

At Kuala Lumpur Regional Centre for Arbitration

**MEMORIAL
FOR
RESPONDENT**

Claimant

**Asamura International
Development Co., Ltd.**

Respondent

Shwe Pwint Thone Co., Ltd.

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II. Abbreviations

| Abbreviation | Official name / Formal name |
|----------------------------|--|
| ACQ. | Additional Clarifications' Question |
| Claimant /or/ AID | Asamura International Development Co., Ltd. |
| CQ | Clarifications Question |
| Dr. Asamura | Dr. Yugi Asamura |
| Dr. Lum | Dr. Fiona Lum Ka Ching |
| ed. | Edition |
| etc. | Etcetera |
| EULA | end-user license agreement |
| HCL | Hashimoto Co., Ltd |
| KLRC | Kuala Lumpur Regional Center for Arbitration |
| p. | Page |
| para(s). | Paragraph(s) |
| Respondent /or/ SPT | Shwe Pwint Thone Co., Ltd. |
| R Mem. | Respondent's memorandum |
| Sec(s). | Section(s) |
| The Agreement | Partnership Agreement (Annexure 1) |

The Parties

Claimant and Respondent

USD

United States Dollar

III. Index of Authorities

Articles and Works of Publicists

| Abbreviation | Book / Article | Page. No. |
|------------------------|--|------------|
| Briggs / Burrows | Adrian Briggs & Andrew Burrows <i>The Law of Contract in Myanmar</i> 1 st ed. Oxford University Press (2017) https://www.law.ox.ac.uk/sites/files/oxlaw/briggsburrowsbook - thelawofcontractinmyanmar.pdf | 16, 19, 23 |
| Collins | <i>Collins English Dictionary – Complete and Unabridged</i> 12 th ed., Harper Collins Publishers (2014) https://www.collinsdictionary.com | 32 |
| IPO of the Philippines | Intellectual Property Office of the Philippines <i>Copyright System in Myanmar</i> http://www.ipophil.gov.ph/images/IPKnowledge/Myanmar_Country%20Report.pdf | 36 |

Statutes

| Abbreviation | Citation | Page No. |
|------------------------------|--|--------------------------------------|
| The Partnership Act | The Partnership Act [India Act IX, 1932.] (1 October 1932) From the Burma Code vol. XI | 19, 21, 30, 34, 35, 36, 44, 45 |
| The Contract Act | The Contract Act From the Burma Code vol. XI | 20, 22, 23, 24 |
| The Transfer of Property Act | The Transfer of Property Act (1882) | 33 |

| | | |
|---------------------|---|---------------------------|
| Burma Copyright Act | The Burma Copyright Act [India Act III, 1914] (24 February 1914) | 38, 39, 41, 45, 46, 47 |
|---------------------|---|---------------------------|

IV. Statements of Jurisdiction

This Tribunal has jurisdiction over this matter because Claimant and Respondent agree to have the arbitration held in Tokyo using the KLRCA i-Arbitration Rules.

V. Questions Presented

The Parties agreed that the issues to be decided in the arbitration are as follows:

The validity of the termination of the agreement by Respondent;

The ownership of the jade-mining machinery and equipment; and

Subsistence and ownership of rights in the JADEYE software.

VI. STATEMENT OF FACTS

The parties to this arbitration are Asamura International Development Co., Ltd. (hereinafter “**Claimant**”) and Shwe Pwint Thone Co., Ltd. (hereinafter “**Respondent**”; jointly referred to as the “**Parties**”).

Claimant is a private international development company specializing in crisis relief and development. Its current leader is Dr. Yugi Asamura (hereinafter “**Dr. Asamura**”), a professor at the University of Tokyo. Claimant has a registered company, fully-owned subsidiary in Myanmar.

Respondent is a local Myanmar company running teashops, jade carving and polishing studios and training centres in Mandalay and Yangon. Its owner is U Thein Kyaw, who left the monastic order and started Respondent.

| | |
|--------------|--|
| 1958 | Atsuko Asamura founded Claimant in Tokyo, Japan. |
| 1990s | Claimant was involved in work in Somalia and Rwanda during the 1990s conflicts. |
| 2000 | Dr. Asamura married Dr. Fiona Lum Ka Ching (hereinafter “ Dr. Lum ”), the |

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| | <p>youngest daughter of the Hong Kong tycoon, Lum Ho Wai. She became the President of Second Life, a regional organization that promotes human rights.</p> |
| 2004 | <p>Claimant was involved in relief work in Sumatra after the 2004 Indian Ocean tsunami.</p> |
| 2005 | <p>Atsuko Asamura died. The leadership of Claimant was passed to her only son, Dr. Asamura.</p> |
| 2007 | <p>Myanmar junta gifted U Thein Kyaw 80 acres of land in Hpakant, located in the Kachin State in northern Myanmar.</p> |
| May 2008 | <p>Cyclone Nargis hit Myanmar, destroying thousands of buildings and causing over a million casualties. By recommendation of the Japan International Cooperation Agency, Claimant participated in rebuilding the town of Labutta in Ayeyarwady, funded by the Japanese government.</p> |

