T1713-R

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 Respondent

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STATEMENT OF JURISDICTION

Based on the 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 Respondent seeks to ask the tribunal:

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

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 agreement between the Claimant and the Respondent in rendered and lawful owing to the fact that the Claimant's refusal to perform a promise of contract to the other party is a breach of a fundamental term. The termination of the contract, unilaterally, without prior notice is not considered invalid because though the Claimant was given opportunity, he did not perform the promise.

Claim 02

The ownership of the jade-mining machinery and equipment lies with the Respondent, given that the ownership transferred to the Respondent the Bill of Lading recognizing the Respondent as the consignee and the endorsee of the machinery and equipment. Alternatively, the ownership transferred through a Contract formed under the Sale of Goods Act of 1930

Claim 03

The ownership and the subsistence of the JADEYE software does not completely lie with the claimant as he is neither the sole author nor the complete owner of the JADEYE software, due to the fact that the software was created once the parties came into discussion of the joint venture. Moreover, the author of the software is not the Claimant's employee, but the employee of the joint venture. In addition, the JADEYE was created with the intention of public good and in benevolence. Thus, the ownership and the subsistence of the JADEYE do not completely lie with the Claimant. Thence, it enables the Respondent also to enjoy the ownership and the subsistence of the software along with the right to reverse engineer the software in Myanmar, on behalf of the public good of the people in Myanmar.

PLEADINGS

1. AS PER THE CONTRACT LAW OF MYANMAR, IN LIGHT OF A REFUSAL TO PERFORM A PROMISE OF A CONTRACT, THE OTHER PARTY HAS THE RIGHT TO UNILATERALLY TERMINATE THE CONTRACT WITHOUT PROVIDING PRIOR NOTICE

A joint venture is an association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture.[2] The agreement between the parties takes the form of a joint venture investment contract with the objective of gaining technical expertise and equipment currently inaccessible in the country to develop a new skill set for the people of Myanmar to improve their livelihoods and be compatible to the evolving world economy[3]. Although it is common to identify a joint venture as a form of partnership, it is very significantly distinguishable. With progressive legal structure, foreign jurisdictions have identified that a joint venture investment contract would not come under the scope of their Partnerships Act but under Contract Law and in almost every such foreign jurisdiction, there are separate statutes governing joint ventures[4]. In the case at hand, the absence of such laws, bring this joint venture under the Myanmar Contract Law, as it is the law that governs all contracts between competent parties. Pursuant to these facts, this joint venture is not a partnership administered under the Partnerships

[2] Williston, *A Treatise On The Law Of Contracts* (3rd edn. Jaeger 1959) 318
[3] ¶ 7,8,10,11 of the Compromis, Agreement clause 5
[4] In UK and India, Joint ventures are expressly governed by UK Limited Liability Partnerships Act (2000), Indian Limited Liability Act (2008)

Act (Indian Act No. IX of 1932) of Myanmar, but an independent contract of investment governed under the Myanmar Contract Act.

Under the Contract law, it allows the innocent party to terminate a contract once a refusal to perform a promise of a contract has taken place. Considering the actions of the claimant in his affirmation of the statement made by his spouse, a non-executive director of AID Lt Co., which was prejudicial to the national interests of Myanmar, and further his refusal to renounce that statement on request by the respondent, results in a repudiatory breach of contract. The claimant has thus violated clause 11 of the signed agreement, and has committed a breach of a fundamental term through his refusal to perform a promise of the contract, thereby giving the Respondent the right to unilaterally terminate this contract under Section 39 of Contract Act without giving prior notice. Owing to this, it is the strong assertion of the Respondent that the termination of the agreement is both valid and lawful.

1.1 Since two companies cannot form a partnership, this is not a partnership that is governed by the Partnerships Act of 1932

According to Myanmar Law, two incorporated companies cannot form a partnership under the Partnership Act. Therein, joint ventures and partnerships are governed by different laws. While partnerships are governed by the Partnership Act of 1932, Joint Ventures still remain under the scope of Contracts Act[5] and allow room for joint venture investment contracts between foreign and domestic companies.

