

T1719-R

**THE 12TH ASIA INTERNATIONAL MOOT COURT COMPETITION
AT THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION**

2017

BETWEEN

THE ASAMURA INTERNATIONAL DEVELOPMENT COMPANY

(THE CLAIMANT)

AND

THE SHWE PWINT THONE COMPANY

(THE RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Claimant, The Asamura International Development Co., Ltd. (“AID”), and the Respondent, the Shwe Pwint Thone Co., Ltd. (“SPT”), agreed to submit the dispute to arbitration under the auspices of the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”), and also consented to use the KLRCA i-Arbitration Rules.

STATEMENT OF FACTS

1. The Claimant is the Asamura International Development Co., Ltd. (“AID”). It is a private international development company founded in Tokyo, Japan. The Respondent is the Shwe Pwint Thone Co., Ltd. (“SPT”). It is a local Myanmar company aiming to provide secular and vocational training to students from underprivileged families.

2. On 9 September 2008, Dr. Yugi, representative from AID, and U Thein Kyaw, representative from SPT, entered into a partnership. Both parties decided to draft their own contract and sign the agreement (“Partnership Agreement”) without engaging a lawyer.

3. Under the agreement, AID has duty to source for second hand jade-mining machinery and equipment from Japan, purchase, recondition and then import into Myanmar by SPT. There is no applicable product registration requirement. SPT is named as the importer of the jade-mining machinery that were bought by the fund of AID. Twenty-five of AID’s employees were placed in SPT’s base where they operated some of the equipment while imparting technical knowledge to SPT’s employee and students. In March 2009, AID and SPT agreed to make capital contributions to the partnership. SPT also acquired permit necessary for operating jade mining machine and equipment from the government.

4. The jadeite venture has four main activities. AID is responsible for exploration and extraction, breaking and cutting while processing and production, distribution and sales is in responsibility of SPT

5. Joe Yamashita, one of AID’s finance executives, created JADEYE software which is capable of expedite assessment work. It was installed in all the computers and equipment used on the sites because of its positive trial tests results. U Thein Kyaw then offered Joe with USD 18,000 in cash. Nevertheless, he declined it and said that it was for the benefit of all of us. On

4 January 2013, Joe resigned from AID and handed source code of JADEYE software to Head of Finance of AID in Tokyo.

6. The interview with the Asian influencers Magazine, Dr. Yugi and Dr. Fiona, Dr. Yugi's wife, were asked about their views on the plea of Rohingya in Rakhine state, giving their existing business involvement in Myanmar and Dr. Fiona's position in Second life. Dr. Fiona's answer upset many of SPT's employees and students, as a result, they went on strike for seven days.

7. On 10 January 2017, U Thein Kyaw decided to end the partnership with AID and offered to bear the relocation costs for AID's employees. He claimed that his team is unable to continue working with AID as they cannot look pass the interview.

8. Unable to compromise, the parties decided to submit the dispute to the arbitration and proceed the arbitration in accordance with the KLRCA i-Arbitration Rules. The arbitration is set to determine validity of the termination of contract, ownership of jade-mining machinery and equipment, and subsistence and ownership of rights in the JADEYE software.

QUESTIONS PRESENTED

- I. What is the law governing the procedural and substantive merits of this dispute.
- II. Whether or not the termination of the agreement by SPT is valid.
- III. Whether or not the ownership of jade-mining machinery and equipment belongs to the Respondent.
- IV. Whether or not the subsistence and ownership of rights in the JADEYE software belongs to the Respondent.

SUMMARY OF PLEADINGS

- I. The KLRCA i-Arbitration Rules and the Japanese laws govern the procedural aspect of the arbitration since the Parties agreed to use the KLRCA i-Arbitration Rules and the Parties agreed that the arbitration will be seated in Japan. The laws of Myanmar shall govern the substantive merits of contractual claims as indicated in the Agreement of the Parties. Moreover, laws of Myanmar shall also govern substantive merits of non-contractual claims relating to property and Intellectual property as considered the most closely connected laws to the dispute.

- II. The termination of the Agreement by the Respondent is valid. The claimant is bound by the obligations under the Agreement as it was created by the free consent of the Parties and it was still in force during the time the dispute arose. As the relationship between the Parties is partnership, the Partnership Act is enforced. As the Claimant breached the Agreement because Fiona's statement given in the interview in the name of the Claimant is harmful to national interest and solidarity of Myanmar; therefore, the Respondent is entitled to terminate the contract.

- III. The Firm is the rightful owner of the jade-mining machinery and equipment as they were brought into the Firm for the Firm by the Claimant. Even though there is no agreement between the Parties in regard of the property of the Firm, it can be implied from the intention of the Parties and the surrounding facts that the Claimant intended to contribute the jade-mining machinery and equipment to the Firm. Furthermore, the machinery and equipment were acquired for the purpose of the Firm on the course of the business. Therefore, it can be concluded that the jade-mining machinery and equipment are property of the Firm. According to the Partnership Act of Myanmar, each party is entitled to the same proportions as their share profits in property of the Firm.

IV. Joe Yamashita resided Myanmar at the date of the making of JADEYE software so it is in the scope of application of copyright law of Myanmar. As computer software is not protected by Copyright Law of Myanmar, the Respondent is entitled to reverse engineer JADEYE software.