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| 9 September 2008 | U Thein Kyaw and Dr. Asamura decided to enter into a joint venture for jade mining. They concluded a contract on this basis the afternoon. |
| January 2009 | Respondent imported second-hand machinery and equipment into Myanmar from Japan. The jade extraction and production business officially began. |
| | 25 of Claimant's employees were placed in Respondent's base and at the jade fields in Hpkant on secondment from Japan. |
| February 2009 | Claimant had spent almost USD 1 million on the jadeite venture. |
| March 2009 | The Parties injected capital contributions of USD 1.5 million and USD 2.5 million respectively. |
| | Respondent handled all the visas and accommodation requirements for Claimant's employees. Respondent obtained the necessary jade mining and equipment permits from the Myanmar government. 50 students of monastic |

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| | <p>schools were assigned to work at the Hpakant base, and 250 new workers of Respondent were hired.</p> |
| <p>11 April 2012</p> | <p>One of Claimant’s finance executives, Joe Yamashita, informed Dr. Asamura that he has been working on the development of a process optimization and operations management software named JADEYE, and was now confident that the software was ready to be used.</p> |
| | <p>U Thein Kyaw presented Joe Yamashita with USD 18,000 in cash. Joe Yamashita declined the cash.</p> |
| <p>4 January 2013</p> | <p>Joe Yamashita resigned from Claimant.</p> |
| | <p>The source code of JADEYE was saved on a hard disk drive together with other documents and handed to Head of Finance of Claimant in Tokyo by Joe Yamashita</p> |
| <p>September 2016</p> | <p>An interview with Dr. Asamura and Dr. Lum in Asian Influencers Magazine for its 2016 edition “Asia’s Top 20 Power Couples” was published and came to the attention of Respondent.</p> |

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| | <p>102 of Respondent's workers went on strike for seven days, requesting Dr. Lum and Dr. Asamura to issue an apology and to retract the statement.</p> |
| August 2016 | <p>The Myanmar government made an announcement that it would not issue any new permits or renew any existing permits for jade mining.</p> |
| October 2016 | <p>The United States lifted its trade sanctions against Myanmar. The lifting of sanctions has opened up new opportunities for the Myanmar jade trade.</p> |
| Mid October 2016 | <p>Dr. Asamura was invited to speak at a conference held by the Japanese Association of Mineralogical Sciences.</p> |
| 1 November 2016 | <p>Claimant and Hashimoto Co., Ltd (hereinafter “HCL”) entered into a USD 1.2 million contract wherein Claimant would supply jade from the Hpakant mines to HCL for the one year.</p> |
| 21 November 2016 | <p>Patrick Green, a very successful American businessman, expressed interest in forming a new partnership with</p> |

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| | <p>Respondent in regard to the jade businesss and approached U Thein Kyaw on this basis.</p> |
| 10 January 2017 | <p>U Thein Kyaw determined to end the venture between the Parties. U Thein Kyaw and Dr. Asamura met that evening, where Dr. Asamura was informed of U Thein Kyaw’s decision to end the partnership.</p> |
| 18-21 September 2017 | <p>The arbitration hearing will take place in Tokyo.</p> |
| 31 March 2019 | <p>The jade-mining permit is set to expire.</p> |

VII. Summary of Pleadings

ISSUE 1: RESPONDENT VALIDLY TERMINATED THE AGREEMENT

Respondent validly terminated the Agreement. In the case that the Agreement was to establish a partnership at will, Respondent fulfilled the requirements to terminate under Sec. 43 of the Partnership Act since Respondent's will was notified to Claimant. In the case that the Agreement is not a partnership at will, the termination was lawful because Claimant breached the Agreement. Firstly, an employee of Claimant, Dr. Lum's interview about the Rohingya minority violated Sec. 11 of the Agreement. Secondly, Dr. Asamura did not take action in order to reduce the risk to breach of the Agreement. Additionally, such acts by Claimant made the Agreement unable to be performed because Respondent's employees and students were not able to work with Claimant.

ISSUE 2: RESPONDENT OWNS THE JADE-MINING MACHINERY AND EQUIPMENT

The jade-mining machinery and equipment belong to Respondent because the Parties agreed that Claimant would transfer the ownership of the jade-mining machinery and equipment to Respondent under Sec. 4 of the Agreement. The Parties do not agree to the interpretation of Sec. 4 of the Agreement. However, in the present case, Claimant

transferred the ownership of the jade-mining machinery and equipment to Respondent for the local Myanmar people under Secs. 5 and 6 of the Transfer of Property Act. This is because the main purpose of the partnership was charity. Respondent hoped to help the local Myanmar people by creating jobs. On this basis, the Parties agreed that both Claimant and Respondent would always prioritize Respondent's employees and students. If Claimant withdraw the machinery and equipment, they would not be prioritized. As a consequence, Respondent owns the jade-mining machinery and equipment.

