T1713-C

Kuala Lumpur Regional Centre for Arbitration

Tokyo, Japan

Commercial Arbitration between AID and SPT

2017

Asamura International Development Co.,Ltd (AID)

(CLAIMANT)

V.

Shwe Pwint Thone Co., Ltd. (SPT)

(RESPONDENT)

Memorial for the Claimant

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STATEMENT OF JURISDICTION

Based on the principle of 'party autonomy", where the parties can choose the applicable law to the arbitration as well any procedural rules[1], the Claimant and the Respondent have come to terms to subject the dispute concerning the Jadeite venture and the consequences of the termination to arbitration in accordance with Clause 10 of the partnership agreement, dated 9th September 2006. The parties to the agreement agreed upon the Myanmar/Burmese Law to be the governing authority concerning matters of the venture and they agreed on the fact that the seat of arbitration shall be Tokyo, Japan. The procedural rules governing the arbitral proceedings shall be the KLRC rules.

[1] Andrew Tweeddale and Keren Tweeddale, *Arbitration Of Commercial Disputes* (Oxford University Press 2007) 216

QUESTIONS PRESENTED

The Claimant seeks to ask the tribunal:

1. Whether the termination of the agreement by SPT valid under the prevailing laws.
2. Whether the Claimant could claim ownership of the Jade mining machinery and equipment.
3. Whether the ownership of the JADEYE software lies with the Claimant.

STATEMENT OF FACTS

Overview of the claimant's company.

Asamura International Development Co.Ltd (AID) is a private international development company which specializes in crisis relief and development, based in Tokyo Japan. Upon the death of its founder, Atsuko Asamura, his son, Dr.Yugi Asamura assumed management. AID is involved in the process of rehabilitation and rebuilding projects throughout the world.

Overview of the Respondents' company.

Shwe Pwint Thone Co., Ltd (SPT), owned by U Thein Kyaw, is a Burmese company which is in the pursuit of providing secular and vocational training to children from underprivileged families. SPT is in the venture of running tea shops, carving jade and polishing studios. Also conducts training centers in Mandalay and Yangoon.

The prospect of a partnership between AID and SPT

With 80 acres of land in Hpakant, state of Kachin, gifted to him by the Junta, which supposedly contained jade deposits, SPT was looking forward to a new business venture to increase the revenues. With the hope of ensuring sustainable and safe extraction of jade, U Thein Kyaw, who was already impressed by AID owing to the contributions they made when calamities hit Myanmar, decided to form a partnership with AID. The idea was warmly received by Dr. Yugi Asamura, given that he aspired to expand the company's work.

The partnership agreement

U Thein Kyaw and Dr. Yugi Asamura, following three rounds of discussion, decided to enter in to a partnership, on the 9th of September 2008.

Dr. Yugi Asamura's proposition to draw up an investment agreement via lawyers was dismissed by U Thein Kyaw. However, owing to the insistence of Yugi Asamura to sign an agreement, both parties drafted their own contract.

Execution of the terms of the agreement.

According to the terms of the arguments, AID sourced for second hand machinery and equipment from Japan. The machinery and equipment were imported to Myanmar by SPT in 2009, January. The Jadeite venture was a division of labor in terms of imparting technical knowledge to the SPT's employees and students while the AID's employees were involved in handling the equipment and took charge of the geographical surveys.

Capital investments to the partnership and the continuance of the joint venture.

In March 2009, AID and SPT injected capital contributions of USD 1.5 and 2.5 respectively. This was done under the suggestion of Dr. Yugi Asamura and the funds were held in SPT's bank account. It has to be noted that the visa, accommodation of the employees, license and permits for mining was obtained and done by SPT. The expiration date of the permit was recorded as 31st March 2019.

Emergence of a new software 'JADEYE" and its ownership.

On the 11th April 2012, Dr. Yugi Asamura was informed by one of AID's finance executives, Joe Yamashita of a software he was developing. This was supposedly able to test the quality and viability of jade. Knowing its potential to assist the jadeite venture, Dr. Yugi Asamura ordered the software to be installed, following a trial test that yielded positive results. The remuneration of 18000 USD offered to Joe Yamashita was refused. He resigned on 4 January 2013, handing over the source code and other documents to AID.

Disintegration of the partnership agreement.

A statement made by Dr. Fiona Lum, during an interview in Asian Influencers Magazine for its 2016 edition regarding "ethnic cleansing" in Myanmar, created uneasiness among the SPT workers. Following a speech by Dr. Yugi Asamura in October 2016, at a conference held by the Japanese Association of Mineralogical Sciences, Yuri Hashimoto decided to obtain Dr. Asamura's assistance in sourcing for Jades for her company, Hashimto Co., Ltd (HCL). The proposition did not involve direct involvement with SPT. With U Thein Kyaw's assent in the matter, a contract of 1.2 million was entered in to by AID and HCL on 1 November 2016, through which AID will supply Jade to HCL for one year.

U Thein Kyaw was approached by one Mr. Patrick Green, who proposed a new partnership with a profit split of 85% for SPT and 15% for his company, New Ventures Corporation. The new venture would be involved in the SPT employees and students being taught by qualified English teachers. U Soe Myint, a close confidante, in the event of a discussion of the topic, convinced U Thein Kyaw of ending the partnership. Hence, on the 10th of January, 2017, Dr. Yugi Asamura was informed of the dissolution of the partnership. Under the circumstances, SPT offered to compensate for the relocation costs of the employees of AID.

Dr. Asamura protested saying that that SPT had no right to terminate the agreement. And wanted more than just compensation for relocation costs.