PLEADINGS

I. The Japanese laws and the KLRCA i-Arbitration Rules govern the procedure of this arbitration and the laws of Myanmar govern the substantive aspect of the dispute.

In international arbitration, several laws may apply to different aspect of cross-border disputes. It is possible that the procedural laws and the substantive laws are not governed by the same laws. The KLRCA i-Arbitration Rules and the Japanese laws govern the procedural aspect of the arbitration [A]. The laws of Myanmar govern the substantive merits of this arbitration [B].

A. The KLRCA i-Arbitration Rules and the Japanese laws govern the procedural aspect of the arbitration.

Both institutional arbitral rules designated by both parties and procedural laws govern the procedure of this arbitration. The procedural laws form the parameters of procedure and support like mandatory rules for international arbitration.¹ Moreover, they fulfill the matters failed to be addressed by the parties and the deficiency of institutional rules.²

The procedural laws in the arbitration are determined by *lex arbitri* or law of the arbitration which provides general principle of arbitration governing law.³ In case the parties designate institutional rules to govern procedural aspects and conflicts with procedural laws, the institutional rules shall prevail except for the extent part that the procedural laws are mandatory.⁴

Therefore, KLRCA i-Arbitration Rules is procedural rules as the Parties agreed and [1] the Japanese laws are the procedural laws as the Parties designated Japan as the seat of arbitration.

¹ SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 59 (2012).

² MICHAEL PRYLES, EXCLUSION OF THE MODEL LAW, 4(6) Int'L Arb. L.Rev. 175, 177 (2001).

³ GREENBERG, *supra* note 1, at 58.

⁴ GREENBERG, *supra* note 1, at 65.

1. The Parties agreed to use the KLRCA i-Arbitration Rules.

In case there is an agreement between the parties regarding the procedural rules, the rules which both parties agreed on shall be applied in the arbitration. The arbitration agreement of both parties is contractual arrangement which binds the parties to proceed the arbitration as in the agreement.⁵

The Parties decided in the Agreement to use KLRCA i-Arbitration Rules for disputes settlement in this arbitration⁶; therefore, the KLRCA i-Arbitration Rules govern procedural aspect of the arbitration.

2. The Japanese laws is the procedural as the parties agreed to use Japan as the seat of arbitration.

The procedural law is determined by *lex arbitri*.⁷ The law of the seat of the arbitration becomes *lex arbitri* as an automatic consequence of choosing the seat of arbitration.⁸ The procedural laws of the country that is decided as the seat of the arbitration govern the procedure of the arbitration.⁹

In this case, the parties decided to bring the disputes to arbitration in Japan.¹⁰ As Japan is set as the seat of arbitration, laws of Japan shall be procedural law and control procedural aspect of the arbitration.

As a result, procedural aspect of the dispute is governed by both KLRCA i-Arbitration Rules and Japanese Law.

⁵ GREENBERG, *supra* note 1, at 59.

⁶ Moot Problem, ¶ 47.

⁷ GREENBERG, *supra* note 1, at 58.

⁸ GREENBERG, *supra* note 1, at 58; Garuda Indonesia v. Birgen Air [2002] 1 SLR 393.

⁹ ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 85 (4th ed. 2004).

¹⁰ Moot Problem, ¶ 47.

B. The laws of Myanmar govern the substantive merits of this arbitration.

The laws of Myanmar, decided by the Parties, govern both the substantive merits of the contractual claims originating from the Agreement [1] and the substantive merits of the non-contractual claims as the law of the state mostly connected with the disputes [2].

1. The laws of Myanmar govern the substantive merits of the contractual claims originating from the Agreement.

The Japanese Arbitration law 2003 No.138 Section 36 (1) indicates that “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute. In such case, any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.”¹¹

As the disputes between the Claimant and Respondent arise from the Partnership Agreement, it has been designated to be in accordance with and interpreted under the law of the golden land of Myanmar.¹² It has been reflected in the Model Law Article 28(1) which most Asia-Pacific jurisdiction lies on that the most important rule in international arbitration is that parties are free to choose applicable substantive law.¹³ Therefore, the substantive merit of the contractual claims originated from the Partnership agreement shall be govern by the law of Myanmar.

2. The laws of Myanmar govern the substantive merits of the non-contractual claims.

In case where no agreement decided on substantive law applicable to substantive merit, Article 36 (2) of Japanese Arbitration law provides that “the arbitral tribunal shall apply the

¹¹ Chūsai-hō [Arbitration Law], Law No.138 of 2003, art. 36 (Japan).

¹² Annexure 1, Partnership Agreement, Clause 10.

¹³ GREENBERG, *supra* note 1, at 101.

substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected.”¹⁴

i. The ownership of jade-mining machinery and equipment claims are governed by the laws of Myanmar.