ISSUE 3: THE JADEYE SOFTWARE IS NOT PROTECTED BY COPYRIGHT,
AND IF IT WERE THE RIGHTS WOULD BE SHARED BY THE PARTIES

Respondent can reverse engineer or create their own version of the JADEYE software because the software is not protected by Copyright. Under Sec. 1 of the Burma Copyright Act, objects of copyright protection are "every original literary, dramatic, and artistic work", However software is not included work and, therefore, JADEYE is not protected by copyright.

Even if the JADEYE software is protected by copyright, this copyright belongs to not only Claimant but also Respondent because Joe Yamashita, the first owner of the copyright, assigned to partnership as property of the partnership under Sec. 14 of the

Partnership Act. Even after the partnership has been terminated, the copyright will be possessed by both Claimant and Respondent under Sec. 46 of the Partnership Act. Therefore, Respondent also has ownership of the right in the JADEYE software and can reverse engineer or create its own version of JADEYE.

VIII. Pleadings of Respondent

ISSUE 1: RESPONDENT VALIDLY TERMINATED THE AGREEMENT

I. Claimant Breached the Agreement

1. According to Sec. 39 of the Partnership Act, “the dissolution of the partnership between all the partners of a firm is called the dissolution of the firm”. While Claimant did not agree to the termination of the Agreement, the Agreement is terminated for Claimant’s breach.

A. The Agreement Was to Establish a Partnership at Will

2. According to Sec. 7 of the Partnership Act, “partnership at will is defined that where no provision is made by contract between the partners for the duration of their partnership, or the determination of their partnership.” In the present case, the Parties have not provisioned for the duration of the Agreement. While Sec. 8 provides that the “partnership and brotherhood will be for the long term,” this is plainly aspirational. There is no article in the Agreement that provides a measurable duration of time for its performance. Therefore, Respondent is able to terminate the Agreement at will.
3. According to Sec. 43 (1) of the Partnership Act, “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”. While this provision contemplates notice in writing, this is not necessary as a legal matter since the aim of this article is to inform the will to terminate to the partner. Myanmar courts have accepted oral notice even where written notice is provisioned. This approach is appropriate in this arbitration since there was no ambiguity from either party about the notice of termination, and Claimant has not contested notice or requested that written notice be given.

4. Sec. 43(2) further provides that “[a] firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.” On 10 January 2017, U Thein Kyaw of Respondent informed Dr. Asamura of Claimant that the Agreement was terminated at a meeting between the two business partners in person.¹ The notice of termination was clear and unambiguous. Respondent explained the reasons for the termination, and Claimant understood that notice was being given.²

B. The Party Who Breached the Agreement Is Claimant

5. According to Sec. 39 of the Contract Act, “when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the

¹ Problem, para. 40

² Problem, para. 41

promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance”. Moreover, “Sec. 39 makes it clear that the decision to put an end to the contract is taken by the party who is not in breach.”³ Under the Agreement, Respondent is obliged to obtain and settle all permits for the jade-mining business,⁴ to prioritize the employees, processing and selling the jade; and to refrain from saying anything harmful about Myanmar. Respondent has fulfilled each of these obligations and can terminate the Agreement.

1. Dr. Lum breached the Agreement

6. According to Sec. 22 of the Partnership Act, “[i]n order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.” In the present case, Dr. Lum was a non-executive director in Claimant⁵ and appeared as such in the interview. In addition, Dr. Asamura and Dr. Lum were questioned together in the interview covering the jadeite partnership.⁶ Dr. Asamura spoke as a partner of the venture and Dr. Lum as

³ Briggs / Burrows, 171.

⁴ Agreement, Sec. 3

⁵ ACQ. 3

⁶ Problem, para. 27

beneficiary who received three shipments of jade annually from the partnership.⁷

Under Sec. 22, Dr. Lum's statement is an "act" that is binding on, or attributable to, the partnership. This is apparent not only by the purpose of the interview but also by the reaction and resulting strike by the students and employees of the partnership.

2. *Even if Dr. Lum did not breach the Agreement by speaking for the partnership, Dr.*

Asamura's tacit Agreement to her statements amounts to breach

7. According to Sec. 40 of the Contract Act, "If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it." Dr. Asamura is a promisor himself of the Agreement. In the present case, Dr. Asamura and Dr. Lum answered about their view on the Rohingya minority given their existing business involvement in Myanmar.⁸ That is to say, the nature of the interview concerned their business.

There are enough conditions to let Respondent's employees and students consider

⁷ Problem, para. 20

⁸ Problem, paras. 27-28

the statement by Dr. Lum on the ground of above two factors, the remark of relevance business in Myanmar and her position in Claimant.

8. According to Sec. 46 of the Contract Act, “where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified. the engagement must be performed within a reasonable time. Explanation.----The question “what is a reasonable time” is, in each particular case, a question of fact.” In the present case, the promise to perform is to take action in some way - namely by apologizing, retracting or modifying the statement by Dr. Lum - and a reasonable time is the term from the interview to publication of the magazine. Since Dr. Asamura is the subject of the Agreement and is aware of the Sec. 11 of the Agreement “to show respect toward the Golden Land, Claimant cannot do or say anything harmful to the national interest and solidarity of Myanmar.” As a result, he was obligated to avoid misunderstandings about the the statements in the interview.