Procedure of arbitration and the issues raised

Arguments were raised regarding the ownership of machinery and equipment and the JADEYE software. To come to an agreement with the issue, upon recommendation of a mutual acquaintance, the parties decided to go for arbitration at the Kuala Lampur Regional Centre for Arbitration in

Malaysia. Dr. Yugi Asamura requested the seat of arbitration to be Japan for convenience, owing to the fact that the initial agreement stipulated that the Burmese law would apply. This was assented by U Thein Kiyaw.

SUMMARY OF PLEADINGS

Claim 01

The termination of the partnership agreement between the Claimant and the Respondent is rendered invalid. Due to the subsistence of a joint venture partnership between the parties to the case, the Respondent is not within his rights to terminate the partnership unilaterally. The validity of the termination is called in to question with the Respondents inability to produce a reasonable written notice.

Claim 02

The existence of a joint venture between the parties at dispute under the Foreign Investment Law of Myanmar (1988) constitutes that the jade-mining equipment and machinery is the foreign capital within the joint venture. Pursuant to the law governing such foreign investment, the investor has the right to claim the foreign capital that he brought into the joint venture, once he leaves the venture. It should be noted that, recording the Respondent as the Consignee or the Endorsee in the Bill of Lading does not negate that the Jade-mining Machinery and Equipment amounted to Foreign Capital.

Claim 03

The subsistence and the ownership of the JADEYE software lies with the Claimant, pursuant to the Foreign Investment Law of Myanmar (1988) since a joint venture exists between the Claimant and the Respondent under the aforementioned law. The software, thus amounts to foreign capital. Therefore, the investor has the right to claim the foreign capital that he brought into the joint venture, when he leaves the venture. Moreover, the Burma Copy Right Act of 1914 also establishes that the Claimant is the first owner of the software, in line with the general principles of authorship

and given that author of the software and the Claimant shared a contract of service as employee and employer. Finally, Myanmar, is obliged to adhere to the basic principles of protecting intellectual property pursuant to the Berne Convention, as it is a member of the World Trade organization.

PLEADINGS

CLAIMANT

1. THE TERMINATION OF THE AGREEMENT IS NOT VALID

A partnership is the shared ownership of a business by two or more persons where there is no legal se¶tion between the business and the individual partners. Therefore, such partnerships are relatively easy to form, where the simplicity of their structure often comes at the cost of a significant amount of risk. A general partnership allows each partner to act independently, pool resources, avoid high startup costs, and avoid large amounts of formalities. Pursuant to this classification, a joint venture is also a form of partnership. The case in hand therefore forms a joint venture partnership through the agreement[2] signed between the Claimant and Respondent. As per the clause 10 of the signed agreement, the parties have agreed to be governed by Myanmar Law, which will be the applicable law concerning this case under Article 35 (1)[3] of the UNCITRAL Arbitration Rules in Chapter II of the KLRCA rules[4]

Moreover, foreign jurisdictions have identified that a joint venture partnership would come under the scope of their Partnerships Act. However, many such foreign jurisdictions also have se¶te statutes governing joint ventures. In the case at hand, the absence of such laws, brings this joint venture under the Partnership Law, mainly by way of precedent from English Common Law Courts. Thus, it is ascertained that a joint venture is governed under the Partnerships Act, 1932[5] of Myanmar through which, it would be further categorized as a Partnership-at-Will due to the

[2] Annexure 1 of the Compromis.
[3] *The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute*.
[4] Provision 1 of Part I of KLRCA Rules
[5] Indian Partnerships Act (Act No.IX of 1932)

absence of the time period where the partnership would operate under. As apparent via the facts of a case, the joint venture has lasted for a period of 8 years to date of respondent's abrupt decision to end the agreement informally. Moreover; according to the general principles of law of contract, which governs all contracts made between parties, such a joint venture constitutes a partnership that has been intended long term. This has been strengthened by clause 8 of the agreement and thereby warrants written notice under Section 43 of PA and reasonable notice according to general principles of contract law. Since none of the requirements both legally and on principle have been satisfied it is the claimant's strong assertion that the respondent has no right what so ever to unilaterally terminate this agreement. Hence this termination is neither valid nor lawful.

1.1 Under Partnerships Act of Myanmar 1932 Respondent does not have a right to terminate the partnership at will without forwarding reasonable written notice

The termination of the joint venture partnership will not constitute a valid termination due to the respondent not following the law of the land as agreed. Under Myanmar law, this partnership will befall under the Myanmar Partnerships Act of 1932[6] and falls under the definition set out in the Act: **Section 4: Definition Of "Partnership", "Partner", "Firm" And "Firm-Name": "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.**

In analyzing the elements of the definition;

Between persons: A partnership is not a se¶te entity with a legal personality of its own but is merely a relationship between persons where there are legal rights and liabilities. In the case at hand, the two individuals represent two se¶te limited companies that are forming a partnership:

[6] The Partnership Act, 1932 of Myanmar is a direct incorporation of the Indian Partnership Act No.IX of 1932

AID Co Ltd and SPT Co Ltd, and although a company typically cannot form a partnership, it can be a partner in a partnership since the definition of a *person* under Sec 2 (44) of Myanmar General Clauses Act 1898[7] states that a "person" shall include ***any company*** or association or body of individuals whether incorporated or not".

'Business': In ***Mann*** v ***D'Arcy*** (1968)[8] it was held that even if the business is only to make one deal, this can be enough to create a partnership. Owing to this, even though this joint venture partnership is established for the sole business of jade mining and production falls under the definition of business.

'By all or any of them acting for all' means not only that all of the partners carry on the business, but that the business is carried on for the benefit of all of them. Although most partnerships employ workers they are not partners. They may help to carry the business on, but it is not carried on for their benefit, thereby it provides common benefit for all.