As per the Section 4 of the PA of 1932, **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.** From the initial overlook

[5] Enforcing Contracts in Myanmar: A Myanmar Lawyer perspective (Research paper, Prism)

of the agreement, it would fulfill these aspects; yet the Partnership Act does not define the word "person". It is found in The Burma General Clauses Act 1898[6], Section 2 (44) where a "person" shall include any company or association or body of individuals whether incorporated or not". Nevertheless, since the Burma General Clauses Act is founded upon the Indian General Clauses Act of 1897[7] while being annexed to British India as British Burma and owing to the direct incorporation of the Indian Partnerships Act 1932 to govern partnership law in Myanmar at present, adherence to the interpretation of these laws done by the highest Court of India becomes binding. In following this authority, in ***The Commissioner of Income-Tax* v. *Kalu Babu Lal Chand***[8], the Supreme Court established that an association of persons or a company is not a person under the Partnership Act and therefore refused to accept the application of the Section 3(42) of The Indian General Clauses Act 1897, (which served as the founding source for the Burma General Clauses Act). Thus, the Indian Courts established that for the Partnership Act, a different meaning to expression "Person" is assigned. Furthermore, in ***Ganga Metal Refining Co. Pvt. Ltd.* v. *Commissioner of Income-tax,*** it was observed three limited companies incorporated under the Indian Companies Act, even if they carry on a venture jointly, cannot be said to form a partnership within the meaning of the Partnership Act of 1932. In the opening statement as well as clause 1 of the Agreement, it is shown that this venture is between two Limited companies, with representatives signing on its behalf: Claimant for AID Ltd Co. and Respondent for SPT Co. Ltd, where it is clearly established that both are incorporated companies and therefore cannot form a partnership under the Partnership Act of Myanmar.

[6] The Burma General Clauses Act [Burma Act I, 1898]
[7] T K Wishwanathan, Legislative Drafting - Shaping the Law for the New Millennium, chapter XII
[8] ***Ganga Metal Refining Co. Pvt. Ltd.* v. *Commissioner of Income-tax*** (MANU/SC/0102/1959)

1.1.1 Sharing of profits do not constitute the existence of a partnership.

The nature of the agreement is such that there is a consensus between the Respondent and Claimant to share the profits of the jade business in a 65% to 35% division under agreement clause 7. However, this alone does not constitute the existence of a partnership. According to Section 5 of the PA[9] : Mode Of Determining Existence Of Partnership: "In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the **real relation** between the parties, as shown by all relevant facts taken together." Further the act explicitly states in *Explanation I: The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.*

In addition to these facts, the UK Partnership Act of 1890[10] also provides assistance. It emphasizes that in determining a partnership: the sharing of gross takings does not necessarily make the people who share those partners, the mere fact that people own property together does not necessarily make them partners, even if they share any profits made from the property.

1.2 The agreement is a joint venture investment contract governed under contract law

A joint venture is a "business undertaking by two or more persons engaged in a single defined project"[11]. Pursuant to this definition, the necessary key elements are: Firstly, *an implied or express agreement*. This element is fulfilled by the existence of a written agreement signed by the parties.[12] Secondly, a *common purpose that the group intends to carry out* which is established through the agreement clause 2[13] which states that the parties become business partners for the **jade business**

[9] Indian Partnerships Act 1932 (No IX of 1932)
[10] From which the Indian Partnerships Act of 1932 relevant to this case draws its foundations.
[11] Blacks Law Dictionary, 7th edition, p 843
[12] Annexure 1
[13] Annexure 1

in Hpakant, Kachin State and is further solidified through clause 5[14], where the parties ascertain to the common purpose of placing the best interests of the employees and students above all, to help the local Myanmar people to improve their lives to be competitive and compatible with the evolving world and economy. Thirdly, *shared profits and losses*. This is clearly established by clause 7[15] of the agreement, where all profits of the jade business are divided amongst the parties in 65% to 35% division. Moreover, the profits of the contract between HCL and the Claimant, was also shared between the Claimant and Respondent.[16] By fulfilling these elements, it is clear that this agreement is a joint venture where two companies from different jurisdictions: a Foreign Company (Claimant, AID) with a Myanmar Company (Respondent, SPT), have ventured into a project with contractual arrangement which aims to undertake a specific task, which is the jadeite venture.

Furthermore, due to the nature of forming a joint venture typically being one involving large scale companies or projects, Courts have redefined it accordingly. Anon, as per the Supreme Court judgement in ***New Horizons Ltd v. Union of India[17],*** it was established that "Joint Venture connotes a legal entity in the ***nature*** of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or ***an association of persons or companies*** jointly undertaking some commercial ***enterprise*** wherein all contribute assets and share risks." Thereby, the agreement although signed by the Claimant and Respondent individually as persons, the clause 1 of the agreement states that they represent two limited companies: the Claimant for AID Co. Ltd and the Respondent for SPT Co. Ltd thus forming a joint venture contract within the scope of the definitions.