C. Claimant’s Actions Rendered the Agreement Unable to be Performed

9. Under Sec. 39 of the Contract Act, “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, unless he has signified, by words or

conduct, his acquiescence in its continuance.” In addition, “Sec. 39 may still apply if the promisor has performed part of his promise.”⁹ Sec. 41 (b) of the Contract Act provides that “[a] firm is dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership.” In Myanmar, “it must be a requirement of the law that the failure of performance by the promisor be serious. If it is not serious enough, there will still be a right under Sec. 37 to claim compensation for loss caused by the breach, but there will be no right to rescind the contract.” In the present case, Sec. 5 of the Agreement which provides that Claimant will “always prioritize the employees and students” must be considered with the charitable purpose of the Agreement.

10. In the magazine interview with her husband Dr. Asamura, Dr. Lum implicated the Myanmar government in human rights abuses and “ethnic cleansing” of the Rohingya minority.¹⁰ These accusations set relations with Respondent’s employees and students in a downward spiral that began with a strike and ended with a complete breakdown of relations within the jadeite venture.¹¹ Her remarks thus

⁹ Briggs / Burrows, 173.

¹⁰ Problem, paras. 27-28

¹¹ Problem, paras. 29-30, 41

prioritized her political activism over the students and employees in violation of Sec. 5. This undermined the Agreement as many of Respondent's employees and students were upset, and 102 of Respondent's workers went on strike for seven days. In these circumstances, the Agreement cannot be performed under its terms.

II. Even If Claimant Did Not Breach the Agreement, There Is Cause for Termination

A. The Parties Accomplished the Aim of the Agreement

11. According to Sec. 40(b) of the Partnership Act, “[s]ubject to contract between the parties, a firm is dissolved ---- if constituted to carry out one or more advantages or undertakings, by the completion thereof”.
12. In the present case, the obligations of Claimant were as follows: providing all equipment required and technical expertise; training the local people of Myanmar; extracting and cutting jade; and giving the direction and instruction under Secs. 4 and 6 of the Agreement. This stated purpose of these measures was that Respondent be independent. As a result, Sec. 8 provides “our partnership and brotherhood will be for the long term” since the parties had not been sure of the date that Respondent would be able to work on its own. In other words, the end date of the Agreement is the date when Respondent is able to work independently and so the right to terminate the Agreement attributed to Respondent. On 10

January 2017, Respondent was sure to be independent from Claimant and to proceed whole business by himself, and thus on that date the termination by Respondent was valid.

III. Conclusion

13. Respondent terminated the Agreement lawfully. It fulfilled the requirements of termination in the Agreement, and Claimant had valid reasons to terminate the Agreement.

ISSUE 2: RESPONDENT OWNS THE JADE-MINING MACHINERY AND EQUIPMENT

I. Respondent Owns the Jade-Mining Machinery and Equipment Based on the Purpose of the Partnership

A. Claimant Gave Up Ownership of the Machinery and Equipment in the Agreement

14. Sec. 4 of the Agreement stipulates that Claimant would “buy and provide all equipment required, and provide technical expertise for the term of the agreement.”

Claimant’s obligations were thus to provide the equipment on one hand and provide technical assistance with the equipment for the duration of the Agreement on the other. There is no provision in the Agreement that the machinery and equipment

would be returned to Claimant.

15. Sec. 3 of the Agreement states that “[t]he land will continue to belong to U Thein Kyaw, the owner of SPT.” In this way, the parties also could have made a similar provision if they had intended that Claimant would maintain the ownership of the jade-mining machinery and equipment. However, no such provision was made.

B. The Ownership of the Machinery and Equipment Was Transferred to Respondent Under the Agreement

16. The jadeite partnership was conceived as a charitable venture. Respondent’s objectives were to help local Myanmar people by training students from underprivileged families¹² and by seeking to create jobs for the local community in Hpakant.¹³ Indeed, the jadeite venture was very successful and made an average net profit of USD 7.5 million a year.¹⁴ The Parties shared the profit with 65 percent going to Respondent and 35 percent to Claimant. However, Respondent spent more than 70 percent of the revenues for training centers which it operated.¹⁵ As a result, the profit of the jade-mining business helped the local Myanmar people. Claimant, for its part, is an aid organization with a history of successful interventions in

¹² Problem, paras. 7, 10

¹³ Problem, para. 11

¹⁴ Problem, para. 26

¹⁵ Problem, para. 10

Somalia, Rwanda, and Sumatra that sought to expand its development work in northern Myanmar.¹⁶

17. The charitable purpose of the Agreement is included as express obligations on the Parties. Sec.5 states that “[i]t is the strong will of SPT that this partnership is to help the local Myanmar people...” and “[b]oth AID and SPT will always prioritize [Respondent’s] employees and students.” The Agreement also stipulates that the partnership would seek to help the Myanmar people to be “competitive and compatible with the evolving world and economy.”
18. Respondent’s employees and the students have only equipment and machinery from Claimant, and there is no other machinery and equipment in Myanmar¹⁷ for them to use as Claimant was aware.¹⁸ If Respondent’s employees were deprived of the machinery and equipment, they could not carry out extracting the jade. In that case, their interests would not be “prioritized,” and the training with the equipment would be pointless. Accordingly, the transfer of the machinery and equipment to Respondent for the benefit of its employees is consistent with the terms and purpose of the Agreement.