The claim regarding the ownership of the jade-mining machinery and equipment that the Parties agreed to be decided by the arbitration¹⁵ is an issue concerning the proprietary of tangible movable property. Generally, ownership of tangible movable property is not represented by formal title. So the law that determines the acquisition or transfer of rights in movable property is not always obvious¹⁶ since tangible movable property can change location or *situs* and the law in each place may differ. Disputes concerning title to, or the right to possession of, movable property are generally governed by the *lex situs*, law of the place, of the movable at the date of the event which is claimed to have affected title to it.¹⁷

In this case, the jade-mining machinery and equipment are used at the jade fields in Hpakant in Myanmar.¹⁸ According to the *lex situs*, the law governing the claim on ownership of the jade-mining machinery and equipment is Myanmar law.

ii. Intellectual property claims are governed by the laws of Myanmar.

The claims concerning intellectual property matters raised to be arbitrated are the subsistence and ownership of rights in the JADEYE software.¹⁹ The cross border of intellectual property dispute leads to conflict of law in deciding initial ownership of JADEYE

¹⁴ Chūsai-hō [Arbitration Law], Law No.138 of 2003, art. 36 (Japan).

¹⁵ Moot Problem, ¶ 48.

¹⁶ JANEEN M. CARRUTHERS, THE TRANSFER OF PROPERTY IN THE CONFLICT OF LAW: CHOICE OF LAW RULES CONCERNING INTER VIVOS TRANSFERS OF PROPERTY 76 (2005).

¹⁷ ADRIAN BRIGGS, THE CONFLICT OF LAW 224 (2008); *Cammell v. Sewell* (1860) 5 H&N 728.

¹⁸ Moot Problem, ¶ 16; Additional Clarifications, Question 11.

¹⁹ Moot Problem, ¶ 48.

software which shall be governed by *lex originis* principle or the law of the country of origin of the work.²⁰ The country of origin is the country where the work was created.²¹

In this case, the sole creator of JADEYE software created JADEYE software in Myanmar.²² As Myanmar is the country where the work was created, the laws governing the Intellectual property relating claims are Copyright laws of Myanmar.

II. The termination of the Partnership Agreement by the Respondent is valid.

As the Partnership Agreement entered into by the Claimant and the Respondent is valid and enforceable [A], both parties are bound by the obligations contained therein. Since the Claimant's interview statement harm national interest and solidarity of the Golden land of Myanmar, the Claimant breached the contract [B]. Therefore, the Respondent is rightfully terminating the Partnership Agreement [C].

A. The Partnership Agreement is valid and enforceable.

The relationship between the Claimant and the Respondent as governed by the Partnership Agreement was recognized as a partnership under the Myanmar Partnership Act as they agreed to share profit and carry on the business [1].²³ Also, such Partnership Agreement arises from a valid contractual basis [2] and was in force during the time the dispute arose [3]. Therefore, the Partnership Agreement is valid and enforceable in this case.

²⁰ INTERNATIONAL CONGRESS OF IMPERATIVE LAW, GENERAL REPORTS OF THE XVIIIITH CONGRESS OF THE INTERNATIONAL OF COMPARATIVE LAW / RAPPORTS GÉNÉRAUX DU XVIII CONGRÈS DE L'ACADEMIE INTERNATIONALE DE DROIT COMPARÉ 411 (Karen B. Brown, David V. Snyder eds., 2012).

²¹ *Id.*

²² Additional Clarifications, Question 15.

²³ Partnership Act, 1932, § 4 (Myan.).

1. The relationship between the Parties is recognized as partnership under the Myanmar Partnership Act.

Section 4 of the Partnership Act 1932 indicates that “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” and “[p]ersons who have entered into partnership with one another are called individually “partners” and collectively “a firm”...”²⁴

Once the Claimant and the Respondent entered into the Partnership Agreement, they are partners in operating the Jadeite venture business. Both parties clearly have distinguished tasks in handling and establishing the jadeite venture.²⁵ The business is carried by both partners acting for all and both are entitled to the profits. According to the agreement, the Claimant is entitled to 35 percent of the profit and the respondent is entitled to 65 percent.²⁶ Therefore, the relationship between the parties is recognized as a partnership under the Myanmar Partnership Act.

2. The Partnership arises from a valid contractual ground.

Section 7 of the Partnership Act 1932 indicates that “The relation of partnership arises from contract and not form status;...”²⁷ Therefore, in order to determine whether the Partnership Agreement between the Parties is valid and enforceable or not, regard also needs to be put on the validity of its contractual basis.

In order for contract to be valid under the Contract Act 1872 of Myanmar: first, the contract must be based on a mutual agreement by the parties. Second, it must be made by

²⁴ Partnership Act, 1932, § 4 (Myan.).

²⁵ Moot Problem ¶ 19.

²⁶ Annexure 1, Partnership Agreement, Clause 7.

²⁷ Partnership Act, 1932, § 5 (Myan.).

competent parties.²⁸ Third, the promise or obligation of each party must be supported by consideration given by each party in the contract.²⁹ Fourth, it must be for a lawful purpose.³⁰

In this case, the Claimant and the Respondent mutually entered into the Partnership Agreement when Dr. Yugi and U Thein Kyaw both agreed to draft their own agreement and willingly signed it.³¹ Since the Agreement was signed and there was no evidence of coercion, undue influence, fraud, misrepresentation and mistake³², it is reasonably implied that the Parties entered into such Agreement with their free consent. Moreover, both Parties are considered to possess contractual capacity as they have ability to understand that a contract is being made, understand the general rule, and have the legal competence to the contract. Moreover, Dr. Yugi, the chairman, representative from AID³³ and U Thein Kyaw, the owner, representative from SPT have the authority to enter into the contract. Third, the consideration given by both Parties is evident. Not only both Parties made capital contribution, the Claimant agreed to be responsible for the arrangement for second hand machinery and equipment from Japan, 25 of AID's employees, and a set of health and safety and environment (HSE) standards,³⁴ whereas the Respondent agreed to handle the visa and accommodations for AID's employee, obtain necessary permit and 50 students working at the base.³⁵ Lastly, apart from the profits, the business's purpose is to help local Myanmar people³⁶ and there is no evidence of unlawful purpose of this business. Therefore, the Parties' business is not made for an unlawful purpose.