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[14] Annexure 1
[15] Annexure 1
[16] as expressed in ¶ 35 of the compromis and 5th additional clarification to compromis
[17] ***New Horizons Ltd v. Union of India*** MANU/SC/0564/1995

Similarly, in defining an ***Enterprise***; the Myanmar Investment Law of 2016[18] distinguishes partnerships and joint ventures separately under Section 2 : Enterprise[19]: (i) Any legal entity, including company, trust, **partnership**, sole proprietorship, **joint venture**, business association or similar organizations. In this context, it is apparent that the Myanmar legal framework considers a partnership and joint venture to be independent to one another.

Moreover, in asserting that a joint venture is not entirely distinguished from a contract, the Courts interpret in ***United Dominion Corporation Ltd v Brian***: *"that the borderline between what can properly be described as a Joint Venture and what can properly be a simple contractual relationship can on occasion be blurred*". With the judicial background for guidance, Joint Ventures generally fall into three categories where **Unincorporated Joint Ventures** are bound by the terms of the contract between the Participants and the commercial activity that they agree to undertake collectively but are not incorporated or registered as a separate entity. Thus, Unincorporated Joint Ventures generally fall into two categories as those which amount to common law partnerships; and those which are not partnerships. Those which are not partnerships are referred to as "contractual Joint Ventures" governed by Contract Law. Considering the fact that the jadeite venture was not separately registered as per the clarification question 2 of the compromis, it constitutes an unincorporated joint venture which is not a partnership, but a contractual joint venture.

[18] Myanmar Investment Law (The Pyidaungsu Hluttaw Law No.40/2016)
[19] Myanmar Investment Law, Section 2 (t) (i)

1.3. Under the contract law, the respondent has the right to terminate the contract due to the claimant's refusal to fulfill a promise[20]

The promises which form the terms of contracts are either express or implied. This undisputed proposition is set out by Section 9 of the Myanmar Contract Act[21]: ***Promises, express and implied***. In so far as a proposal or acceptance of any promise is made in words and in writing, the promise is said to be express. Although the Contract Act does not refer to express or implied 'terms', it is clear that the references in the Act to express 'promises' are being treated as embracing 'terms' within a contract as well as the central set of promises that we tend to focus on when considering the formation of a contract. If the parties have thus recorded the express terms of their agreement in a written document, the Court is obliged to consider this to be conclusive so far as these express terms are concerned. It is clear, therefore, that the agreement[22] signed by the parties include a set of promises which are the terms of contract, i.e. the clauses. Additionally, Sections 91 and 92 of the Burma Evidence Act[23] provide in effect that where the contract is reduced to a written document, the express terms of the contract are to be proved by the document, and not by other means.

1.3.1. The claimant has refused to fulfill a promise of the contract

The clause 11 of the agreement[24] states that AID, the claimant cannot do or say anything harmful to the national interest and solidarity of Myanmar and vice versa. In this light the promisor-Claimant has made a promise to the Promisee- Respondent. Furthermore, the promise is a reciprocal promise where through clause 11, the respondent has in turn agreed to not do or say

[20] Uses reference from Briggs and Burrows, Law of Contract in Myanmar (Ashford Colour Press 2007) Chapter 7,170-182
[21] Myanmar Contract Act, 1872
[22] Annexure 1
[23] Evidence Act, 1872
[24] Annexure 1

anything harmful to the national interest and solidarity of Japan. If a contract comprises such reciprocal promises, Section 51[25] sets out the conditions in which a promisor is required to perform. Promisor is not bound to perform unless reciprocal promisee is ready and willing to perform. It is thereby ascertained that if on its true construction a contract provides for both A and B to perform a promise, and B is not willing to perform, then A is not obliged to perform because B is not willing to perform. This is established in ***AKACTAL Chettyar v AKRMMK Firm[26].*** Considering the case at hand, the readiness of the parties to perform this promise are without dispute due to the parties signing the contract which incorporates the said promise in its terms.