¹⁶ Problem, para. 3

¹⁷ Problem, para. 13

¹⁸ ACQ. 6

C. The Performance of the Agreement Confirms the Parties' Intention That Ownership of the Machinery and Equipment Be Transferred to Respondent

19. Respondent paid the shipping costs of transportation of the machinery and equipment from Japan to Myanmar.¹⁹ It was identified as the recipient of the machinery and equipment on the bill of lading²⁰ rather than the partnership or Claimant's subsidiary in Myanmar. Respondent was also identified as the sole "owner" of the machinery and equipment on permits for operation.²¹ These facts were known to Claimant who made no attempt to reassert ownership rights. This is consistent with the understanding that ownership would pass to Respondent.

II. Myanmar law supports Respondent's right to ownership of the machinery and equipment

A. The Parties Agreed That Claimant Would Transfer the Ownership of the Jade-Mining Machinery, and Equipment Was Transferred to Respondent Under the Agreement

20. Sec. 5 of the Partnership Act states that "[t]he relation of partnership arises from contract and not from status." According to Sec.6 of the Partnership Act, whether a group of persons is a partnership or not is decided by all relevant facts. In this way,

¹⁹ CQ. 30

²⁰ ACQ. 25

²¹ Problem, para. 43

the law in Myanmar “allows considerable freedom for the partners to specify for themselves the manner in which the partnership is structured.”²² In this case, under the Agreement, Claimant had obligation to provide the equipment on one hand and provide technical assistance with the equipment for the duration of the Agreement on the other.²³ On the other hand, Respondent had an obligation to obtain all the permits and requirement to do the jade-mining business from the government of Myanmar.

21. Under the Agreement, it is reasonable that the Parties agreed that Claimant transferred the ownership of the jade-mining machinery and equipment to Respondent considering the following facts and circumstances.

1. *Sec. 4 of the Agreement provides that Claimant would transfer the ownership of the jade-mining machinery and equipment to Respondent*

22. Sec. 4 of the Agreement states that “AID will buy and provide all equipment required, and provide technical expertise for the term of the agreement.”

23. The Parties thereby agreed that Claimant would transfer the ownership of the jade-mining machinery and equipment to Respondent.

²² Briggs / Burrows, p. 250

²³ R Mem. para. 24

24. Firstly, “for the term of the agreement” refer only to the training. This is because there is a comma after “required”. There would be no reason to include a comma after “required” if “term” referred to providing equipment. The word “term” means a limited period for investment, which is used in Sec.8 of the Agreement in the same way. Thus, there is no provision concerning the period for providing equipment. Accordingly, “provide” means a transfer of the ownership of the jade-mining machinery and equipment to Respondent.

25. Secondly, the word “provide” is used for both all equipment required and technical expertise. Equipment is a tangible object. On the other hand, technical expertise is intangible, and would not be natural that Respondent return an intangible to Claimant. However, the Parties used the same verb for both objects. This shows that the Respondent would not return either to Claimant.

26. Therefore, “provide” means to transfer the ownership of the jade-mining machinery and equipment to Respondent.

2. *The provision that partnership is to help the local Myanmar people is an express term in the Agreement*

27. Sec. 5 of the Agreement states that “[i]t is the strong will of SPT that this partnership is to help the local Myanmar people...” and “[b]oth AID and SPT will always

prioritize [Respondent's] employees and students.”

28. This provision demonstrates the partnership's charitable purpose. In the beginning, the main objection of the Respondent was to help the local Myanmar people by creating jobs for the local community.²⁴ Respondent collaborated with Claimant, an aid organization, for this purpose.²⁵

29. There was no locally manufactured jade-mining machinery and equipment in Myanmar.²⁶ Hence, if the equipment were withdrawn from Respondent's employees and students, Claimant would not prioritize them and thereby violate Sec. 5 of the Agreement.

30. From these facts and circumstances, the Parties agreed that Claimant would transfer the ownership of the jade-mining machinery and equipment to Respondent under the Agreement.

B. The Ownership of the Jade-Mining Machinery and Equipment Was Transferred to Respondent from Claimant

31. Sec. 5 of the Transfer of Property Act states that property is transferred when a living person conveys property to one or more other living people and that “to transfer

²⁴ Problem, para. 11

²⁵ Problem, para. 2

²⁶ ACQ. 6

property” is to perform such an act. According to Sec. 9 of the Transfer of Property Act, a transfer of property may be made without writing in any case in which a writing is not expressly required by law. In other words, the requirements of transfer of property are the declaration of intention to transfer property and the performance of an act which is intended to transfer property.