'***Share the profits'*** does not mean that the business must make a profit, but rather that the partners should intend to make a profit and share it. This intention to make a profit distinguishes partnerships, i.e. a joint venture, from non-profit making members. In gauging this aspect, UK Partnership Act of 1890[9] provides assistance. Accordingly; if a person receives a share of the profits of a business this is strong evidence, that he is a partner in the business. Further, the decision of the House of Lords in ***Khan* v *Mia*** (2000)[10] asserts that the persons who were intending to trade as a partnership could be partners even before the business actually began to trade as long as there was a clear intention to share the profit made by the business. With regard to the case at hand, it is

[7] The Burma General Clauses Act 1932 (Burma Act I 1898)
[8] *Mann v D'Arcy* [1968] 2 All ER 172
[9] From which the Indian Partnerships Act of 1932 relevant to this case draws its foundations.
[10] *Khan v Mia* [2000] 1 WLR 2123 (HL)

clearly expressed in the Agreement signed by the parties, Clause 7: All the profits from the Jade Business will be shared: 65% goes to SPT and 35% to AID showing intention to share the profits of the venture. Therefore these aspects strengthen this joint venture to form an agreement with shared characteristics of that of a partnership and in the nature of a partnership governed under the ambit of the PA.

1.1.1 Partnership-At-Will

A partnership-at-will- is defined as the term given to the association of two or more people that will continue as the long as the people involved want it to[11]. Further, it is a partnership with no fixed term and can, as the name suggests, be terminated by any partner giving notice of termination.[12] In this regard, the Partnership Act defines the type of partnership that the present agreement would categorize under, as a partnership at will due to the absence of a definitive time period: **Section 7: Partnership-At-Will: Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership-at-will"**

Considering Clause 8 of the Agreement, the phrase "Our partnership and brotherhood shall be long term."[13] reflects that the parties intended to carry on the partnership with no time limit or a date of termination. Similarly, since the signing of the partnership agreement on the 9th of September 2008, the partnership fulfills 8 years to the date 10th January 2017, and does not indicate an upcoming end. Therefore, this is a partnership at will as specified in the Law. Pursuant to this establishment of a partnership at will, if the respondent intends to terminate the agreement, he must do so under

[11] Blacks Law Dictionary, 2nd edition
[12] 'Partnership at will' (Collins Dictionary of Law,2006)< http://legal-dictionary.thefreedictionary.com/partnership+at+will>accessed 10 August 2017
[13] Annexure 1, Partnership agreement

Section 43 of the PA[14]. Thus, **Section 43 (1)** establishes **Dissolution By Notice of Partnership at Will: Where the partnership is at will, the firm may be dissolved by any partner giving *notice in writing* to all the other partners of his intention to dissolve the firm.**

It is evident through the compromis ¶ 40 that no written notice: prior or at that moment, was given to the claimant regarding the termination of the contract. The respondent has simply "made up his mind to end the partnership" and abruptly informally informed the Claimant of his decision on 10th January 2017. Thereby the respondent has no such lawful right to terminate the agreement unilaterally in this manner and he has violated the requirement of written notice under the Myanmar law.

1.2 Unilateral termination of a partnership without reasonable notice is illegal under English Common Law

As Myanmar uses the Indian Partnerships Act of 1932[15] which is a direct incorporation of the English Partnerships Act[16], English common law principles will apply to all partnerships governed by the Act. As the Act states in Section 43, it requires written notice in order to dissolve a partnership. However through case law, due to the nature and invested capital in a partnership such as the current joint venture at hand, the concept of "Reasonable notice" has been used by Courts in deciding the adequate amount of time within which a partner should receive notice of intended dissolution.

[14] Partnerships Act 1932
[15] Indian Partnership Act, 1932 (Act No.IX of 1932)
[16] Partnerships Act 1890

1.2.1 Reasonable notice

What constitutes "reasonable notice" is not always straightforward and each unique case has considered how "reasonable notice" should be construed. In such regard, each case will turn in its own facts, but there are some universal factors which have been established and taken into account when determining the length of notice to be provided. The Courts have established, in *Martin-Baker Aircraft Co* v ***Canadian Flight Equipment*** *[1955]*[17], that what is "reasonable notice" will be determined on the basis of the facts in existence at the time notice was given and not the time when the contract was entered into. Following this, in this case, the facts in existence at the time of informal notice was that this was a partnership that had operated over a period of eight years to date and procedure for termination nor for assessing the amount of compensation was specified in the agreement presently in force save **clause 8:** where it states that **"Our partnership and brotherhood shall be long term. The party causing partnership to end must pay compensation"**.

Pursuant to this, Courts have given special consideration to partnerships that have existed long term, as in this case, where significant amount of investment and time has been dedicated as well as profits reaped. In ***Musgrave*** v ***Levesque Securities Inc.*** (2000)[18], the Courts decided that an investment dealer partnering with a company for 4 years required a notice prior to 16 months from termination. In ***George*** v ***The Hardman Group*** (1984)[19], Courts agreed that the period that fulfills reasonable notice for a Vice President of operations of a firm working with them for 8 years is 9 months.

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[17] *Martin-Baker Aircraft Co v Canadian Flight Equipment [1955] 2 QB 556*
[18] *Musgrave* v. *Levesque Securities Inc.* (2000) 183 N.S.R. (2d) 349 (S.C.)
[19] *George* v. *The Hardman Group* (1984),63 N.S.R. (2d) 333 (T.D.)

1.2.2 The Claimant received no prior reasonable notice

As established before, since this partnership is a joint venture investment partnership governed by English Law principles relating to contracts, other factors, including the general circumstances and any relevant trade practices done within the scope of the joint venture, is also be applicable in determining the appropriate notice period when terminating a contract. Such a trade practice has commenced, where the Claimant entered into a 1.2 million USD contract with HCL, a se¶te company for one year from 1ST November 2016[20], with the awareness and consent of the Respondent[21]. Hence, if the termination of this agreement by the respondent is allowed to stand with no prior reasonable notice, the Claimant would incur a much larger loss of profits.