According to the general principles of contract law, the refusal to fulfill a promise of a contract by the promisor gives the promise the option to terminate the contract at his discretion. This is provided to by law in Section 39[27] of the Myanmar Contract Act, where it establishes when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract. The Act therefore makes it clear that the decision to put an end to the contract is taken by the party who is not in breach. In ***Etbari v Bellamy[28]*** the Courts established that it is the promisee who has the option to terminate the contract, when the promisor has refused or failed to perform a promise made. Hence, a contract is not brought to an end by the breach or refusal of the party who refuses to perform, but by the decision of the promise[29]. According to the facts of the case, in September 2016, it comes to light that the Claimant had been present at an interview where a prejudicial statement was made by the Claimant's wife, Fiona Lum, who is a non-executive director[30] of the AID Co Ltd., that implied

[25] Myanmar Contract Act, 1872
[26] ***AKACTAL Chettyar v AKRMMK Firm*** (1938) RLR 660, AIR 1939 Ran 84
[27] Myanmar Contract Act, 1872
[28] ***Etbari v Bellamy*** AIR 1938 Ran 207
[29] *G Kyi Maung* v *Morrison & Co* AIR 1933 Ran 399, (1933) ILR 11 Ran 506
[30] Additional Clarifications, Question 3

negligence of duty by the Myanmar government to remedy the ethnic cleansing of Rohingya[31] Through his inaction to disprove this statement and further by refusing to retract the statement[32], the Claimant has thus refused to perform the promise he made to the Respondent[33] in the Joint Venture Contract and conducted himself in a way that harms the national interest and solidarity of Myanmar. Furthermore, the Claimant's actions also gave rise to a disturbance within the venture, disrupting the smooth flow of business where 102 workers from SPT went on a seven day strike, requesting an apology and retracting of the statement made by Fiona Lum[34]. If not for efforts of the Respondent the workers would not have been coaxed back to resuming work, creating a loss of profits for the business. This shows a clear violation of the best interests of the venture at the hands of the Claimant, and also shows the refusal to perform a promise to prioritize the employees under clause 5.

This constitutes the refusal to perform the promise or terms of the contract and the violation of the interests of the venture by the Claimant, and thereby gives the right to the Respondent to unilaterally terminate the contract.

1.3.1. The claimant was given the opportunity to perform his promise

The termination of a contract at the discretion of the promisee operates when he is a clear innocent party, and had not in any way prevented the promisor from fulfilling his promise. This is expressed in Section 53[35] where in a contract containing reciprocal promises, where one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he

[31] ¶ 27, 28 and 29 of the Compromis
[32] ¶ 30 of the Compromis
[33] Annexure 1,Clause 11 of the Partnership Agreement
[34] ¶ 29 of Compromis
[35] Indian Contract Act, 1872

may sustain in consequence of the non-performance of the contract due to a repudiatory breach. Pursuant to the facts of the case, following the prejudicial statement made by Fiona Lum in the presence of the Claimant in September 2016, SPT Ltd Co had requested the Claimant to issue an apology and to retract the statement, giving him the opportunity to perform his promise. However, this request was not accepted by the Claimant[36], proving an apparent refusal to fulfill the promise he had made under the Joint Venture Investment Contract[37] and thereby committing a repudiatory breach of contract, giving the respondent the right to terminate the agreement without prior reasonable notice

1.3.2. The Claimant has committed a breach of a fundamental term and repudiatory breach under the general principles of Contract law and requires no prior notice before termination

Where there has been a breach of a fundamental term, it is necessary to identify the term that has not been fulfilled. The relevance of the importance of the term lies in how essential it is to the contract, so that the failure to perform the term would violate the agreement so deeply that the stipulated expectations from the contract would significantly differ for the other party. In ***Tramways Advertising Pvt Ltd v. Luna Park (NSW) Ltd[38],*** the Supreme Court decided that when looking at the breach of contract, the nature of the promise broken as a fundamental term is what matters: "If it is a condition that is broken that is, an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option whether to treat himself as discharged from the contract…." Considering that, the Respondent represents a local Myanmar company that largely operates on community welfare and development[39], and as expressed in the

[36] ¶ 29 and 30 of the Compromis
[37] Annexure 1, Agreement
[38] ***Tramways Advertising Pvt Ltd v. Luna Park (NSW) Ltd*** (1938) 38 SR (NSW) 632
[39] ¶ 7,8,10 and 11 of the Compromis

Agreement clause 5[40], where this venture is founded to help the local Myanmar people to evolve and grow potential, where they assert that both SPT and AID will prioritize the employees and students, it is clear that the respondent's conduct has made it apparent that the inclusion of Clause 11 holds significant weight in the joint venture, since his interests are rooted towards the progress and solidarity of Myanmar making it a fundamental term of the contract.