²⁸ Contract Act, 1872, § 10 (Myan.).

²⁹ Contract Act, 1872, § 2 (Myan.).

³⁰ Contract Act, 1872, § 10 (Myan.).

³¹ Moot Problem, ¶ 15.

³² Contract Act, 1872, §14 (Myan.).

³³ Additional Clarifications, Question 19.

³⁴ Moot Problem, ¶ 16.

³⁵ Moot Problem, ¶ 18.

³⁶ Annexure 1, Partnership Agreement, Clause 5.

3. The Claimant and the Respondent are bound by the obligations contained in the Partnership.

A contract's effective date may or may not be the same as the date of signing. If a contract does not specify its effective date, it goes into effect on the date it was signed by the person to whom the contract was offered for a signature.³⁷ Moreover, Section 37 of the Myanmar Contract Act indicates that, "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or any other law..."³⁸

In this case, the offer to the Partnership Agreement was made when Dr. Yugi insisted they drawn up a contract and made U Thein Kyaw sign them as an acceptance. In the afternoon of 9 September 2008 when U Thein Kyaw agreed to sign the agreement, the contract was formed and became in to effect from 9 September 2008. Since there is no indicated expiration date of the Agreement, the agreement is valid until there is a rightful termination of it. The dispute between both Parties started on 10 January 2017 when U Thein Kyaw made up his mind to end the partnership and informed his partner about the decision. The Agreement was still in force on 10 January 2017. Therefore, the Respondent is bound by the obligations as indicated in the Partnership Agreement.

As a result, the relationship between both parties is recognized as a partnership recognized under the Myanmar Partnership Act. The Partnership Agreement being made arises from a valid contractual ground. Therefore, the Agreement is valid and enforceable during the dispute.

³⁷ RICHARD A. LORD&SAMUEL WILLISTON, 2 WILLISTON ON CONTRACT § 6:1 (4th ed., 2009-2010).

³⁸ Contract Act, 1872 § 37 (Myan.).

B. The Claimant breaches the Agreement.

The statement given by Dr. Fiona in the interview with the Asian Influencers Magazine was made in the name of the Claimant [1]. Such statement concerns national interest and solidarity of Myanmar [2]. Therefore, the Claimant breaches the Agreement, which entitles allowing the Respondent to the right to terminate the Agreement [3].

1. Dr. Fiona's statement given in the interview with the Asian Influencers Magazine was made in the name of the Claimant.

Section 9 of the Partnership Act prescribes that

partners are bound to carry on the business of the firm to be the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.³⁹

In other words, the parties to the contract must pay the utmost fidelity in all relationships with other partners. If any partner fails to do so, other partners have certain legal remedies to redress the wrong.⁴⁰ The provision interprets that a partner has a duty to work on behalf of the partnership and must use reasonable care and skill in conducting the firm's business.

Section 28 of the Partnership Act prescribes that

[a]nyone who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does not know that the representation has reached the person so giving credit.⁴¹

³⁹ Partnership Act, 1932, § 9 (Myan.).

⁴⁰ JOHN D. ASHCROFT & JANET E. ASHCROFT, LAW FOR BUSINESS 379 (Jack W. Calhoun ed., 17th ed. 2011).

⁴¹ Partnership Act, 1932, § 28 (Myan.).

Fiona Lum Ka Ching is married to Dr. Yugi Asamura, who holds 70% shares and is the chairman of AID.⁴² Even though Dr. Fiona is not an existing shareholder, she is a non-executive director of the AID. This allows her to be involved in policy making and planning exercises even if she does not engage in the day-to-day management of the organization. Therefore, Fiona is considered a representative of the Claimant and her actions bind the Firm.

2. The matter concerned in the interview is harmful to national interest and solidarity of Myanmar.

The Rohingya is a Muslim ethnic minority group living in the Northwest part of Rakhine State in Burma (Myanmar). The Rohingya has been persecuted by the government since 1982, when the Burma Citizen Law 1982 was enacted. The given law does not recognize the Rohingya as Myanmar citizens, even though the group makes up to 7% of the country's population. The Rohingyas live in inhumane condition, one that has provoked international concerns. Although the Myanmar government has been pressured by international organizations, the problem continues to persist.

In general, the primary interest of state concerns the existence of the state.⁴³ However, the interest of a nation shall be defined by the political and cultural context at the time the above policy was formulated.⁴⁴ More importantly, in defining national interest, the country's economic capability shall also be taken into account.⁴⁵ In this case, Myanmar's national interest may include the integrity of the well-being of its people⁴⁶ and its opportunity for economic growth.

