.

⁴⁶ *Smith v Cox* [1940] 2 KB 558 at 559-560; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503-506.

⁴⁷ *Sika Contracts Ltd v BL Gill and Closeglen Properties Ltd* [1978] 9 Build LR 11 at 16-17.

⁴⁸ Moot Problem at [27].

⁴⁹ *Id.*, at [28].

⁵⁰ *Id.*, at [5].

30. Therefore, as Lum did not make the Statement on behalf of AID, the Statement is not attributable to AID.
- (2) *Even if the Statement was attributable to AID, AID did not breach any clause in the Agreement*
31. Section 39 provides that a contract may be terminated when a party has refused to perform or has disabled himself from performing his promise in its entirety.⁵¹ As Section 39 is identical to s 40 of the Malaysia Contracts Act,⁵² Malaysian case law is persuasive. SPT could not terminate the Agreement under Section 39 as AID did not refuse to perform Clause 5 (a) or Clause 11 (b).
- (a) AID did not refuse to perform Clause 5
32. A contract is to be interpreted as a whole.⁵³ Where a specific clause in a contract is followed by a more general clause, the general clause ought to be interpreted according to the prior specific clause.⁵⁴
33. Here, the first sentence of Clause 5 emphasises the economic benefit the Venture aims to bring to the local Myanmar community, by “improv[ing] the livelihoods of the Myanmar people” and “help[ing] them be competitive and compatible with the evolving world and economy”.⁵⁵ The second sentence of Clause 5 then imposes an obligation on both parties to prioritise the employees and students of the Venture.⁵⁶ This obligation to prioritise, when interpreted in accordance to the first sentence of

⁵¹ Myanmar Contract Act, supra n 43, s 39.

⁵² Contracts Act 1950 (Act No. 136 of 1974) (Malaysia).

⁵³ *The Mineral Resources Development Corp v U Ba Yone* [1965] BLR 856 at 859.

⁵⁴ *SS. Magnhild v McIntyre Brothers and Company* [1920] 3 KB 321 at 330-333.

⁵⁵ Moot Problem, Annexure 1, Clause 5.

⁵⁶ *Ibid.*

Clause 5, should be understood as one to prioritise the employees and students economically.

34. AID fulfilled its contractual obligations under Clause 5 by prioritising the employees and students economically. First, AID trained SPT's employees and students to operate and maintain the Equipment.⁵⁷ This resulted in SPT's employees and students gaining the skills required to remain competitive and compatible with the evolving economy.
 35. Secondly, AID, through Yamashita, implemented the JADEYE software into all the computers and equipment used at the Hpakant site, greatly expediting assessment work at the site.⁵⁸ The enhanced productivity of the Venture resulting from JADEYE improved the livelihoods of SPT's employees and students by increasing SPT's profits.
 36. Lastly, AID secured a contract with Hashimoto Co., Ltd (“**HCL**”) to produce official jadeite souvenirs and merchandise for the Tokyo Olympics.⁵⁹ Given the scale of the Olympics games, securing such a large order for the Venture would provide the employees and students with steady employment and revenue for the year to follow.
 37. Therefore, the above reasons indicate that AID did not refuse to perform Clause 5.
- (b) AID did not refuse to perform Clause 11
38. AID did not say or do anything harmful to the national interest and solidarity of Myanmar.⁶⁰ As a contract is interpreted according to the intentions of the parties

⁵⁷ Moot Problem at [16].

⁵⁸ *Id* at [21]-[23].

⁵⁹ Moot Problem at [33].

⁶⁰ *Id*, Annexure 1, Clause 11.

objectively ascertained,⁶¹ where the contracting parties are laymen, the contract ought to be given its ordinary meaning ascertained from the circumstances.⁶²

39. Here, both Asamura and Kyaw drafted the Agreement as laymen without any legal advice.⁶³ The ordinary meaning of the terms “national interest” and “solidarity” in Clause 11 may be ascertained from English newspapers in Myanmar or dictionaries as the Parties, being non-native English users, would likely have been influenced by such sources.
40. National interest ought to refer to the promotion of peace and stability within Myanmar. Community peace and stability in Myanmar were stated daily as objectives of Myanmar in one of the few English newspapers widely available in Yangon,⁶⁴ “The New Light of Myanmar”.⁶⁵ This meaning is further corroborated by the dictionary meaning of national interest, which has been defined as the interests of a state, usually determined by its government.⁶⁶ The Government of Myanmar prioritises ensuring peace and stability within Myanmar, and has repeatedly called for the observation of harmony with respect to the Rohingya minority in the Rakhine state.⁶⁷

⁶¹ Claimant Memorial at [3].