By the Claimant's refusal to perform this term; firstly by his inaction to disprove the prejudicial statement made in his presence at a publicly published interview and secondly, by refusing to retract the statement as shown in the facts of the case, he has committed a breach of fundamental term giving the respondent the right to terminate the contract. The respondent informs the Claimant of this breach where he explains that those in his team cannot look past the breach of confidence committed by the Claimant in harming the national interests and solidarity of Myanmar.[41]

Similarly with regard to repudiatory breach, under the law, the party who terminates a contract for common law repudiatory breach, is not obliged to follow contractual termination provisions such as reasonable notice period and written notice. In ***Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC[42],*** the Courts ascertained this where the claim that the termination was not valid because the terminating party had not provided notice or an opportunity to remedy the breach was discharged as there had been a breach of a fundamental term. As established in the facts above, in the case at hand, there was an opportunity offered for the Claimant to remedy the breach as well, which he chose to abandon, further proving a repudiatory breach. Pursuant to these facts, the Respondent has a well ascertained right to terminate the contract unilaterally without prior notice.

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[40] Annexure 1

[41] ¶ 41 of the Compromis

[42] ***Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC*** [2016] EWHC 525

1.4. The Realization of objectives also terminates the Contract on its own

A joint venture may terminate as a result of an event of default where the realization of an aspect will automatically terminate the contract.[43] A well-crafted joint venture agreement will therefore specify the obligations of the joint venture parties. The objectives of this joint venture between the Claimant and Respondent, as seen through the facts of the case, has been for gaining technical expertise and training, and also receiving equipment unavailable in Myanmar[44] for such skill development, for the betterment of the local people of Myanmar to progress, grow and be ready to adapt to the evolving world and global economy[45]. Considering that the joint venture has lasted for 8 years successfully, it can be ascertained that the objective in receiving training and skills development is achieved. As per the Compromis para 39, the Respondent is reassured of this by the statement of U Soe Mynt, a close confidante from SPT, where he says "We have all the equipment now and now our people have the skills to handle things on their own." Similarly, the aspect of progress in the *evolving world* is dynamic and ever changing. Hence, in keeping to the core objectives of the SPT, the offer made by New Ventures Company to teach English and offer scholarships for tertiary education in the States would be a more advantageous and progressive venture in further realizing this objective. Thereby, the fact that the initial objective that was to be realized by the jadeite venture can be ascertained to be fulfilled, giving room for the Respondent to move to more beneficial ventures as the joint venture contract with the Claimant fulfills an event in default.

In light of these established facts, it is evident that the Claimant has committed a repudiatory breach and a breach of a fundamental term through refusal to fulfill a promise of the contract,

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[43] Danny Lee and John Morrison, *Terminating a joint venture and the consequences,* series exploring joint ventures in the Energy & Natural Resources sector, 2013

[44] 6th Additional Clarification to the Compromis

[45] Clause 4 and 5 of the Agreement, Annexure 1

granting the respondent a lawful right to unilaterally terminate the agreement without forwarding prior notice or any notice at all. Also, the failure to take back the prejudicial statement[46] by the Claimant resulted in a disturbance that disrupted the smooth flow of business and instilled a general displeasure regarding the continuation of the joint venture. Further it can also be inferred that the objectives of this venture is fulfilled creating an event in default. Therefore, owing to these facts, it is the strong assertion of the respondent that this joint venture investment contract, governed under the applicable Burmese Law: Contract Act of 1872 and general principles of Contract under English Common Law, has been validly as well as lawfully terminated.

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

The ownership of the jade-mining machinery and equipment lies with the Respondent, given that the ownership transferred to the Respondent the Bill of Lading recognizing the Respondent as the consignee and the endorsee of the machinery and equipment. Alternatively, the ownership transferred through a Contract formed under the Sale of Goods Act of 1930.

2.1. Ownership of the Jade-Mining Machinery and Equipment was transferred to the Respondent

2.1.1 Transfer of Ownership via the Bill of Lading which recognized the Respondent as the Consignee and the Endorsee of the Machinery and Equipment

Pursuant to the **Bill of Lading Act [India Act IX, 1856] of Myanmar,** hereinafter referred to as the Bill of Lading Act, **"Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or**

[46] ¶ 28 of the Compromis

by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." In this regard, not only was the Respondent recorded as the consignee and the endorsee of the jade-mining equipment and machinery, but the Claimant also allowed the Respondent to be recorded as the importer of the machinery and equipment.[47] Thence, it is apparent that by reason of such consignment or endorsement the goods named in a bill of lading shall be transferred to him and he will be vested with all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2.1.2 Ownership transferred through a Contract formed under the Sale of Goods Act of 1930

Alternatively, pursuant to the **Sale of Goods Act of 1930,** hereinafter referred to as Sale of Goods Act, **Section 19,**