⁴² Addition Clarifications, Question 3,19.

⁴³HANS J. MORGENTHAU, IN DEFENSE OF NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY. 172 (1952).

⁴⁴ HANS J. MORGENTHAU, POLITICS AMONG NATIONS 5-8 (1985).

⁴⁵ SCOTT BURCHILL, THE NATIONAL INTEREST IN INTERNATIONAL THEORY 36 (2005).

⁴⁶ HANS J. MORGENTHAU, DIPLOMACY, 55 YALE L.J. 1067, 1069 (1946).

The fact indicates that the statement made by AID's executive led to a misunderstanding that the government was involved in ethnic cleansing,⁴⁷ regardless of the lack of evidence. This statement has tainted the reputation of Myanmar, preventing the government from achieving a peaceful growth as it can be implemented that the government neglect basic human right. Foreign investors may doubt the stability which deter them from investing. Moreover, this could lead to loss of credibility of government which could hinder the country's solidarity. As a result, the given statement could be accounted as harmful to its national interest. Were the statement had not been made, there would be no breach of Myanmar's national interest.

3. The Claimant breaching the agreement allows the Respondent to terminate the contract.

As to the partnership agreement made by both parties Clause 11 indicates that "To show respect towards the Golden Land, AID cannot do or say anything harmful to the national interest and solidarity of Myanmar, and vice versa."⁴⁸ The partnership agreement was constituted based on the contractual principal. Therefore, the termination of contract by breach could be considered in this case. According to Section 39 of the contract act 1872 indicates that "[w]hen a party to contract has refused to perform, or disabled himself from performing his promise in it's entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."⁴⁹

When Dr.Yugi, an agent of the Claimant, gave an interview which is harmful to national interest and solidarity of Myanmar, she neglected the agreement number 11 being disrespect

⁴⁷ Moot Problem, ¶ 29.

⁴⁸ Annexure 1, Partnership Agreement, Clause 11.

⁴⁹ Contract Act, 1872 § 39 (Myan.).

to the Golden land. Therefore, the Claimant is considered to be breaching the contract so this instance allows the Respondent to rightfully put an end to the contract. The aggrieved party may elect to rescind the contract, which release this party from all obligations which have not yet been performed.⁵⁰

III. The Firm is a rightful owner of the jade-mining machinery and equipment.

Myanmar's legal system is a combination of customary law, English common law, legislation, and judicial decision.⁵¹ Historically, Myanmar used to be a part of India, which was under the control of the British Empire. Consequently, Myanmar has adopted some of the Indian statutory laws, which were generally influenced by the English common law, as its own laws.⁵² In the case where there are no applicable statutory Myanmar laws, the English common law shall be applied.⁵³ Therefore, the courts of Myanmar have mainly relied on the interpretation and application of law from the judicial decisions from both England and India.⁵⁴

Myanmar has adopted the Partnership Act 1932 from India, which is closely similar to the English law⁵⁵ regarding the nature of the partnership and its property.⁵⁶ In this case, the Agreement that established the partnership between the Claimant and the Respondent took place in Myanmar. Therefore, any issue arising in regard to such partnership is subject to the Partnership Act 1932 of Myanmar.

⁵⁰ ASHCROFT, *supra* note 40, at 139.

⁵¹ Nang Yin Kham, "An introduction to the Law and Judicial System of Myanmar", CALS Working Paper Series, No.14/02, March 2014, <http://law.nus.edu.sg/cals/pdfs/wps/CALS-WPS-1402.pdf>.

⁵² *Id.* at 2.

⁵³ *Id.* at 2; ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN MYANMAR 11 (2016).

⁵⁴ T.C. Mohamed v. A. Kunjalah and two others, (1951) S.C. 1951 (India); A.M.M. Murugapp A Chetty Ar v. N.C. Galliaro and others, (1933) 155 Civ. Misc. App. 150 (Myan.); U Maung v. Tan Kut Htai. And One, (1958) 8 Civ. App. 675 (Myan.).

⁵⁵ Partnership Act, 1890, 53 & 54 Vict. C.39 (U.K.).

⁵⁶ Malabar Fisheries Co, Calcutta v. Commissioner of Income Tax, (1980) 1 S.C.R. 696 (India).

In regard to the ownership of the jade-mining machinery and equipment, Section 14 of the Partnership Act 1932 provides that

subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of business of the firm.⁵⁷

Since the Claimant brought the jade-mining machinery and equipment into the stock of the Firm for the Firm, such assets are the property of the Firm [A] and each partner is entitled to the same proportion as their share profits in those assets [B].

A. The Claimant brought the jade-mining machinery and equipment into the Firm for the Firm.

Pursuant to Section 14 of the Partnership Act 1932, if there is no agreement between the partners showing contrary intention, property is deemed to belong to the firm if a) it was brought into the common stock by the partners as their contribution or b) it was acquired or purchased by or for the firm, or for the purposes and in the course of the business of the firm.⁵⁸

In this case, there is no agreement between Parties in regard to the ownership of the property of the Firm. However, the Claimant brought the jade-mining machinery and equipment to the Firm for the Firm. Therefore, such properties belong to the Firm.