Moreover, in ***S Childrenswear Limited (in liquidation)*** v ***Boots UK Limited***[22] the Courts identified that particular partnership agreements are subject to core rules regarding reasonable notice periods even though each case is considered se¶tely. Firstly, **Degree of formality** where whether a written authoritative contract was in force with rights to the parties pursuant to the contract existed was given significance. In the case at hand, there is a clear written and signed agreement, signed by the partners that sets out the terms of profit distribution, roles and responsibilities, legal capacity as well as an intention to pursue a long term partnership. Therefore this is not a relaxed contractual relationship that gives room to Courts to not impose a lengthy notice period. Secondly, **Competition** has not taken place. Although, the Claimant was engaged in another contract with HCL within the pre-existing partnership since the respondent has given his consent to a new venture within the pre-existing partnership and since the product sold was

[20] ¶ 33-35 of the compromis
[21] ¶ 35 of the compromis
[22] *S Childrenswear Limited (in liquidation) v. Boots UK Limited [2013] 3251 (Pat)*

semi-processed jade and not the full processed jade handled by the joint venture, the claimant did not engage in competition with the Respondent to harm his business. Thirdly, with regard to **Length of the relationship & early investment,** there is evidence of a lengthy relationship between the parties and significant initial investment of time, effort and money as expressed in the facts of the case which all in turn contribute to a lengthy notice period. The Claimant had borne costs of the purchase and reconditioning of second hand machinery and equipment needed for the partnership[23] and when faced with financial difficulties in operational costs, had made additional capital contributions to a joint fund under the Respondents bank account amounting to 1.5 million USD in March 2009[24]. In addition, the length of the relationship is established as 8 years from the date of signing of the agreement on 9th September 2008[25] to the date where the informal informing of the Respondent's decision to end the partnership occurred on 10th January 2017[26], further the agreement clause 08 establishes that the parties also intended this joint venture partnership to be long term. Pursuant to the fulfillment of these rules, the partnership yet again requires a period of reasonable notice. Therefore as no prior notice what so ever was given to the Claimant by the respondent under a reasonable time period nor in writing this termination is once again deemed invalid.

In this regard, the respondent has neither adhered to the laws of Myanmar i.e. the Myanmar Partnership Act[27] nor has he adhered to the general principles of law of contract governing agreements between business partners, in particular between investors in a joint venture partnership, and thereby has no right what so ever to unilaterally terminate the agreement with

[23] P 16 of the Compromis
[24] ¶ 17 of the Compromis
[25] ¶ 14 of the Compromis
[26] ¶ 40 of the Compromis
[27] Partnership Act, 1932

neither written nor reasonable notice. Therefore, there is no valid termination of the Joint Venture partnership between the Claimant and Respondent.

2. Ownership of Jade-Mining Machinery and Equipment lies with the Claimant

The existence of a joint venture between the Claimant and the Respondent under the Foreign Investment Law of Myanmar constitutes that the jade-mining equipment and machinery is the foreign capital within the joint venture. Pursuant to the law governing such foreign investment, the investor has the right to claim the foreign capital that he brought into the joint venture, when he leaves the venture.

2.1 The Existence of a "Joint Venture" pursuant to the Foreign Investment Law between the Claimant and the Respondent

In line with the **The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88),** hereinafter referred to as **FIL 1988**, the Agreement between the Claimant and the Respondent constitutes a "Joint Venture" which, in the context the parties entered into the partnership agreement (09.09.2008), was the existing law in Myanmar governing such joint ventures between a citizen of Myanmar and a foreign investor.[28]

The Respondent initiated an investment partnership with the Claimant given that the **Myanmar Citizen's Investment Law (The State Law and Order Restoration Council Law No. 4/94) Section 11 (h)** permits, an investor to **"form and operate in accordance with the Foreign Investment Law, if desirous of establishing a joint venture with a foreigner or with any foreign company."** Pursuant to the aforementioned **FIL 1988**, under **Section 5 (b),** foreign

[28] The current Foreign Investment Law is governed by the Myanmar Investment law (The Pyidaungsu Hluttaw Law No. 40/2016) or commonly known as MIL 2016, which is a consolidation of the Foreign Investment Law (2012) and the Citizen's Investment Law (2013) of Myanmar.

investment may be made as **"joint-venture made between a foreigner and a citizen."**[29] In this regard, it is evident that the contemporaneous law imparted strong incentive on the part of the Claimant and the Respondent to initiate an investment partnership in the form of a joint venture to engage in jade mining.

Moreover, as elucidated in **FIL 1988**, under **Section 4** foreign investments shall be made: **for the exploitation of natural resources which require heavy investment**[30]**; acquisition of high technology**[31]**; supporting and assisting production and services involving large capital**[32]**; opening up of more employment opportunities**[33]**; regional development.**[34] Note worthily, the joint venture of the parties encompassed the above principles stipulated by the foreign investment law within the jurisdiction of Myanmar in 1988.

For example, the **4th clause** of the partnership agreement is in line with **Section 4(d)** where the Claimant agreed to provide technical expertise and train the local people of Myanmar in order for the locals to acquire new skill sets and become independent. In addition, the **5th clause** of the partnership agreement lays out the basic principles of **Sections 4(e) and 4(g)** noting that, **"it is the strong will of SPT that this partnership is to help the local Myanmar people, to improve their livelihoods..."**[35] enunciating the emergence of the new employment opportunities and regional development**.** Whilst this outlines the legal cornerstones of investment policy in the 1988 Burmese

[29] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[30] Section 4(b) of The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[31] Section 4(c) of The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[32] Section 4(d) of The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[33] Section 4(e) of The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[34] Section 4(g) of The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[35] Annexure 1 of the Compromis

economy; it simultaneously pinpoints at the intention that existed between the parties in investing on a joint Jadeite venture pursuant to the basic principles of investment laid out in **FIL 1988**.