1. *Claimant had intention that Claimant would transferred the ownership of the jade-mining machinery and equipment to Respondent*

a. Sec. 4 of the Agreement demonstrates Claimant’s intention

32. Sec. 4 of the Agreement stipulates that “AID will buy and provide all equipment required.” As noted, “provide” means to transfer ownership of the jade-mining machinery and equipment to Respondent.²⁷ The Parties thus agreed that the ownership the jade-mining machinery and equipment would pass to Respondent.

b. Claimant made no objection to the transfer of the ownership of the jade-mining machinery and equipment to Respondent

33. Sec. 3 of the Agreement states that “[t]he land will continue to belong to U Thein K yaw, the owner of SPT.” The land in Hpakant did not pass to the property of the firm under Sec. 14 of the Partnership Act as the parties intend for the ownership of the

²⁷ R Mem. para. 26

land not to transfer. In this way, Claimant also could have made a similar provision if Claimant had had intention that Claimant would maintain the ownership of the jade-mining machinery and equipment. However, there was no provision that was ensure that the Claimant retained ownership.²⁸

34. Moreover, under Sec. 3 of the Agreement, Respondent had the obligation to obtain all permissions to operate the jade-mining business from Government. Respondent was recorded as the owner and operator of the jade-mining machinery and equipment on the permits required for operation.²⁹ Although Claimant was aware that Respondent was recorded as the owner and operator, Claimant did not make any objection.³⁰ These facts show that Claimant had no intention that Claimant would give up its rights and transferred ownership of the jade-mining machinery and equipment to Respondent.

2. *The jade-mining machinery and equipment was delivered to Respondent*

35. The jade-mining machinery and equipment was shipped to Respondent.³¹

36. Respondent was addressed as a consignee/endorsee for the jade-mining machinery

²⁸ R Mem. para. 15

²⁹ Problem, para. 43

³⁰ CQ. 14

³¹ ACQ. 23

and equipment on the Bill of Lading.³² Respondent bore the cost of the shipping of the machineries from Japan to Myanmar.³³ Therefore, Respondent obtained the ownership of the jade-mining machinery and equipment conclusively.

III. Claimant Does Not Own the Jade-Mining Machinery and Equipment

A. The Ownership of the Jade-Mining Machinery and Equipment Does Not Pass to the Property of the Firm

37. According to Sec. 4 of the Partnership Act, people who have entered into the partnership with one another are called “a firm”. Sec. 14 of the Partnership Act stipulates that “[s]ubject to contract between the partners, the property of the firm includes all property...” In other words, ownership does not pass to the property of the firm where the parties do not intend for the ownership to pass to the property of the firm. In this case, the Parties did not agree that Claimant would transfer the ownership of the jade-mining machinery and equipment to the property of the firm under Sec. 4 of the Agreement.³⁴ Hence, the ownership of the jade-mining machinery and equipment passed to the firm.

B. The Ownership of the Jade-Mining Machinery and Equipment Would Belong to

³² ACQ. 25

³³ ACQ. 30

³⁴ R Mem. para.23

Respondent Even If the Ownership Were Included in the Property of the Firm

38. Sec. 46 of the Partnership Act stipulates that “[o]n the dissolution of a firm every partner...entitled...to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners...according to their rights.”

39. In this case, the jade-mining business was largely successful, making average profits of USD 7.5 million a year.³⁵ This means there was no liabilities of the partnership.

40. If Claimant had the right to withdraw the jade-mining machinery and equipment after the partnership is terminated, it would be contrary to Sec. 5 of the Agreement which stipulates that “[b]oth AID and SPT will always prioritize [Respondent’s] employees and students.”

41. Respondent’s employees and the students have only the equipment and machinery from Claimant.³⁶ If Respondent’s employees were deprived of the machinery and equipment, they could not carry out extracting the jade. In the case, their interests would not be always “prioritized.”

C. Claimant Would Not Suffer from Damages Even If Claimant Does Not Withdraw the Jade-Mining Machinery and Equipment

³⁵ Problem, para.26

³⁶ ACQ. 6

42. Claimant purchased all the jade-mining machinery and equipment³⁷ while Respondent made no payment. However, the jade-mining venture has lasted for 9 years,³⁸ and the jadeite venture has made huge profits every year.³⁹ Moreover, Claimant sourced for second hand machinery and equipment.⁴⁰ Therefore, Claimant has benefitted from the Agreement and is not entitled to the machinery and equipment.

IV. Conclusion

43. Respondent owns the jade-mining machinery and equipment. This is because Claimant had the intention that Claimant would transfer the ownership and deliver possession to Respondent despite ownership passing to the firm.

ISSUE 3: THE JADEYE SOFTWARE IS NOT PROTECTED BY COPYRIGHT, AND

IF IT WERE THE RIGHTS WOULD BE SHARED BY THE PARTIES

I. Copyrights Do Not Subsist Because the JADEYE Software Is Not Protected by the Burma Copyright Act

44. Intellectual property rights in the JADEYE software are determined by Myanmar

³⁷ ACQ. 9

³⁸ Problem, para. 14

³⁹ Problem, para. 26

⁴⁰ Problem, para. 16

law under Sec. 10 of the Agreement. Myanmar law on intellectual property is provided in the Burma Copyright Act established in 1914. Under Sec.1, subjects to copyright protection are “every original literary, dramatic, and artistic work”, and Sec. 35 of the Burma Copyright Act clearly identifies what property is included in each category of work. Computer software is not included for the evident reason that it was largely developed after the Burma Copyright Act came into force.