"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

Accordingly, it is apparent that the Claimant had the intention to transfer the ownership rights of the jade-mining machinery and equipment. Such intention can be ascertained in the following manner. Firstly, the Bill of Lading addressed the Respondent as the consignee and the endorsee for the machineries and equipment furbishing evidence as to the **conduct of the parties** and the **circumstances of the case**, in establishing the intention of transferring the machinery and

[47] 8th Additional Clarification to the Compromis

equipment to the respondent.[48] In this regard, not only was the Respondent recorded as the consignee and the endorsee of the jade-mining equipment and machinery, but the Claimant also allowed the Respondent to be recorded as the importer of the machinery and equipment[49] and was aware that the Respondent was recorded as the owner and operator of the jade-mining machinery and equipment on the permits required to operate them[50]. Additionally, there are no title deeds for machineries and equipment under the Claimant's name in Japan.[51] Therefore, it is apparent that the conduct of the Claimant does not embody an intention to retain ownership rights of the equipment and machinery; but to transfer the ownership rights over the machinery and equipment to the Respondent.

Secondly, the **terms of the contract** between the parties, as explicitly stipulated in the Partnership Agreement in Annexure 1, and impliedly by the conduct of the parties indicate that there was a clear intention on the Claimant's part to transfer the jade-mining equipment and machinery to the Respondent. In terms of **Clause 4** of the **Partnership Agreement,** the Claimant has explicitly agreed to **"provide all equipment required".** Pursuant to **Section 2(d)** of the **Contract Act of 1872**, **"When, at the desire of the promisor, the promisee or any other person ... promises to do or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise."** Furthermore, **Section 2(e)** notes that, **"Every promise and every set of promises, forming the consideration for each other, is an agreement".** In this light, as outlined by **Briggs and Burrows**,[52] according to the Contract Law of Myanmar one should **"first look for a proposal (Section 2(a)), and then for its acceptance (Section 2(b)), which**

[48] 25th Additional Clarification to the Compromis
[49] 8th Additional Clarification to the Compromis
[50] 14th Clarification to the Compromis
[51] 27th Additional Clarification to the Compromis
[52] Briggs and Burrows, Law of Contract in Myanmar (Ashford Colour Press2007) 18

creates a promise. If there is consideration for the promise or promises, there is an agreement (Section 2(d), (e) and (f)). If the agreement is not made void by the Act, the agreement is enforceable by law and is therefore a contract (2(g) and (h)).”

Thus, it is evident that, pursuant to Section 2 of the Contract law of 1840, there exists a contract between the Claimant and the Respondent that transfers the jade-mining machinery and equipment to the Respondent based on the promise made by the Claimant, to provide the aforementioned machinery and equipment; and his fulfillment of the said promise amounts to consideration, which forms an agreement, that is legally enforceable.

Thus, the ownership of the machinery and equipment legally lies with the Respondent and Claimant does not have any legal ground whatsoever to claim an ownership over the jade-mining machinery and equipment.

3. Ownership and the Subsistence of the JADEYE Software does not completely lies with the Claimant

The ownership and the subsistence of the JADEYE software does not completely lie with the claimant as he is neither the sole author nor the complete owner of the JADEYE software, due to the fact that the software was created once the parties came into discussion of the joint venture. Moreover, the author of the software is not the Claimant’s employee, but the employee of the joint venture. In addition, the JADEYE was created with the intention of public good and in benevolence. Thus, the ownership and the subsistence of the JADEYE do not completely lie with the Claimant. Thence, it enables the Respondent also to enjoy the ownership and the subsistence of the software along with the right to reverse engineer the software in Myanmar, on behalf of the public good of the people in Myanmar.

3.1. The Software was created once the parties came into discussion of the Joint Venture which entices that authorship should be widely interpreted

According to the **18th Additional Clarification to the compromis**, Joe Yamashitha started working on the JADEYE, after the Respondent contacted the Claimant to discuss the "Partnership Agreement" between the Respondent's and the Claimant's companies. Thus, one can argue that the software was solely created for the jadeite venture within Myanmar. In line with the **World Intellectual Policy Organization**[53], hereinafter referred to as WIPO, among the 3 aspects relating to the conferral of copyright and ownership of copyright which does not necessarily coincide, the **"wide meaning of the term 'author'"** is defined to usually include persons who are not the actual authors but persons responsible for the origin of the work.[54] Moreover, "authorship", in this regard, does not have to necessarily be with the owner of the software.[55] Thus, it can be argued that, Joe Yamashitha was greatly influenced by the establishment of the joint venture between the Claimant and Respondent in the creation of the JADEYE software as the **15th Additional Clarification** underpins that**,** JADEYE was created mainly in Myanmar. Therefore, the aspect of authorship should be widely interpreted as opposed to strict adherence to the concept of "authorship under employment"[56], given that one can argue that Yamashitha was the Claimant's employee, working in Myanmar.[57]