⁶² *U Nyo v U Ko Ko Gyi* [1950] BLR 147 at 150; *Cosmos Holidays Plc v Dhanjal Investments Ltd* [2009] EWCA Civ 316 at [15]-[16].

⁶³ Moot Problem at [14]-[15].

⁶⁴ “Myanmar Newspapers - Myanmar Newspaper & News Media Guide”, *ABYZ Web Links Inc.*, <<http://www.abyznewslinks.com/myanm.htm>> (accessed 29 July 2017).

⁶⁵ Ministry of Information, *The New Light of Myanmar* (9 September 2008) <<http://www.burmalibrary.org/docs5/NLM2008-09-09.pdf>> (accessed 29 July 2017) at 1.

⁶⁶ Iain McLean *et al*, “The concise Oxford dictionary of politics” (Oxford University Press, 2003, 2nd Ed) at p 360.

⁶⁷ The Government of the Republic of the Union of Myanmar Ministry of Foreign Affairs, “Press Release on Situation in Rakhine State” <http://www.mofa.gov.mm/?page_id=43> (accessed 4 July 2017).

41. Solidarity has been defined as the unity or agreement of feeling or action.⁶⁸ The meaning of solidarity ascribed by the Parties would be the solidarity of all persons residing in Myanmar. In Clause 11, the term “of Myanmar” was used. This contrasts with the narrower phrase used in Clause 5, the “local Myanmar people”. As the Parties did not choose to qualify Clause 11 to apply to a particular group within Myanmar, the term “solidarity” ought to refer to the solidarity of all persons residing in Myanmar, including the Rohingya.
42. The Statement is not against the national interest or solidarity of Myanmar. The interpretation of a statement ought to be given the meaning a reasonable man, in the circumstances that the statement was made, would likely understand.⁶⁹ Here, a reasonable man in Myanmar would not have interpreted the Statement to be against the peace and stability or solidarity of Myanmar.
43. First, a plain reading of the Statement merely calls for everyone, especially the Myanmar government, to end the persecution of the Rohingya. The Statement does not suggest that the Myanmar government was involved in the ethnic cleansing of the Rohingya.⁷⁰
44. Secondly, the Statement is in line with statements frequently made by the international media in recent years, calling for the Myanmar government to cease the persecution of the Rohingya.⁷¹ Given that similar sentiments have been widely

⁶⁸ English Oxford Living Dictionary at “solidarity”, *Oxford University Press*, <<https://en.oxforddictionaries.com/definition/solidarity>> (Accessed 5 July 2017).

⁶⁹ *Foodco UK LLP and ors v Henry Boots Development Ltd* [2010] EWHC 358 at [186]; *Rubber Improvement Ltd v Daily Telegraph* [1963] 2 WLR 1063 at 1069.

⁷⁰ Moot Problem at [28].

⁷¹ United Nations Press Release, “Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide” (6 February 2017) <http://www.un.org/en/genocideprevention/documents/20170206%20Statement_Myanmar_reaction%20to%20OHCHR%20report_Final.pdf> (accessed 5 July 2017); Joseph Sipalan, “Malaysian PM tells Myanmar to ‘stop

published, it is unlikely that the Statement would further erode the peace and stability or solidarity of Myanmar. Resolution of the Rohingya crisis would serve to encourage peace, stability and solidarity between all persons within Myanmar, rather than detract from it. Therefore, the Statement is not harmful to the national interests and solidarity of Myanmar and AID is not in breach of Clause 11.

(3) *Even if there was a breach of the terms of the Agreement, SPT had waived its right to terminate the Agreement*

45. Under Section 39, once an innocent party elects to treat the contract as subsisting, he waives his right to terminate the contract.⁷² Where an innocent party voluntarily continues performance of the contract without protesting or reserving his rights to terminate the contract, the innocent party would be held to have elected to treat the contract as subsisting.⁷³

46. Here, SPT had, through its actions, waived its right to terminate the Agreement. Even though SPT's employees and students went on strike,⁷⁴ Kyaw, representing SPT, voluntarily coaxed them into resuming their duties in continuance of SPT's contractual obligations.⁷⁵ The Venture continued to operate normally for another four months.⁷⁶

47. Thereafter, Kyaw neither protested nor reserved SPT's rights to terminate, but even encouraged AID to take on further contractual obligations with HCL,⁷⁷ which the

the killing' of Rohingya, as Muslims meet", *Reuters* (19 January 2017) <<http://www.reuters.com/article/us-myanmar-rohingya-malaysia-idUSKBN1530QX>> (accessed 5 July 2017).

⁷² Myanmar Contract Act, *supra* n 43, Illustration (b) to s 39.

⁷³ *Chua Ngah Chin v Ng Kie En* [1968] 1 MLJ 267 at [10].

⁷⁴ Moot Problem at [29].

⁷⁵ *Id* at [30].