Since the Agreement between both Parties did not specifically identify anything as a property of the Firm,⁵⁹ it can be implied from the intention of the partners what are property of the Firm [1]. Based on the Agreement and surrounding facts, it can be concluded that the Claimant intended to contribute the jade-mining machinery and equipment to the Firm [2] as the assets were acquired for the purpose of the Firm in the course of the business [3]. Therefore,

⁵⁷ Partnership Act, 1932, § 14 (Myan.).

⁵⁸ THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, MERCANTILE LAWS 161 (2014).

⁵⁹ Annexure 1, Partnership Agreement.

it can be reasonably concluded that the Claimant brought the jade-mining machinery and equipment into the Firm for the Firm.

1. The implied intention of the Parties needs to be considered to determine the properties of the Firm.

In light of Section 14 of the Indian Partnership Act, the Supreme Court of India held in *Mohd. Laiquiddin & Anr v. Kamala Devi Misra (Dead) By Lrs. & Ors.* that “an agreement of the partners on which property belongs to the Firm may be expressed or implied.”⁶⁰ As a result, it depends on the intention of the partners whether a certain property did or did not become property of the firm.⁶¹

In the absence of an express agreement, the following factors must be considered in order to determine the implied intention of the partners: first, the source when the property was obtained; second, the purpose that the property was acquired for and; third, the mode in which the property has been dealt with.⁶²

In this case, the Agreement between the Parties did not specify any property as the property of the Firm.⁶³ Therefore, the implied intention of the Parties needs to be considered in order to determine whether the jade-mining machinery and equipment are property of the Firm.

2. The Claimant intended to contribute the ownership of the jade-mining machinery and equipment to the Firm.

The phrase ‘property originally brought into the stock of the firm’ in Section 14 of the Partnership Act 1932 was interpreted by the Supreme Court of India as “the property which is brought in by the partners when the partnership is formed.”⁶⁴ In this case, even though there

⁶⁰ *Mohd. Laiquiddin & Anr v. Kamala Devi Misra (Dead) By Lrs. & Ors.*, (2010) S.C.C. (India).

⁶¹ DAVID MILMAN & TERENCE FLANAGAN, *MODERN PARTNERSHIP LAW* 49 (1983); *Income-Tax Officer v. Dr. C. Kurshid*, (1988) 28 I.T.D. (India).

⁶² ERNEST H. SCAMELL & R.C. FANSON BANKS, *LINDLEY ON PARTNERSHIP* 496 (15th ed. 1991).

⁶³ Additional Clarifications, Question 28; Annexure 1, Agreement.

⁶⁴ *Addanki Narayanappa & Anr v. Bhaskara Krishtappa And 13 Ors.*, (1966) 3 S.C.R. 400 (India).

is no agreement explicitly specifies whether the jade-mining machinery and equipment are property of the Firm⁶⁵, it can still be implied from the construction of Clause 4 of the Agreement and the surrounding facts that the jade-mining machinery and equipment were brought into the stock of the firm according to the interpretation mentioned above. As it was stipulated in Clause 4 of the Agreement *when the partnership between the parties was formed* that the Claimant would be the one to buy and provide all equipment required⁶⁶, it can be implied that the parties mutually agreed that the jade-mining machinery and equipment would be brought into the common stock of the firm as the Claimant's contribution to the Firm.

Based on the Agreement, if the parties did not intend to treat the jade-mining machinery and equipment as property of the Firm, they could have had stated that the machinery and equipment will continue to belong to the Claimant like they did with the land used for the partnership in Clause 3 of the Agreement which expresses "The land will continue to belong to U Thein Kyaw, the owner of SPT."⁶⁷ However, there is no expressed or implied agreement like that. Therefore, it can be concluded from the Agreement and the surrounding facts that the jade-mining machinery and equipment are property of the Firm because it was brought into the stock of the Firm when it was formed since there is no agreement states otherwise.

3. The jade-mining machinery and equipment were acquired for the for the purpose of the Firm in the course of the business.

In order to infer an implied agreement to identify property of the firm the surrounding circumstances including the subsequent treatment of the property,⁶⁸ the purpose in which it was acquired for and the mode in which it was dealt with⁶⁹ should be considered. In this case, it can be inferred from how the jade-mining machinery and equipment was acquired and are used in

⁶⁵ Additional Clarifications, Question 28; Annexure 1, Partnership Agreement.

⁶⁶ Annexure 1, Partnership Agreement, Clause 4.

⁶⁷ Annexure 1, Partnership Agreement, Clause 3.

⁶⁸ GEOFFREY MORSE, Partnership Law 215 (6th ed. 2006).

⁶⁹ THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, *supra* note 58.

the partnership for the purpose and in the course of the business of the firm that the assets are property of the firm.

The jade-mining machinery and equipment are needed to be imported for the production of jade at Hpakant site in Myanmar in this partnership since there were no locally manufactured machinery and equipment.⁷⁰ If the machinery and equipment were not acquired, the Firm would not be able to conduct the jade business as they would not be able to produce jade without the machinery and equipment. Therefore, the acquisition of the jade-mining machinery and equipment is for the purpose of the Firm and in the course of the jade business between the parties.