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[53] Myanmar became part of the WIPO in 2001
<http://www.wipo.int/members/en/details.jsp?country_id=116>accessed 9th of August 2017
[54] The Enforcement of Intellectual Property Rights : A case book'(2012)162
<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf_>accessed 10th of August 2017
[55] The Enforcement of Intellectual Property Rights : A case book'(2012)193
<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf_>accessed 10th of August 2017
[56] The Enforcement of Intellectual Property Rights : A case book'(2012)162
<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017
[57] 17th Additional Clarification to the Compromis

For example, in the case *Cala Homes* v *McAlpine*[58] it was stressed that**, "to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant."**

In this regard, the Respondent ascertains that the mere carrying out of the fixation or the mechanical art of the JADEYE does not confer authorship to Yamashitha, as it is indeed, not only that skill and expertise which is relevant. For example, undeniably the Respondent provided the land in Hpkant for the jadeite venture along with a large contribution of capital, both physical and human. The respondent handled all the VISA and accommodation requirements of AID's employees, including Yamashitha's. SPT also obtained the necessary jade mining and equipment permit from the government to ensure the smooth flow of works at the jade field. Moreover, 50 students were assigned to work at the Hpakant base, and 250 new workers were also hired.[59] In this way, it is apparent that the contribution of the Respondent to the jadeite venture, which sourced inspiration to Yamashitha in the first place, was immense.

One can argue that, by offering USD 18,000 to Yamashitha, the Respondent have recognized his authorship of JADEYE and thereby the ownership of the software by the Claimant. However, it

[58] ***Cala Homes* v *McAlpine*** [1995] FSR 818 [UK]
[59] ¶ 18 of the Compromis

should be noted that, this is merely a token of appreciation for Yamashitha's work, as Yamashitha's work was monetarily appreciated, as once installed on the computer systems and mining equipment, JADEYE allowed the user to test the quality and viability of the jade at 99% accuracy and through its statistical and optimisation algorithms, JADEYE expedited assessment work, also assisting in the determination of scalability and economic value of the site.

3.1.1. The Author of the Software is not the Claimant's employee, but the Employee of the Joint Venture

3.1.1.1. The Claimant and Joe Yamashitha did not share a contract of service employment relationship

Pursuant to **Clause 10** of the **Partnership Agreement**, **"Everything will be in accordance with and interpreted under the law of the Golden Land of Myanmar" Section 5(1)(b) of the first schedule of the Burmese Copyright Act, notes that "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 section ascertains the Common Law principles of enforcing copyrights, where it is vital to establish that, a contract of service existed between the Claimant and the creator of the software. However, as noted in the case, ***King*** v ***SA Weather Service***[60] "**The phrase "under a contract of service...in the course of employment" is a stock concept in employment law (formerly known**

[60] ***King*** v ***SA Weather Service*** [2008] ZASCA 143

as the law of master and servant). The term is unambiguous and does not require anything by way of extensive or restrictive interpretation. A practical and common sense approach directed at the facts will usually produce the correct result." Accordingly, it is apparent that, as stipulated in a contract of service, the Claimant did not direct Yamashitha to create the JADEYE. Thus, it a question as to whether such a contract of service existed, and thereby whether the Claimant as the employer of the creator of the software, is indeed the owner of the copyright of JADEYE.

However, if one argues that the Claimant did in fact share a "contract of service", as the Claimant was able to "immediately order" the software to be installed in all computers and equipment used on the site,[61] and that according to **WIPO "the authorship of a work <u>(except a program work) which, on the initiative of an employer</u>, is made by an employee in the course of his duties and is made public under the name of the employer as the author is attributed to the employer."**[62]This can be contested by analyzing the requisites in ascertaining copyrights of the employer as the author, such as the <u>work created is based on the initiative of an employer</u> and <u>is made public under the name of the employer as the author</u>.

Pertaining to the facts of this case it is apparent that, it was the creator of the software, Joe Yamashita, who 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.[63] The Claimant only took initiative to order the software to be installed into all equipment and computers on the site, once it yielded positive results.[64] Moreover, the work

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[61] ¶ 23 of the Compromis
[62] The Enforcement of Intellectual Property Rights : A case book'(2012)193,194 <http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017
[63] ¶ 21 of the Compromis
[64] ¶ 23 of the Compromis

created was not made public under the name of the employer as the author. It should be borne in mind that, Yamashitha explicitly expressed that JADEYE was "for the benefit of all of us",[65] thereby ascertaining his intention for the software to be used in benevolence to benefit all parties involved in the issue, including the wider Myanmar community, which supplemented employees to the joint venture between the Claimant and the Respondent.