⁷⁶ *Id* at [29] and [40].

⁷⁷ *Id* at [35].

Parties contemplated would be satisfied by the Venture. Kyaw told Asamura to proceed with the HCL contract “via” AID,⁷⁸ suggesting that the contract was entered into on behalf of both Parties. The benefits of the HCL contract were also shared between the Parties.⁷⁹

48. SPT’s continued performance of their contractual obligations and their willingness to carry on the Venture indicates its election to treat the Agreement as subsisting. Therefore, even if AID was in breach of the terms of the Agreement, SPT waived its right to terminate the Agreement.
49. Accordingly, SPT did not validly terminate the Agreement by Kyaw’s verbal communication on 10 January 2017.

C. Even if there was a partnership, SPT did not validly dissolve the partnership

50. Alternatively, if a partnership exists between the Parties, where no provision is contractually made for the duration or determination of the partnership, the partnership is a partnership at will.⁸⁰ Here, the duration of the partnership was not specified, and there is no clause allowing for the determination of the partnership in the Agreement. Thus, any partnership between the Parties be a partnership at will.
51. Where a partnership is at will, it may be dissolved by any partner giving written notice to all other partners of his intention to dissolve the firm.⁸¹ Oral notice is

⁷⁸ *Ibid.*

⁷⁹ Additional Clarifications, Question 5.

⁸⁰ Myanmar Partnership Act, *supra* n 27, s 7.

⁸¹ Myanmar Partnership Act, *supra* n 27, s 43(1).

insufficient to effect dissolution.⁸² Here, Kyaw’s notice to Asamura of his decision to end the partnership⁸³ was insufficient as the notice was given orally.⁸⁴

52. Additionally, SPT cannot dissolve the partnership through Section 39 as Section 39 does not apply to partnership contracts. Section 3 of the Myanmar Partnership Act, which provides that the unrepealed provisions of the Contract Act consistent with the Partnership Act would continue to apply to partnership agreements,⁸⁵ was repealed when the India Partnership Act was transplanted into Myanmar. Further, Section 39 is co-extensive to the doctrine of repudiation,⁸⁶ which does not apply to partnership agreements.⁸⁷
53. Therefore, the partnership between the Parties was not validly dissolved.

III. AID IS THE LEGAL OWNER OF THE EQUIPMENT

54. AID is the legal owner of the Equipment as AID became the legal owner of the Equipment at the point of purchase (**A**), and ownership of the Equipment was never transferred to SPT (**B**). Even if there was a partnership between the Parties, the Equipment never became partnership property (**C**).

⁸² *Sm. Lilabati Rana v Lalit Mohan Dey and Ors* AIR 1952 Cal 499 at [9].

⁸³ Moot Problem at [40].

⁸⁴ Clarifications, Question 13.

⁸⁵ India Partnership Act, *supra* n 26, s 3.

⁸⁶ *Choo Yin Loo v SK Visuvalingam Pillay* (1930) 7 FMSLR 135, discussed in S. V. Sinnadurai, *Law of Contract* (LexisNexis, 2011, 4th Ed) at [12.07].

⁸⁷ *Goldstein v Bishop* [2013] EWHC 881 at [123]; *Mullins v. Laughton and Others* [2002] EWHC 2761 (Ch) at [93].

A. *AID became the legal owner of the Equipment at the point of purchase*

55. As the initial purchase of the Equipment occurred solely in Japan,⁸⁸ Japanese law governs the initial purchase. A sale becomes effective when one party promises to transfer property rights to another for a promise to pay purchase money.⁸⁹ Once the sale is effective, the seller is obliged to transfer the rights promised to the buyer.⁹⁰ Here, AID purchased the Equipment by transferring monies for ownership rights in the Equipment.⁹¹ Therefore, AID became the legal owner of the Equipment at the point of purchase.

B. *Ownership of the Equipment was never transferred to SPT*

56. For ownership of movable property to pass, the parties must have entered into a valid consensual transfer of title in the property,⁹² such as by sale, exchange or gift.⁹³ Here, AID remained the legal owner of the Equipment as there was no transfer of ownership by sale or exchange (1), there was no transfer of ownership by gift (2), and the documents obtained by SPT have no legal implications on the ownership of the Equipment (3).

(1) *There was no transfer of ownership by sale or exchange*

57. The requirements for a sale of the Equipment were not met. For a sale to be effected, one party must have transferred or agreed to transfer the Equipment to another party

⁸⁸ Moot Problem at [16].

⁸⁹ Japan Civil Code (Minpō, Act No. 89 of 1896), Art 555.

⁹⁰ *Id.*, Art 560; Hiroto Doguchi, “Outline of Contract Law in Japan”, *Group for the Law concerning International Sales of Goods and International Service Contracts*, <http://www.law.tohoku.ac.jp/kokusaiB2C/overview/contract.html#page_top> (accessed 03 April 2017).