Furthermore, the surrounding facts indicate that the Parties treat the jade-mining machinery and equipment as property of the Firm since the machinery and equipment are used and operated by both the Claimant's employees and the Respondent's employees in the course of the jade business.⁷¹ In addition, the operational costs including the operation of the jade-mining machinery and equipment was paid by the capital of the firm.⁷²

In conclusion, the Parties did not explicitly identify anything as property of the Firm in the Agreement. However, it can be inferred from some clauses of the Agreement and the surrounding facts that there is an implied agreement indicating that the jade-mining machinery and equipment are property of the Firm as the machinery and equipment were brought into the stock of the firm when it was formed for the purpose and in the course of the jade business of the Firm and the parties also treated them as property of the Firm.

⁷⁰ Additional Clarifications, Question 6.

⁷¹ Moot Problem, ¶ 16.

⁷² Additional Clarifications, Question 13.

B. Each partner is entitled to the same proportion as their share profits in partnership property.

According to section 4 of the Partnership Act, legally “the firm name is compendious method of describing partners”⁷³ and the Supreme Court of India ruled, in accordance with English Courts, that the firm of the partnership is not a legal entity.⁷⁴ In other words, the firm “has no legal personality distinct from the personalities of its constituent members.”⁷⁵ As a result, the partnership property or property of the firm would vest in all partners of the firm⁷⁶ as joint estate.⁷⁷

Once a property is deemed as property of the firm, it “would cease to be the exclusive property of the person who brought it in”⁷⁸ and “an individual partner shall only be entitled to his share of profits, if any, accruing to the partnership from the realisation of this property and upon dissolution of the partnership to a share in the money representing the value of the property”⁷⁹ as Section 48 of the Partnership Act prescribes.⁸⁰

In this case, it can be concluded that the jade-mining machinery and equipment are property of the Firm. Therefore, the machinery and equipment belongs to the Firm and the ownership of them vests in all the partners of the Firm.

According to the Agreement, the Respondent is entitled to 65% of the profits from the jade business and the Claimant is entitled to 35%.⁸¹ Therefore, each party is entitled to the same proportions as their share profits in property of the Firm.

⁷³ Partnership Act, 1932, § 4 (Myan.).

⁷⁴ S.V. Chandra Pandian And Ors. v. S.V. Sivalinga Nadar And Ors., (1993) 1 S.C.C. 589 (India).

⁷⁵ THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, *supra* note 58, at 148.

⁷⁶ See S.V. Chandra Pandian And Ors., 1 S.C.C. 589 (India); Addanki Narayanappa & Anr v. Bhaskara Krishtappa And 13 Ors., (1966) 3 S.C.R. 400 (India).

⁷⁷ THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, *supra* note 58, at 149.

⁷⁸ Boda Narayana Murthy And Sons v. Valluri Venkata Suguna And Ors., (1978) A.I.R. 257 (India).

⁷⁹ See S.V. Chandra Pandian And Ors., 1 S.C.C. 589 (India).

⁸⁰ Partnership Act 1932, § 48 (Myan.).

⁸¹ Annexure 1, Partnership Agreement, Clause 7.

IV. The Respondent is rightfully entitled to reverse engineer JADEYE software.

The copyright is protected under The Burma Copyright Act which was promulgated in 1914 through application of Copyright Act 1911 of the United Kingdom. As Section 1 of the Burma Copyright Act provides that “The Copyright Act as set out in the First Schedule and with the Definitions Modifications set out herein shall apply to the Union of Burma”.⁸² Moreover, Section 2 (2) indicates that “[w]ords and expression defined in the Copyright Act have the same meanings as in that Act.”⁸³ However, the scope of copyright protection only covers the types of work indicated in The Copyright Act 1911.

Joe Yamashita resided in Myanmar on the date of making of JADEYE software [A]. However, as JADEYE software is not protected by Copyright Law of Myanmar, anyone, including the Respondent is entitled to reverse engineering the software [B].

A. Joe Yamashita resided within Myanmar on the date of making of JADEYE software.

The Copyright Law of Myanmar applies to works that are created in Myanmar as provided in Section 1 (1) (b) that

Subject to the provisions of this Act, copyright shall subsist for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if — in the case of an unpublished work, the author was at the date of the making of the work a citizen of the Union or resident within the Union of Burma.⁸⁴

The place where “individual eats drinks and sleeps” or where the author resides as his home is regarded as a residence⁸⁵. The permanence of stay is not necessary in determining the status of residence, because only the fact that the author lives in Myanmar as his home during the making of the work needs to be considered.⁸⁶

⁸² Burma Copyright Act, § 1 (1914).

⁸³ Burma Copyright Act, § 2 (1914).

⁸⁴ Copyright Act, 1911, 1 & 2 Geo. 5 § 1 (U.K.); Burma Copyright Act, § 1 (1914).

⁸⁵ WALTER ARTHUR COPINGER & SKONE JAMES, COPINGER AND SKONE JAMES ON THE LAW OF COPYRIGHT 24 (Francis Edmund & Skone James eds. 8th ed. 1948).