3.1.1.2 Joe Yamashitha was an employee of the Joint Venture

Pursuant to **Clause 4** of the **Partnership Agreement,** the Claimant agreed to provide technical expertise to the joint venture, and in line with that obligation, 25 of AID's employees were placed in SPT's base and at the jade fields in Hpakant on secondment from Japan. AID's employees operated some of the equipment, took charge of geological surveys and strategic prospecting, while imparting technical knowledge to SPT's employees and students.[66] Thus, since the Claimant agreed to provide technical expertise to the joint venture, despite the Claimant remunerating the respective AID employees working in Myanmar, the employees belong to the Joint Venture, pursuant to the agreed terms of the Partnership Agreement.

[65] ¶ 24 of the Compromis
[66] ¶ 16 of the Compromis

3.2. JADEYE was created with the intention of public good and in benevolence.

The JADEYE was created once the Claimant and the Respondent came into an Agreement stipulating the joint venture[67] and it would best serve its purpose in Myanmar. On the other hand, the "Northern hills of Kachin State is home to the world's highest quality jadeite known as imperial jade."[68] Moreover, the creator of the software himself, stressed that the JADEYE software should be allowed to be used for the "benefit of all". [69]

Thus, as noted in the Canadian case, ***Theberge* v *Galerie D' Art Du Petit Champlain INC***[70] "Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long term interests of society as a whole, or create practical obstacles to proper utilization."[71] In addition, in ***Robertson*** v ***Thompson Corp***[72] "This Court has repeatedly held that the overarching purposes of the Copyright Act are twofold: promoting the public interest in the encouragement and dissemination of artistic and intellectual works, and justly rewarding the creator of the work. Since these purposes are often in opposition to each other, courts "should strive to maintain an appropriate balance between those two goals".[73]

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[67] 18th Additional Clarification to the Compromis
[68] The Report : Myanmar 2016 (2016) 135
< https://books.google.lk/books?id=sUhDDgAAQBAJ&printsec=frontcover#v=onepage&q&f=false> accessed 10th of August 2017
[69] ¶ 24 of the Compromis
[70] ***Theberge* v *Galerie D' Art Du Petit Champlain INC*** 2002 SCC 34 [Canada]
[71] The Enforcement of Intellectual Property Rights : A case book'(2012)181
<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017
[72] ***Robertson*** v ***Thompson Corp*** 2006 SCC 43 [Canada]
[73] The Enforcement of Intellectual Property Rights : A case book'(2012)193,194
<http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf >accessed 10th of August 2017

Thence, the Respondent should be enabled to enjoy possession and subsistence of the software in Myanmar, on behalf of the public good of the people in Myanmar by the Claimant, as ascertained above.

Moreover, in the Singaporean case ***Asia Pacific Publishing Pte Ltd*** v ***Pioneers & Leaders (Publishers) Pte Ltd,***[74] the "Court of Appeal drew a distinction between authorship and ownership. It held that these were not synonymous in that authorship refers to the act of creation whereas ownership refers to the possession of proprietary rights. An author is not necessarily the owner and the owner is not necessarily the author. The Court of Appeal said, definitively, that for the purposes of the Copyright Act, authors had to be living persons. To hold otherwise would run counter to other sections of the Copyright Act, notably the duration of works. The Court held that companies could not claim a perpetual monopoly of copyright ownership based on an assertion of authorship."[75] This serves as an important judgment underpinning the vitality of respecting the human source of copyrights, which is indeed for whom the laws on copyright had been created in the first place.

Thus, the ownership and the subsistence of the JADEYE do not completely lie with the Claimant. Thence, it enables the Respondent also to enjoy the ownership and the subsistence of the software along with the right to reverse engineer the software in Myanmar, on behalf of the public good of the people in Myanmar.

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[74] ***Asia Pacific Publishing Pte Ltd*** v ***Pioneers & Leaders (Publishers) Pte Ltd*** [2011] SGCA 37

[75] Dr. Stanley Lai, 'Publisher Reigned in on Race Data Copyright Claim' (WIPO Magazine, January 2012) < http://www.wipo.int/wipo_magazine/en/2012/01/article_0007.html> accessed 19 November 2009