An Investor in this case, is a person or an organization making an investment under a permit.[36] One can argue that the Claimant does not fall into the given category of an investor since the Claimant has not obtained a permit from the Myanmar Foreign Investment Commission, commonly known as the MIC[37]. However, it should be noted that the MIC came into operation with the enactment of the new Foreign Investment Law[38] in 2012, which vested the commission with the powers of accepting a proposal which is considered beneficial to the interests of the Union[39] and issuing permit to the promoter or the investor if the proposal is accepted[40]. Moreover, the **6th Clarification** of the Compromis outlines that the Respondent **obtained "all necessary permits in relation to the venture..., including the mining permit."[41]** This infers the following conclusions.

Firstly, given that the investment partnership was for a joint venture, by the phrase "**all necessary permits,"** it is evident that, under **Section 10** of **FIL 1988**, the Respondent has obtained the permit issued by the **"Union of Myanmar Foreign Investment Commission"** for the joint venture, which was the existing authority, vested with the duty of issuing a permit to an accepted proposal, at the time.

[36] Section 2(i) of The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[37] 7th Additional Clarification of the Compromis
[38] The Republic of the Union of Myanmar Pyidaungsu Hluttaw Foreign Investment Law No. 21/2012 3rd Waning of Thadingyut 1374 ME
[39] Section 13 (a)
[40] Section 13(b)
[41] 6th Clarification of the Compromis

Secondly, given the issue of not obtaining a permit from the MIC, the Respondent should be held at blame as **Clause 3** of the Partnership Agreement in Annexure 1 specifies that, the respondent is **"in charge of obtaining and settling all the permits and requirements to do the jade-mining business and all related matters with the government of Myanmar."** Thus, the Respondent has breached a fundamental term of the partnership agreement, by not obtaining the required permit from the MIC, once it was established in 2012.

Thirdly, it is apparent that the Respondent has particularly obtained the permit for mining under the **Myanmar Mines Law (The State Law and Order Restoration Council Law No 8/94)**, as the **7th Clarification** underpins that, the Respondent was granted a permit for **"large scale"** mining activities. **Section 7** of this legislation reads that, **"The Ministry may with the approval of the Government, grant permit for of the following operations:**
(a) prospecting, exploration, large scale production or small scale production of gemstone, metallic mineral, industrial mineral or stone involving foreign investment" which yet again buttresses the existence of a joint venture between the Claimant and the Respondent in the form of an investment partnership permitted by the Government of Myanmar.

In this light, the agreement between the Claimant and the Respondent is a joint venture, given that the parties had a clear intention to institute an investment partnership in the form of a joint venture within the Burmese investment environment that existed in 2009. This was facilitated by the permits obtained by the Respondent for the venture, including the permit under the Myanmar Mines Law, which further establishes the existence of an investment under the Partnership Agreement within Myanmar. Therefore, the Jade Mine-Machinery and Equipment brought into the investment agreement is governed under the Foreign Investment Law of Myanmar, particularly

the 1988 Foreign Investment legislation, given that the parties intended to create the partnership under that law.

2.2. Jade-mining Machinery and Equipment constitutes Foreign Capital

Anon, the jade mining machinery and equipment amount to foreign capital under the **FIL 1988, Section 2(h),** where the legislation notes that foreign capital includes:

" The following which are invested in an economic enterprise by any foreigner under a permit: foreign currency; property actually required for the enterprise and which is not available within the State such as machinery equipment, machinery components, spare parts and instruments; rights which can be evaluated such as licenses, trademarks and patent rights; technical know-how; re-investment out of benefits accrued to the enterprise from the above or out of share of profits;" [42]

In this regard, the machinery and the equipment, particularly dump trucks, excavators and drilling machines, were imported, as it was not locally available[43]. These machinery and equipment was sourced by the Claimant, having purchased and reconditioned them in Japan[44] pursuant to the **4th clause** of the Partnership Agreement, which outlined that the Claimant was obliged to buy and provide all equipment. Moreover, the clause further stipulates that the agreement itself was created by the parties to enable the dispersion of the Claimant's expertise in the field of jade extraction to the Respondent's company and thereby the Myanmar community stipulating the requisites of **Section 2(h).** Thus, the jade-Mining equipment and machinery constitutes foreign capital on the part of the claimant within the joint venture.

[42] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[43] 6th Additional clarification of the Compromis
[44] Compromis, ¶ 16

However, given that the Respondent was recorded as the owner and the operator of the jade-mining Machinery and equipment on the permits required to operate them,[45] one can question as to whether the equipment and the machinery actually constituted "foreign capital" under Section 2(h). The Claimant was fully aware of the Respondent being recorded as the owner and the operator of the equipment and the machinery and thereby allowed it, as it does not merely transfer the ownership of the equipment and the machinery in favor of the Respondent.

On one hand, the Respondent was recorded as the owner and the operator of the jade-mining equipment and machinery, pursuant to **Clause 3** of the Partnership Agreement in Annexure 1, which stipulated that **the Respondent is in charge of settling all requirements to do the jade-mining business and all related matters with the government of Myanmar.** Thus, it is evident that the Claimant allowed the registration of the assets in the name of the Respondent, in line with the Partnership Agreement without an intention of conferring ownership to the Respondent. Had there been such intention the partnership agreement would have stipulated that the Respondent would be the "importer" of the jade-mining equipment and machinery. Instead, in **Clause 4** of the Partnership Agreement the parties have agreed that the Claimant would **"buy and provide all equipment required."** On the other hand, on behalf of the Partnership Agreement, the Claimant has agreed to the above terms and, allowed the registration of the assets under the Respondent's name for the convenience and the smooth functioning of the joint venture within Myanamar.