⁸⁶ *Id.*

In this case, Joe Yamashita is the author of JADEYE software because he is “the one who originates and executes the work”.⁸⁷ Joe Yamashita is not a citizen of Myanmar, however, at the time of the making of the JADEYE software, he is considered a resident within Myanmar. As Joe Yamashita was one of the employees assigned to work at Hpakant, Myanmar in January 2009,⁸⁸ it can be reasonably implied that Myanmar is his main workplace in which he spent most of his time creating JADEYE software.⁸⁹ With this reason, Joe Yamashita is considered a resident within Myanmar during the time when the JADEYE was made.

Therefore, the Myanmar Copyright Laws apply in this case, as Joe Yamashita, the author of JADEYE software, was a resident within Myanmar on the date of making of JADEYE software.

B. As JADEYE software is not protected by Copyright Law of Myanmar, anyone, including the Respondent is entitled to reverse engineering the software.

JADEYE software is not regarded as protected work by Copyright Law of Myanmar [1] so the Respondent is entitled to reverse engineer JADEYE software [2].

1. JADEYE software is not regard as protected work by Copyright Law of Myanmar.

Generally, in case where intellectual property is protected by the law, the author is the first owner of the work. Nevertheless, there are some exceptions that other persons like employer of the author of the may be the first owner of the work if it was created in the author’s course of employment. The owner of copyright enjoys protection of exclusive rights granted by the law.

⁸⁷ Additional Clarifications, Question 17.

⁸⁸ Clarifications, Question 8.

⁸⁹ Additional Clarifications, Question 15.

In this case, the dispute is about the computer software. Therefore, the issue is whether or not the computer software is protected under the law. According to the Copyright Law of Myanmar, the copyright of computer software is not protected. Copyright protection as contained in the Copyright Act 1911 covers only literary, dramatic, and artistic work.⁹⁰ Section 1 (1) of Copyright Act 1911 provides that

[s]ubject to the provision of this Act, copyright shall sub the term hereinafter mentioned in every original literary, dramatic and artistic work”.⁹¹ The scope of literary work, dramatic work and artistic work are defined in Section 35 (1) that “ literary work includes maps, charts, plans, tables, and compilations; dramatic work includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character; artistic work includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs.”⁹²

Computer software is not included in the scope of copyright protection under the Copyright Act of Myanmar; therefore, rights in computer software shall not be protected by Copyright Act of Myanmar.

Myanmar is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement), which grants computer software a copyright protection. However, Myanmar is regarded as least developed country by the United Nations.⁹³ Therefore, Myanmar is not required to grant a copyright protection for computer software until 1 July 2021 as transitional period provision in Article 66.1 of the TRIPS Agreement was extended.⁹⁴

⁹⁰ A.D.RUSSELL-CLARKE, COPYRIGHT AND INDUSTRIAL DESIGNS, 11 (1951).

⁹¹ Copyright Act, 1911, 1 & 2 Geo. 5 § 1 (U.K.); Burma Copyright Act, § 1 (1914).

⁹² Copyright Act, 1911, 1 & 2 Geo. 5 § 35 (U.K.); Burma Copyright Act, § 1 (1914).

⁹³ UNITED NATIONS COMMITTEE FOR DEVELOPMENT POLICY, *List of least developed countries*, DEVELOPMENT POLICE & ANALYSIS DIVISION (June, 2017), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf.

⁹⁴ World Trade Organization, *Responding to least developed countries' special needs in intellectual property*, TRADE TOPICS, https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm (updated: Oct. 16, 2014).

In conclusion, Myanmar JADEYE software which is a computer program is not regarded as copyrightable subject and not protected by Copyright Law of Myanmar.

2. The Respondent is entitled to reverse engineer JADEYE software

Generally, the owner of the intellectual property is entitled to exclusive rights of reproduction and translation of the work. The Copyright Act 1911 Section 1 (2) provides that “copyright means the sole right to produce or reproduce the work or any substantial part thereof in any form whatsoever”.⁹⁵ Therefore, only the owner of the software is entitled to reverse engineer, which contains process of reproducing and translating computer program. However, computer software is not protected under Copyright Law of Myanmar. Therefore, anyone can use JADEYE software in Myanmar in any manner while protection in the work could not be claimed.

Although the Respondent is not entitled to use any work protected by Copyright Law of Myanmar, the JADEYE software which is a computer program is not protected under Copyright Law of Myanmar. Therefore, the Respondent is entitled to reverse engineer JADEYE software.

In conclusion, The JADEYE software is not recognized as protected work by Copyright Law of Myanmar. The exclusive right to reproduce and translate the software is not granted by Copyright Law of Myanmar; therefore, anyone, including the respondent, is entitled to reverse engineer the JADEYE software.

⁹⁵ Copyright Act, 1911, 1 & 2 Geo. 5 § 1 (U.K.); Burma Copyright Act, § 1 (1914).

PRAYER FOR RELIEF

For aforementioned reasons, the Respondent respectfully requests the arbitral tribunal to grant the following orders:

- I. The termination of the Agreement by the Respondent is valid.
- II. The Respondent is only liable to pay relocation cost of the Claimant's employees.
- III. The Firm is the owner of the jade-mining machinery and equipment.
- IV. Rights of JADEYE software subsist in neither the Claimant nor the Respondent.

Therefore, the Respondent is entitled to reverse engineer JADEYE software.

Respectfully Submitted,
Counsel for the Respondent