⁹¹ Moot Problem at [16]; Additional Clarifications, Question 9.

⁹² Michael Bridge, *Personal Property Law* (Oxford University Press, 2015, 4th Ed) (“Bridge”) at 153.

⁹³ Sarah Worthington, *Personal Property Law: text, cases and materials* (Hart Publishing, 2000, 1st Ed) (“Worthington”) at 220.

for consideration in the form of money.⁹⁴ Here, no payment was made by SPT to AID in respect of the Equipment.⁹⁵ Therefore, ownership of the Equipment was not transferred to SPT through a sale.

58. Similarly, the requirements for an exchange of the Equipment were not met. For an exchange to be effected, the parties must have “mutually transfer[red] the ownership of one thing for the ownership of another, with neither thing... being money only”.⁹⁶ Here, there was no transfer of any property from SPT to AID in exchange for the Equipment. Therefore, ownership of the Equipment was not transferred to SPT through an exchange.

(2) *There was no transfer of ownership by gift*

59. Movable property may be transferred voluntarily and without consideration by a gift.⁹⁷ Under Myanmar law, movable property may be gifted if three elements are met:

- a. the gift must be effected by delivery or a registered instrument under certain conditions;⁹⁸
- b. the transferor must have had the intention to transfer ownership to the transferee;⁹⁹ and
- c. the gift must be accepted by the transferee.¹⁰⁰

⁹⁴ Sale of Goods Act (Burma Code Vol. X Part XIX) (Myanmar), ss 4(1) and 2(10).

⁹⁵ Clarifications, Question 5.

⁹⁶ Transfer of Property Act (Burma Code Vol. X Part XVII) (Myanmar) (“Myanmar Transfer of Property Act”), s 118.

⁹⁷ *Id.*, s 122.

⁹⁸ Myanmar Transfer of Property Act, *supra* n 96, s 123.

⁹⁹ *Scott v Revenue and Customs Commissioners* [2015] UKFTT 0266 (“*Scott*”) at [39]; Worthington, *supra* n 93 at 229.

¹⁰⁰ Myanmar Transfer of Property Act, *supra* n 96, s 122.

Here, AID did not gift SPT the Equipment as there was insufficient delivery of the Equipment (a), and AID did not intend to transfer ownership of the Equipment to SPT (b).

(a) There was insufficient delivery of the Equipment

60. The element of delivery is not satisfied. For a gift to be delivered, there must be clear and unequivocal transfer of possession.¹⁰¹ Delivery would be insufficient if the donor retained some control over the property.¹⁰² Here, SPT's possession over the Equipment was temporary and not unequivocal.¹⁰³

61. Possession passed to SPT when SPT, authorised by the bill of lading,¹⁰⁴ received the Equipment in Myanmar. However, the Equipment was subsequently utilised in the exploration, extraction, breaking and cutting of the jade at the Hpakant site.¹⁰⁵ AID operated the Equipment and dictated the allocation and use of the Equipment at the site.¹⁰⁶ AID's retention of control over the Equipment at the Hpakant site meant that the transfer of possession was not unequivocal. Therefore, there was insufficient delivery of the Equipment.

(b) AID did not intend to transfer ownership of the Equipment to SPT

62. An intention, or lack thereof, to transfer ownership can be inferred from the surrounding circumstances.¹⁰⁷ Here, the element of an intention to transfer ownership is not satisfied.

¹⁰¹ Bridge, *supra* n 92, at 172.

¹⁰² *Ibid*; Scott, *supra* n 99.

¹⁰³ Worthington, *supra* n 93, at 77-78.

¹⁰⁴ Additional Clarifications, Question 25.

¹⁰⁵ Additional Clarifications, Question 11.

¹⁰⁶ Moot Problem at [16].

¹⁰⁷ *Kuppuswamy Chettiar v A.S.P.A. Arumugam Chettiar and anor* AIR 1967 SC 1395 at [5].

63. First, both parties were commercial entities engaged in a business arrangement and it is unlikely that one would intend to make a gift to the other. Given this commercial background, a gift of the Equipment should have been clearly addressed by the Parties. However, the possibility that the Equipment was to be gifted was never contemplated in the Agreement nor was it apparently discussed at any point in the Parties' relationship despite the Venture having operated for more than eight years.¹⁰⁸
64. Secondly, there was no commercial reason for AID to intend to gift the Equipment to SPT. On the contrary, AID contributed USD 1.5 million and SPT contributed USD 2.5 million to the Venture, carefully calculated to be proportionate to their respective 35% and 65% profit return.¹⁰⁹ AID gifting the Equipment to SPT without any proportionate return would upset this intentional balance of contributions and returns. Therefore, the above reasons indicate that AID would not have intended to gift the Equipment to SPT.
- (3) *The documents obtained by SPT have no legal implications on the ownership of the Equipment*
65. SPT imported the Equipment into Myanmar¹¹⁰ and obtained all necessary permits in relation to the Venture,¹¹¹ which includes permits listing SPT as the “owner” and “importer” of the Equipment.¹¹² However, the permits listing SPT as the “owner” of the Equipment do not give SPT ownership of the Equipment. Documentation of a

¹⁰⁸ Moot Problem at [16].