In addition, as **Section 24** stipulates **"The Commission shall evaluate the foreign capital in terms of kyat in the manner prescribed, and register it in the name of the investor"**[46] and "**investor"** here, is defined in **Section 2(i)** as **"a person or an economic organization making**

[45] 14th Clarification of the Compromis
[46] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)

an investment under a permit."[47] It is apparent in this regard that the legal definition of an investor does not constitute a foreigner-citizen distinction within the FIL 1988. As established under the existence of an investment, it is apparent that the law allowed the Respondent to become an investor in a joint venture with a foreign entity, such as the Claimant. Thus, irrespective of the capital being registered under the Respondent, the legal requisite is for the capital to be registered under an investor, which can be a foreign entity as in the Claimant or a citizen as in the Respondent.

Thus, the jade-mining equipment and machinery, does indeed constitute the foreign capital investment on the part of the Claimant under **Clause 4** of the **Partnership Agreement**.

2.3 Pursuant to the Foreign Investment Law, the person who has brought in the foreign capital may withdraw foreign capital

Accordingly, under **Section 25** of FIL 1988, **"in the event termination of a business, the person who brought in the foreign capital may withdraw foreign capital."**[48]

2.3.1. Recording the Respondent as the Consignee or the Endorsee in the Bill of Lading does not negate that the Jade-mining Machinery and Equipment amounted to Foreign Capital.

One could contest as to whether the Claimant actually brought in the jade-mining machinery and equipment as foreign capital, given that the Bill of Lading recognized the Respondent as the consignee or the endorsee for the machinery and equipment[49], thereby outlining the transfer of ownership of these assets from the Claimant to the Respondent. In addition, the Respondent was also named as the importer of the equipment and machinery.[50] However, it should be noted that, the mere possession of the Bill of Lading does not account for a transfer of ownership of the

[47] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[48] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[49] 25th Additional Clarification of the Compromis
[50] 8th Additional Clarification to the Compromis

machinery and equipment from the Claimant to the Respondent.[51] For example, in the English case ***Sewell*** v ***Burdick*** it is clear that the bill of lading does not necessarily transfer ownership in the goods.[52] "Ownership is transferred by the sale contract. In ordinary sales the seller will transfer full ownership, which includes the proprietary right to immediate possession. The transferee of the bill of lading will not, therefore, necessarily acquire ownership by taking an endorsement of the bill and as such would seem to lack the necessary interest required to support an action in conversion."[53] Therefore, it is apparent that, the ownership of the jade-mining machinery and equipment does not transfer to the respondent, merely because the Respondent is addressed as consignee or the endorsee for the machineries and equipment in the Bill of Lading.

Thus, the Claimant indeed brought in the jade mining equipment and machinery as foreign capital into the joint venture, pursuant to his obligation under **Clause 4 of the Partnership Agreement** in Annexure 1. Thence, the Claimant has the right to retain the jade-mining machinery and equipment under the joint venture stipulated by the partnership agreement.

3. Subsistence and Ownership of the JADEYE Software lies with the Claimant

The subsistence and the ownership of the JADEYE software lies with the Claimant, pursuant to the FIL 1988; given the existence of a joint venture between the Claimant and the Respondent under the Foreign Investment Law, thereby the JADEYE software amounting to foreign capital. Therefore, the investor has the right to claim the foreign capital that he brought into the joint venture, when he leaves the venture. In addition, the Burma Copy Right Act of 1914 establishes that the Claimant is the first owner of the software, in line with the general principles of authorship

[51]Ewan Macintyre, Business Law, 5th edn,(Pearson Education Limited 2010)
[52]***Sewell* v *Burdick* [1875] 10 AC 74**
[53] Nick Curwen, '**The Bill of Lading as a Document of Title at Common Law'**
<http://ssudl.solent.ac.uk/66/1/2007_140-163.pdf> accessed 05th August 2017

and given that author of the software and the Claimant shared a contract of service as employee and employer. Finally, Myanmar, by virtue of being a member of the World Trade Organization, is obliged to adhere to the basic principles of protecting intellectual property pursuant to the Berne Convention.

3.1 The Subsistence and the Ownership of the JADEYE Software lies with the Claimant, pursuant to the Foreign Investment Law of Myanmar

It was established under the second pleading that, in line with **FIL 1988**[54] the Agreement between the Claimant and the Respondent constitutes a "Joint Venture" which, in the context the parties entered into the partnership agreement (09.09.2008), was the existing law in Myanmar governing such joint ventures between a citizen of Myanmar and a foreign investor.[55]

Pursuant to this Law, **Section 2(h)** identifies that; foreign capital may constitute **"rights which can be evaluated such as licences, trademarks and patent rights"** which are invested in an economic enterprise by any foreigner under a permit. However, since the term "copyrights" is not explicitly recognized in the given section, one can argue that it does not amount to foreign capital. This has been a fundamental problem for many foreign investors in Burma, as the laws governing Intellectual Property in Myanmar is currently being subjected to reform given its inconsistencies with the contemporary investment environment and the law's premature nature.[56]

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[54] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88)

[55] The current Foreign Investment Law is governed by the Myanmar Investment law (The Pyidaungsu Hluttaw Law No. 40/2016) or commonly known as MIL 2016, which is a consolidation of the Foreign Investment Law (2012) and the Citizen's Investment Law (2013) of Myanmar.