45. Although the Myanmar legislature has modernized many areas of law, it has chosen not to change the Burma Copyright Act from its original form. For example, on 18 October 2016 Myanmar Investment Law was enacted and, more to the point, the government passed legislation to develop and modernize computer science without any corresponding change to the Burma Copyright Act. The Computer Science Development law of 1996 seeks to “contribute towards the emergence of a modern developed State through computer science” but does not rights to software. In these circumstances, the law must be applied as it exists in the Burma Copyright Act. The right to possess computer software is not protected by the Burma Copyright Act. Therefore, the JADEYE software is not protected by the Burma Copyright Act.

I. Even If the JADEYE Software Were Protected by Copyright, Respondent Owns Copyright in the Software

46. Even if the JADEYE software were included as a subject of copyright protection under the Burma Copyright Act, Respondent owns intellectual property in the software. This is because the first owner of the JADEYE software was not Claimant but Joe Yamashita, and he transferred it to partnership. Respondent is therefore within its rights to reverse engineer or create its own version of JADEYE.

A. Joe Yamashita, the First Owner of the Copyright, Granted Property Rights in JADEYE to Respondent

47. Under Sec. 5(1) of Burma Copyright Act, “the author of a work shall be the first owner of the copyright therein: Provided that 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”.

48. In present case, the first owner of copyright was Joe Yamashita and not Claimant because Mr. Yamashita did not create JADEYE in his employment by Claimant.⁴¹ Mr. Yamashita was employed as a financial executive of Claimant and not as a software developer. Likewise, Claimant did not ask Mr. Yamashita to develop the

⁴¹ Problem, para. 21

JADEYE software. The idea came to him as he was thinking of how to improve the efficiency of the partnership⁴² in his free time away from his obligations as a financial executive. This is evident by his communication to Dr. Asamura that he “ha[d] been working on the development of a process optimisation and operations management software.”⁴³ There would be no reason to inform Dr. Asamura in this way if the project were being undertaken under Dr. Asamura’s guidance or as a project conceived and funded by Claimant. For these reasons, Mr. Yamashita did not create the JADEYE software in his employment by Claimant. Therefore, the first owner of copyright in the JADEYE software is Joe Yamashita.

B. Joe Yamashita Authorized Use of JADEYE to Respondent

49. In general, copyright or end-use license agreement (EULA) is required when using the copyrighted work. “(Computer Science) end-user license agreement: the agreement made by a user before being granted permission those computer software”⁴⁴ the JADEYE software does not have its EULA or any other kind of terms of use,⁴⁵ Respondent can use it freely because Joe Yamashita authorized use of JADEYE to Respondent and he was a partner in partnership.

⁴² ACQ. 26

⁴³ Problem, para. 21

⁴⁴ Collins

⁴⁵ ACQ. 36

50. After JADEYE had been installed on partnership computers, Joe Yamashita said to U Thein Kyaw that it was “for the benefit of all of us”⁴⁶ and refused to accept payment from Mr. Kyaw. Under the Burma Copyright Act, there is no provision that prohibits transfer or EULA of copyright. Under the Burma Copyright Act, there is no provision that prohibits transfer or EULA of copyright. Therefore, his remark was a license.

51. Furthermore, Joe Yamashita created the JADEYE software for partnership to achieve the purpose “to help the local Myanmar people, to improve their livelihoods, to help them to be competitive and compatible with the evolving world and economy.”⁴⁷

52. Actually, JADEYE software can test the quality and viability of the jade at 99% accuracy⁴⁸ and made an average net profit of USD 7.5 million years.⁴⁹ That is to say, the software played a major role in achieving the purpose of the partnership. Respondent is willing to continue mining the jade to achieve its purpose even after the end of the partnership. As long as its intrinsic purpose of use has not changed, Respondent should be allowed to use JADEYE. In order to continue using JADEYE

⁴⁶ Problem, para 24

⁴⁷ Agreement, Sec. 5

⁴⁸ Problem, para. 22

⁴⁹ Problem, para.26

software, Respondent can reverse engineer or create Respondent's own version of JADEYE.

53. On the other hand, the fact that Claimant currently possesses a hard disk saved with the source code of the JADEYE software⁵⁰ is not proof that Claimant has rights. On his last day of employment, Joe Yamashita gave the source code of the JADEYE software on hard disk drive together with other documents to Head of Finance of Claimant. Although ownership of the hard disk moved to Claimant, ownership of the JADEYE software source code did not move to Claimant.

54. Joe Yamashita's relinquishment of the disk, following his remark "JADEYE was for the benefit of all of us,"⁵¹ demonstrate his pass of copyright to the partnership.