¹⁰⁹ *Id* at [17] and Annexure 1, Clause 7.

¹¹⁰ *Id* at [16]; Clarifications, Question 5.

¹¹¹ Clarifications, Question 6.

¹¹² Moot Problem at [43]; Additional Clarifications, Question 8.

person as the “proprietor”¹¹³ of certain assets has no legal implications on the ownership of the assets if the person could not have possibly obtained ownership title over the assets.¹¹⁴

66. Here, SPT could not obtain ownership of the Equipment as they were merely importers of the Equipment and AID did not transfer ownership to SPT at any point in time.¹¹⁵ Therefore, while SPT is recorded as the “owner” and “importer” of the Equipment on some permits required to import and operate the Equipment in Myanmar,¹¹⁶ such documentation does not have any legal implications on AID’s ownership of the Equipment.

C. Even if there was a partnership between the Parties, the Equipment never became partnership property

67. AID remains the legal owner of the Equipment as the Equipment does not constitute partnership property. As s 14 of the Myanmar Partnership Act¹¹⁷ and India Partnership Act¹¹⁸ are identical, and similar to s 20(1) of the UK Partnership Act,¹¹⁹ Indian and English case law is persuasive.
68. Property acquired by a partner would not constitute partnership property unless there was an agreement between the partners to treat the property as partnership property.¹²⁰

¹¹³ The meaning of “proprietor” is synonymous with that of “owner”: Brian A. Garner, *Black’s Law Dictionary: 9th Edition* (Thomson Reuters, 2009, 9th Ed) at “proprietor”.

¹¹⁴ *Kemp v Elisha* [1918] 1 K.B. 228 at 232.

¹¹⁵ Claimant Memorial at [59]-[63].

¹¹⁶ Moot Problem at [43]; Additional Clarifications, Questions 8 and 25.

¹¹⁷ Myanmar Partnership Act, *supra* n 27.

¹¹⁸ India Partnership Act, *supra* n 26.

¹¹⁹ Partnership Act 1890 (53 & 54 Vict. c. 39) (UK).

¹²⁰ *Boda Narayana Murthy And Sons v Valluri Venkata Suguna* AIR 1978 AP 257 at [8]-[9].

Such an agreement is required even if the property is used for partnership purposes.¹²¹

In ascertaining the presence of an agreement, all circumstances surrounding the acquisition of the property must be considered.¹²²

69. Here, the Parties never agreed that the Equipment would constitute partnership property. First, the issue regarding ownership of the Equipment was never contemplated in the Agreement, nor was it discussed at any point in the Parties' relationship despite the Venture having operated for more than eight years.¹²³ Even after the Parties' relationship had broken down, both AID and SPT claimed complete ownership of the Equipment.¹²⁴
70. Secondly, it is unlikely for the Parties to have intended for the Equipment to constitute partnership property as AID and SPT's capital contributions of USD 1.5 million and USD 2.5 million respectively were carefully calculated to be proportionate to the Venture's profit-sharing structure of 35% to AID and 65% to SPT.¹²⁵ The Equipment constituting partnership property would mean that AID had contributed a greater percentage of capital compared to the profits they would receive in return. Given Asamura's business expertise,¹²⁶ it is unlikely that he would have agreed to put AID in such a detrimental business position.
71. Thirdly, the use of the Equipment is not confined to the Venture. The Equipment consists of dump trucks, excavators and drilling machines.¹²⁷ Such assets are generic equipment that can be utilised for AID's other rehabilitation and rebuilding projects.

¹²¹ *Id.*, at [9]; *Arjun Kanoji Tankar v Santaram Kanoji Tankar* (1969) 3 SCC 555 at [15]; *Miles v Clarke* [1953] 1 WLR 537 at 540.

¹²² Roderick Fanson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 19th Ed, 2010) at [18-12].

¹²³ Moot Problem at [16].

¹²⁴ Moot Problem at [43].

¹²⁵ *Id.* at [17] and Annexure 1, Clause 7.

¹²⁶ Moot Problem at [4].

¹²⁷ *Id.* at [16].