[56] Eifl <http://www.eifl.net/eifl-in-action/copyright-reform-myanmar> accessed 01 August 2017
Mark D.litvack and Aaron R.Hutman, 'Protect Your Intellectual Property Rights in Myanmar/Burma- Key Steps to Take Now' (2012) <https://www.pillsburylaw.com/images/content/3/2/328.pdf > accessed 25 July 2017
Kyaw Zaw Naing, 'Problems and Prospects of CopyRights for Myanmar Today'(04th August 2005)<http://www.accu.or.jp/appreb/10copyr/pdf_ws0509/2_6_kyaw.pdf> accessed 25 July 2017
Yu Wadee Thean Ngarm and Shalini Ghosh, 'Myanmar:Update on Myanmar's Laws'<http://www.managingip.com/Article/3521769/Myanmar-Update-on-Myanmars-IP-laws.html > accessed 06 July 2017

Especially given that, on 02.11.2012, when the Burmese Investment Law underwent a reform with the establishment of the new Foreign Investment Law, it came to recognize in **Section 2(i)** that, Foreign Capital includes **" rights which can be evaluated the intellectual property such as license, patent, industrial design, trademark, copyright"** which are invested in the business by any foreigner under the permit. It should be borne in mind that Joe Yamashitha, the author of the JADEYE software informed the Claimant that "he has been working on the development of a process optimisation and operations management software, and that he was now confident that the software was ready to be used on 11.04.2012."[57] In the aftermath of this development, the Foreign Investment Law of Myanmar is reformed again in 18.08.2016 to establish the Myanmar Investment Law[58], which does not recognize, in any of its provisions, a se¶te clarification of what constitutes foreign capital. Thus, in the backdrop of a constantly changing legal environment, it is impractical to reside to a strict interpretation of what constitutes foreign capital.

Given that the Burmese law recognized that rights which can be evaluated as intellectual property, such as copyrights in this case can be identified as foreign capital, at the time the Claimant's Company brought the JADEYE software into the joint venture it can be established as foreign capital within the joint venture. Moreover, the Union of Myanmar Foreign Investment Law, which existed in the context that the Claimant and the Respondent established a partnership, has also underpinned certain rights constituting intellectual property (such as license and patents) to enclose

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'CopyRight System in Myanmar'<http://www.ipophil.gov.ph/images/IPKnowledge/Myanmar_Country%20Report.pdf > accessed 6th of August 2017

[57] ¶ 21 of the Compromis

[58] The Pyidaungsu Hluttaw Law No. 40/2016

the definition of foreign capital.[59] Thus, in interpreting the law on foreign capital in various investment legislations that Myanmar has produced, it can be established that the JADEYE software, which was created by an employee of the Claimant's company amounts to foreign capital that was invested within the Jadeite venture.

Accordingly, in line with **Section 25** of the Foreign Investment law[60], **"in the event termination of a business, the person who brought in the foreign capital may withdraw foreign capital."** Thence, the Claimant has the right of subsistence and ownership of the JADEYE software.

3.2. Burma Copy Right Act of 1914 establishes the Claimant as the first owner of the Software

Moreover, pursuant to Section **5(1)(b) of the first schedule Burmese Copyright Act,**[61] which serves as the most relevant provision within domestic legislation underpinning copyrights, the first owner of the JADEYE software is the Claimant. It should be established that, although **Clause 10** of the **Partnership Agreement** notes, **"Everything will be in accordance with and interpreted under the law of the Golden Land of Myanmar"** the laws governing Intellectual Property in Myanmar is currently subjected to reform as mentioned above.[62] Yet, there may be strategies to

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[59] Section 2(h) of the Union of Myanmar Investment Law (The State Law and Order Restoration Council Law No. 10/88)
[60] Supra note 1
[61] Burma Copyright Act of 1914
[62] Eifl <http://www.eifl.net/eifl-in-action/copyright-reform-myanmar> accessed 01 August 2017
Mark D.litvack and Aaron R.Hutman, 'Protect Your Intellectual Property Rights in Myanmar/Burma- Key Steps to Take Now' (2012) <https://www.pillsburylaw.com/images/content/3/2/328.pdf > accessed 25 July 2017
Kyaw Zaw Naing, 'Problems and Prospects of CopyRights for Myanmar Today'(04th August 2005)< http://www.accu.or.jp/appreb/10copyr/pdf_ws0509/2_6_kyaw.pdf> accessed 25 July 2017
Yu Wadee Thean Ngarm and Shalini Ghosh, 'Myanmar:Update on Myanmar's Laws'<http://www.managingip.com/Article/3521769/Myanmar-Update-on-Myanmars-IP-laws.html > accessed 06 July 2017
'CopyRight System in Myanmar'<http://www.ipophil.gov.ph/images/IPKnowledge/Myanmar_Country%20Report.pdf > accessed 06 of August 2017

protect IP in lieu of traditional copyright rules which can be explored as follows.[63] The Burma Copy Right Act, Section 5(1)(b) reads,

"Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that-

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

This ascertains several key inferences, which can derivate the above conclusion over ownership. Firstly, in line with the general principles of literacy works in English law, where the work is created in employment, first ownership must go to the employer, in the absence of a contrary contractual arrangement. These general principles apply to the question of authorship in the current English legal system as the **Art. 2** of the Computer **Programs Directive**[64] permit it. Given that the Burmese Copyright Law is a replica of the 1911 English Copyright Act, with the development of the English Law, the novel principles therein are of value in the interpretation of the Burmese Intellectual Property Regime. Thus, despite the archaic nature of the Burma Copyright Act, utilising the general principle within this provision, the Claimant's right to the subsistence and ownership of the JADEYE software can be established. It is evident that Joe Yamashitha created the software within the course of employment under the Claimant, as he informed the Claimant that he has

[63] Mark D.litvack and Aaron R.Hutman, 'Protect Your Intellectual Property Rights in Myanmar/Burma- Key Steps to Take Now' (2012) <https://www.pillsburylaw.com/images/content/3/2/328.pdf > accessed 25 July 2017

[64]William Cornish,David Llewelyn and Tanya Aplin: Intellectual Property-Patents,Copyright,Trade Marks and Allied Rights(8th edn, Sweet & Maxwell 2013)

been working on the development of a process optimization and operations management software[65].