C. The JADEYE Software Was Assigned to Partnership as Property of the Partnership

55. In present case, JADEYE was expressly created for use by the partnership to improve operational efficiency in exploration, extraction, breaking, cutting, and processing jade.⁵² The JADEYE software was created by Joe Yamashita during his work on behalf of the partnership in Myanmar.⁵³

56. The JADEYE software was made after the conclusion of the Agreement, namely

⁵⁰ Problem, para. 25

⁵¹ Problem, para. 24

⁵² Problem, paras. 21-22; ACQ. 16

⁵³ ACQ. 17

“after U Thein Kyaw contacted Dr. Asamura to discuss the partnership between AID and SPT”⁵⁴ / in April 2012⁵⁵ That is to say the JADEYE software was created under Partnership and in line with its implementation.

57. Moreover, the JADEYE software was first used by the partnership and only ever used by the partnership.⁵⁶ This fact also support that the JADEYE software was created for not Claimant but partnership.

58. Furthermore, Joe Yamashita confirmed this understanding. When Respondent offered him money for JADEYE, he rejected the money and stated that JADEYE is “for the benefit of all of us.”⁵⁷

59. For these reasons, the JADEYE software is the property of the partnership, and on dissolution, the partners retain a right to the software under Sec. 14 of the Partnership Act.

60. According to Sec. 46 of the Partnership Act, “[o]n the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their

⁵⁴ ACQ. 18

⁵⁵ Problem, para. 21

⁵⁶ Problem, paras. 21-23

⁵⁷ Problem, para. 24

representatives according to their rights.”

61. In present case, the Parties do not have any debts or liabilities. Thus, on the basis of the rights stipulated by this provision, property should be distributed among the Parties. The JADEYE software is an intangible asset that multiple people can employ at the same time. Therefore, it is not necessary to decide which of them belongs to and in what proportion; they share.

Both Claimant but also Respondent have rights in the JADEYE software once the partnership ends.

D. Whether JADEYE Was Assigned to Partnership or Not, Respondent Can Continue to Use It with a License

62. The partnership has was granted a license by Joe Yamashita’s remark “JADEYE was for the benefit of all of us.”⁵⁸

63. Even after the partnership has been terminated, the copyright will be possessed by both Claimant and Respondent under Sec.46 of the Partnership Act. ⁵⁹

II. Even If JADEYE Was Created in the Course of his Employment, Respondent Can Own the Right

64. Even if the JADEYE software was created in the course of Joe Yamashita’s

⁵⁸ R Mem. para. 50

⁵⁹ R Mem. paras. 60, 61

employment, his employer was the partnership at the time the software was created.

65. According to Sec. 18 of the Partnership Act, “[s]ubject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm”. That is to say, in present case, the partnership was the employer of Joe Yamashita and Claimant is the agent. Since the partnership is his employer, the firm becomes the first owner of right in JADEYE under Sec. 5 of the Burma Copyright Act. Even after the partnership has been terminated, the copyright will be possessed by both Claimant and Respondent under Sec. 46 of the Partnership Act.

66. For these reasons, Respondent also own a right to the JADEYE software. Therefore, Respondent can reverse engineer or create its own version of the JADEYE software.

III. In Any Case, Respondent Can Reverse Engineer or Create Respondent’s Own Version of the JADEYE Software

67. In any case, because it is not prohibited under the current Burma Copyright Act, Respondent can reverse engineer or create Respondent’s own version of the JADEYE software.

68. Myanmar law provides that “[s]elling, offering for sale, hiring, distributing or exhibiting in public for the purposes of trade, importing for sale or hiring any work shall also constitute an act of infringement of copyright.[...] However, using any

work for private study, research, criticism, review, publishing an address of a political nature delivered at a public meeting, publication in a newspaper of a lecture delivered in public unless such a publication is not prohibited, publishing of printings, drawings, engravings or photographs of a work of art, permanently situated in any public place, reading or recitation in public of any reasonable extract from any published work, etc., will not be considered the infringement of Copyright.”⁶⁰

69. Respondent does not seek to use the JADEYE software⁶¹ for any of the prohibited reasons. The purpose that Respondent seek to reverse engineer or create Respondent’s own version of JADEYE is for Respondent’s benefit from jade-mining.
70. Therefore, Respondent can reverse engineer or create Respondent’s own version of the JADEYE software.

IV. Conclusion

71. Respondent can reverse engineer or create its own version of the JADEYE software because the computer software is not protected by current the Burma Copyright Act. Even if it were protected, Respondent has a right of ownership because Joe Yamashita authorized used] of the JADEYE software to Respondent. Furthermore, there is no provision prohibiting reverse engineering. For these reasons, Respondent

⁶⁰ IPO Philippines,

⁶¹ Problem, para. 44

can reverse engineer or create our own version of the JADEYE software.

IX. Prayer for Relief

- (1) The termination by Respondent was not valid.
- (2) Respondent owns the jade-mining machinery and equipment.
- (3) Respondent can reverse engineer or create of Respondent's own version of the
JADEYE software.