In the event the partnership is dissolved, AID could easily reroute the Equipment to their other rehabilitation and rebuilding projects.¹²⁸

72. Lastly, AID’s retention of control over the Equipment is also indicative that the Equipment was not to be treated as partnership property. As noted above, AID retained control over the Equipment, dictating the use of the Equipment, and essentially operated the Equipment as its own.¹²⁹
73. Therefore, the above reasons indicate that there was no agreement between the Parties that the Equipment constitutes partnership property. Accordingly, AID is the owner of the Equipment.

IV. THE JADEYE DISPUTE IS ARBITRABLE IN THIS ARBITRATION

74. The JADEYE Dispute is arbitrable as the curial law governing the arbitration is that of Japan (A), and copyright issues are arbitrable under Japanese law (B).

A. *The curial law governing the arbitration is Japanese law*

75. Where parties do not indicate a choice of curial law, it is presumed that the curial law follows the law of the seat,¹³⁰ which would be deemed as the law of the place of arbitration unless otherwise stipulated by parties.¹³¹ Here, the Parties chose Japan as the place of arbitration.¹³² Therefore, the seat of arbitration is Japan, and the curial law applicable to this arbitration would be the laws of Japan.

¹²⁸ *Id.*, at [3].

¹²⁹ Claimant Memorial at [61].

¹³⁰ *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [26] and [29].

¹³¹ Claimant Memorial at [7].

¹³² Moot Problem at [47].

B. Copyright issues are arbitrable under Japanese law

76. Whether an issue is arbitrable would depend on the curial law governing the arbitration.¹³³ The curial law governing this arbitration is that of Japan.¹³⁴ The Arbitration Law of Japan allows for the arbitration of all civil disputes capable of being settled by parties, except divorce or separation cases.¹³⁵ The existence and ownership of a copyright is an issue capable of being settled by parties.¹³⁶ Therefore, copyright disputes are arbitrable under Japanese law.

77. Accordingly, the JADEYE Dispute is arbitrable in this arbitration.

V. THE JADEYE SOFTWARE IS PROTECTED BY A COPYRIGHT IN MYANMAR

78. For AID to claim ownership over JADEYE, JADEYE must be protected under the Myanmar Copyright Act.¹³⁷ Under the Myanmar Copyright Act, a work is protected if two elements are met:¹³⁸

- a. the work is an original literary, dramatic, musical or artistic work; and
- b. published in Myanmar or made when the author was a citizen or resident of Myanmar.

JADEYE is protected under the Myanmar Copyright Act as JADEYE is a literary work under the Myanmar Copyright Act (A), and Yamashita authored JADEYE whilst he was a resident in Myanmar (B).

¹³³ Blackaby, *supra* n 12, at [3.46].

¹³⁴ Claimant Memorial at [70].

¹³⁵ Japan Arbitration Law, *supra* n 14, Art 13(1).

¹³⁶ Cook, *supra* n 19, at 72.

¹³⁷ Copyright Act (Burma Code Vol. X Part XXI) (Myanmar) (“Myanmar Copyright Act”).

¹³⁸ *Id.*, First Schedule, s 1.

A. *JADEYE is a literary work under the Myanmar Copyright Act*

79. Software should be considered a literary work under the Myanmar Copyright Act. Legislation ought to be interpreted dynamically unless otherwise specified¹³⁹ and should be construed to reflect changes in society.¹⁴⁰ The Myanmar Copyright Act was put into force in 1914, before computer software existed.¹⁴¹ Given the prevalence of software in modern society, the term literary work ought to be updated to include software. English and US courts have interpreted literary work in their respective copyright acts to include software¹⁴² prior to any legislative clarification.¹⁴³
80. Therefore, the term literary work in the context of the Myanmar Copyright Act should be interpreted to include software, and JADEYE would be protected under the Myanmar Copyright Act.

B. *Yamashita authored JADEYE while he was a resident in Myanmar*

81. The term “resident” can be interpreted in two ways. First, it could mean a physical presence in the country at a certain point in time¹⁴⁴ (“**First Resident Interpretation**”). Second, it could mean one’s “settled or usual abode”¹⁴⁵ with a degree of permanence in the country¹⁴⁶ (“**Second Resident Interpretation**”). The term must be interpreted according to the context in which it occurs.¹⁴⁷

¹³⁹ Francis Alan Roscoe *et al*, *Bennion on Statutory Interpretation: a code* (LexisNexis, 2008, 5th Ed) at p 890.

¹⁴⁰ *Id.*, at 892-893.

¹⁴¹ Gerald O’Regan, *A Brief History of Computing* (Springer, 2012, 2nd Ed) at p 124.

¹⁴² *Sega Enterprises Ltd v Richards* [1983] FSR 73 at 75; *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) at [4].

¹⁴³ Copyright, Designs and Patents Act 1988 (c. 48) (UK) (“UK Copyright Act 1988”), s 3(1).