Secondly, in establishing that the first ownership of the JADEYE software lies with the Claimant, it is vital to ascertain that the author of the JADEYE software was under the **employment** of a person under a **contract of service**. Although the **Employment and Skill Development Law[66]** does not distinct between an Employee working for contract of service and contract for service, it defines in **Section 2(b)**, that the employee **"means the person who works for remuneration of skill job, fairly skill job, non-skill job in the Government department and Organization, the Co-operative society, Private or Joint-Venture, any Organization, the Company.**" An employer on the other hand is depicted in **Section 2(a)** as **"the person who has the right to appoint the employee or the person who is delegated to appoint this employee in ... Private or Joint-venture business, any Organization, the Company."**

Therefore, in the light of these definitions it is evident that Joe Yamashitha, as a Finance Executive of the Claimant's company[67] was the Claimant's employee. He was working in Myanmar along with 24 other employees of the Claimant's company under the Partnership Agreement[68]. Joe Yamashitha is remunerated by the Claimant[69]. In the event of the JADEYE software yielding positive results, the Claimant as the employer of the author of the software, was able to **"immediately order"** the software to be installed all the computers and equipment used on the sites.[70] Thus, it is apparent that the Claimant and the author of the Software shared an employer-

[65] ¶ 21 of the Compromis
[66] Pyidaungsu Hluttaw Law No. 29/2013
[67] ¶ 21 of the Compromis
[68] 17th Additional Clarification of the Compromis
[69] 14th Additional Clarification of the Compromis
[70] ¶ 23 of the Compromis

employee relationship, which ascertains the first ownership of the JADEYE software given that it was created in the course of the employee's employment under the Claimant. Moreover, given that the Claimant was able to **order Joe Yamashitha** to **install the software into all the computers and equipment used on the sites**[71]**,** it is evident that the relationship between the Claimant and Yamashitha was indeed a contract of service.

> Accordingly, in the case ***Patchett* v *Sterling*,**[72] **"it is an implied term in the contract of service of any workman that what he produces by the strength of his arm or the skillof hand or the exercise of his inventive faculty shall become the property of the employer"**[73]

In addition, the respondent have also by conduct recognized the Claimant as the owner of the software, as the Respondent, pleased by JADEYE software, presented Joe Yamashita with USD 18,000 in cash.[74] Given that Joe Yamashita declined the cash, and said that JADEYE was "for the benefit of all of us"[75] it is apparent that, the author of the software had no intention to confer the ownership of the copyright to the joint venture, but in fact retained it in the ownership under the Claimant's company. This is further ascertained when Yamashitha, handed the so urce code of JADEYE to the head of Finance of the Claimant's company, saved in a hard disk drive, together with other documents during the exit clearance process, on his last day at Tokyo.[76]

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[71] 32nd Additional Clarification
[72] ***Patchett* v *Sterling*** (1955) 72 R.P.C. 50.
[73] William Cornish,David Llewelyn and Tanya Aplin: Intellectual Property-Patents,Copyright,Trade Marks and Allied Rights(8th edn, Sweet & Maxwell 2013)
[74] ¶ 24 of the Compromis
[75] ¶ 24 of the Compromis
[76] ¶ 25 of the Compromis

3.3 Myanmar is obliged by virtue of being a member of the World Trade Organization, to adhere to the basic principles of protecting intellectual property pursuant to the Berne Convention.

Furthermore, since Myanmar is a member state of the World Trade Organization (WTO)[77], it is required to oblige with the basic principles of the **Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)[78]**, herein after referred to as the Berne Convention. According to the basic principle of **"National Treatment"** elucidated in the **Article 2(6), 3** and **5(3) of the Berne Convention, "Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals"[79].** Moreover, the convention notes that, computer programs whether in source or object has to be protected as literacy work under the convention.[80] In the case, ***Francois Lucazeau*** v ***Societe Des Auteurs[81]*** it was recognized that, "under the international copyright conventions, that the owners of copyright recognized under the legislation of a contracting State are entitled, in the territory of every other

[77] Myanmar became a member of the World Trade Organization on the 01.01.1995, <https://www.wto.org/english/thewto_e/countries_e/myanmar_e.html> accessed 09th August 2017
[78] The Enforcement of Intellectual Property Rights : A case book'(2012)173 <http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf> accessed 10th of August 2017 The Enforcement of Intellectual Property Rights : A case book'(2012) < <http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017
[79] The Enforcement of Intellectual Property Rights : A case book'(2012)169<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017
[80] Article 10 of the TRIPS Agreement
[81] ***Lucazeau*** v ***Societe Des Auteurs*** (SACEM) ECJ, 13 July 1989, joined cases 110/88, 241/88 and 242/88, ECR 1989, 2811

contracting State, to the same protection against the infringement of copyright, and the same remedies for such infringement, as the nationals of the latter State."[82]

Therefore, since the first owner of the software is the Claimant, the Respondent does not have the right to reverse engineer or create their own software pursuant to the Copyright Act of Burma; as not only does it infringe the domestic copyright law of Myanmar, but also the Burmese international obligations to the protection of intellectual property as a founding member of the WTO.

[82] The Enforcement of Intellectual Property Rights : A case book'(2012)169<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017