¹⁴⁴ *Adoption Application (No 52 of 1951)* [1951] Ch 16 at 24 (“*Adoption Application*”).

¹⁴⁵ *Levene v Commissioners of Inland Revenue* [1928] AC 217 at 222 (“*Levene*”).

¹⁴⁶ *Adoption Application*, *supra* n 144, at 25.

¹⁴⁷ *D.D. Grover v A.C. Koonda Controller of Rent Mandalay* [1955] BLR 54 at 57.

82. In the context of the Copyright Act, the First Resident Interpretation ought to be adopted. The purpose of copyright law is to encourage the making of works for the benefit of society.¹⁴⁸ As such, the First Resident Interpretation that provides more extensive protection ought to be adopted. This approach was followed for the UK Copyright Act 1842,¹⁴⁹ where the term “author” was interpreted to include persons temporarily within the jurisdiction of the act.¹⁵⁰

83. Here, Yamashita is a resident of Myanmar under the First Resident Interpretation (a). Even if the Second Resident Interpretation is adopted, Yamashita is still a resident of Myanmar (b).

(1) *Yamashita is a resident of Myanmar under the First Resident Interpretation*

84. Yamashita is a resident of Myanmar under the First Resident Interpretation as he had a physical presence in Myanmar when JADEYE was authored. Yamashita had authored JADEYE mainly in Myanmar,¹⁵¹ and was residing in Myanmar when the software was first implemented at the Hpakant site.¹⁵² Therefore, Yamashita would be considered a resident of Myanmar under the First Resident Interpretation.

¹⁴⁸ *Low v Routledge* [1868] LR 3 HL 100 at 108 (“Low”).

¹⁴⁹ Copyright Act 1842 (5 & 6 Vict. c. 45) (UK).

¹⁵⁰ *Low*, *supra* n 148, at 110-112.

¹⁵¹ Additional Clarifications, Question 17.

¹⁵² Moot Problem at [23]; *Id*, Question 32

(2) *Even if the Second Resident Interpretation is adopted, Yamashita is still a resident of Myanmar*

85. Yamashita is still a resident of Myanmar under the Second Resident Interpretation as he had a “settled or usual” abode in Myanmar.¹⁵³ In ascertaining whether one had a “settled or usual” abode, several factors are indicative:

- a. the duration of stay in the country,¹⁵⁴
- b. the location of the author’s work,¹⁵⁵ and
- c. the type of accommodation the author uses.¹⁵⁶

86. Yamashita was posted to Myanmar in January 2009,¹⁵⁷ and worked on the development of JADEYE in Myanmar until 11 April 2012.¹⁵⁸ When JADEYE was completed, Yamashita had already stayed in Myanmar for approximately three years and four months. Yamashita’s place of work was located in Myanmar¹⁵⁹ and he had permanent accommodation in Myanmar.¹⁶⁰ Therefore, Yamashita had a “settled or usual abode” in Myanmar, and would be considered a resident of Myanmar, even if the Second Resident Interpretation is adopted.

VI. AID OWNS THE JADEYE COPYRIGHT

87. AID owns the JADEYE copyright as JADEYE was made by Yamashita who was an employee of AID (A), and made in the course of his employment with AID (B). Even

¹⁵³ Claimant Memorial at [77].

¹⁵⁴ *Bank of Dubai Limited v Fouad Haji Abbas* [1997] ILPr 308 at 312.

¹⁵⁵ *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 at [460] and [477]-[483]; *Cherney v Deripaska* [2007] EWHC 965 at [39].

¹⁵⁶ *Levene, supra* n 145, at 224.

¹⁵⁷ Moot Problem at [16]; Additional Clarifications, Question 17.

¹⁵⁸ Moot Problem at [21].

¹⁵⁹ *Id.*, at [16]; Additional Clarification, Question 17.

¹⁶⁰ Moot Problem at [18].

if a partnership is found between the Parties, the JADEYE copyright belongs to AID (C).

A. *JADEYE was made by Yamashita who was an employee of AID*

88. In ascertaining whether a person is an employee of a company, two factors are indicative:¹⁶¹

- a. the control the company had over the employee; and
- b. the opportunity the employee had to profit additionally from the sound execution of his task.

89. Here, AID had control over Yamashita and his work. Yamashita was employed as a finance executive by AID¹⁶² and AID seconded Yamashita to Myanmar.¹⁶³ Asamura instructed Yamashita to implement JADEYE on all the computers and equipment at the Hpakant site, to which Yamashita complied without question.¹⁶⁴ Yamashita even handed JADEYE's source code over to AID upon his resignation from AID.¹⁶⁵

90. Additionally, Yamashita did not stand to profit additionally from his work. There is no evidence that Yamashita was additionally rewarded for good performance. Therefore, Yamashita was an employee of AID.

¹⁶¹ *Market Investigations*, *supra* n 37, at 185.

¹⁶² Moot Problem at [21].

¹⁶³ *Id.*, at [16].

¹⁶⁴ *Id.*, at [23]; Additional Clarifications, Question 32.

¹⁶⁵ Moot Problem at [25].

B. *JADEYE was made in the course of Yamashita’s employment with AID*

91. Under Myanmar law, copyright in works authored by employees in the course of their employment would belong to the employer.¹⁶⁶ In ascertaining whether a work was made in the course of employment, two factors are indicative:

- a. whether the work was made in relation to the employer’s business;¹⁶⁷ and
- b. whether the work was relevant to the employer’s business.¹⁶⁸

92. Here, Yamashita was an employee of AID and had no reason to author JADEYE if not for his employment at AID. The idea for JADEYE came to Yamashita when he was thinking of how to improve the financial efficacy of the Venture.¹⁶⁹ JADEYE also played an important part in AID’s business by significantly improving the efficiency of the jade mining operations.¹⁷⁰ Therefore, JADEYE was authored in the course of Yamashita’s employment with AID.

C. *Even if a partnership is found between the Parties, the JADEYE copyright belongs to AID*

93. The JADEYE copyright belongs solely to AID as there was no assignment of the copyright to the partnership. When a work is made by one partner for the purposes of the partnership, the copyright in the work can become partnership property through:

¹⁶⁶ Myanmar Copyright Act, *supra* n 137, First Schedule, s 5(1)(b).

¹⁶⁷ *King v South African Weather Service* [2009] FSR 6 at [20].

¹⁶⁸ *Id* at [18]; *Stevenson Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101 at 111.

¹⁶⁹ Additional Clarifications, Question 26.

¹⁷⁰ Moot Problem at [22]-[23].

- a. a written assignment of legal title by the partner owning the copyright,¹⁷¹ or
- b. an intention to assign the equitable title of the copyright, supported by consideration.¹⁷²

94. Here, there was no written assignment of the JADEYE copyright to the partnership. Additionally, AID did not intend to assign the copyright to the partnership, and there was a lack of consideration. The source code of JADEYE remained with AID throughout the Parties' relationship, with Yamashita handing over the source code of JADEYE to AID upon his resignation.¹⁷³ Further, the partnership did not provide any consideration to AID. The USD 18,000 offered to Yamashita by Kyaw¹⁷⁴ cannot constitute consideration as it was not offered to AID. Therefore, there was no intention to transfer the JADEYE copyright to the partnership.

95. Accordingly, AID is the owner of the JADEYE copyright.

VII. SPT WOULD INFRINGE ON AID'S COPYRIGHT BY REVERSE ENGINEERING JADEYE

96. Reverse engineering occurs when a software is disassembled and its object code is translated into source code.¹⁷⁵ Most programmes utilised on computers are in object code¹⁷⁶ which is unreadable to most humans without translation into source code.¹⁷⁷

¹⁷¹ Myanmar Copyright Act, *supra* n 137, First Schedule, s 5(2); *Tayplan Ltd v D & A Contracts* [2005] CSOH 17 at [10] and [26].

¹⁷² Kevin Garnett *et al*, *Copinger and Skone James on Copyright* (2011, Sweet & Maxwell, 16th Ed) at [5-183]-[5-184].

¹⁷³ Moot Problem at [25].

¹⁷⁴ Moot Problem at [24].

¹⁷⁵ David Bainbridge, *Software Copyright Law* (Butterworths, 1999, 4th Ed) at 159.

¹⁷⁶ Ian J Lloyd, *Information Technology Law* (Oxford University Press, 2011, 6th Ed) at 354.

¹⁷⁷ *Ibid.*

Such a translation of the object code to another form of code is a breach of the original software's copyright.¹⁷⁸

97. Here, SPT expressed the intention to reverse engineer JADEYE.¹⁷⁹ SPT does not possess the source code for JADEYE.¹⁸⁰ The act of reverse engineering JADEYE by SPT would likely entail translating the object code of JADEYE to understandable source code. Such translation would constitute an infringement on AID's JADEYE copyright. Therefore, SPT should not be allowed to reverse engineer JADEYE.

¹⁷⁸ Myanmar Copyright Act, *supra* n 137, First Schedule, ss 1(2) and 2(1).

¹⁷⁹ Moot Problem at [44].

¹⁸⁰ *Ibid.*

PRAYER FOR RELIEF

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

1. The agreement between the parties was not validly terminated;
2. AID is the owner of the jade-mining machinery and equipment;
3. AID is the owner of the JADEYE copyright; and
4. SPT would infringe on AID's copyright by reverse engineering JADEYE.