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THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION

IN TOKYO, JAPAN

2017

BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT CO. LTD. (AID)

(CLAIMANT)

AND

SHWE PWINT THONE CO. LTD. (SPT)

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

The Parties, Asamura International Development Co., Ltd. (the '**Claimant**') and Shwe Pwint Thone Co., Ltd (the '**Respondent**') hereby mutually submit this dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules. The substance of this dispute will be governed and interpreted under the law of the Golden Land of Myanmar, as agreed under Clause 10 of the Partnership Agreement (the '**Partnership Agreement**') entered by both parties on 9 September 2006. Any award made by the tribunal will be final and binding pursuant to Rule 12(7) of KLRCA i-Arbitration Rules.

INDEX OF AUTHORITIES

CASES

OTHER DOCUMENTS

QUESTIONS PRESENTED

I. Whether Respondent has validly terminated the partnership agreement.

II. Whether the jade-mining machinery and equipment are owned by the Claimant or the Respondent.

III. Whether there is subsistence of intellectual property rights in the JADEYE software and whether the JADEYE software is owned by the Claimant or the Respondent.

STATEMENT OF FACTS

INTRODUCTION

1. This dispute involves the untimely termination of a partnership agreement between the Claimant, Asamura International Development Co., Ltd **('AID')** and the Respondent, Shwe Pwint Thone Co., Ltd. **('SPT')**. The Respondent communicated its decision to terminate the partnership on 10 January 2017.

THE RELATIONSHIP BETWEEN THE CLAIMANT AND THE RESPONDENT

2. The Claimant is a private international development company specializing in crisis relief and development and it was founded in Japan. They manage and implement project to foster economic growth and this includes natural resource management.
3. The Respondent runs teashops, jade carving and polishing studios in Mandalay and Yangon. The Respondent also runs training centre.
4. The representative of the Respondent, Mr. U Thein Kyaw contacted Dr. Yugi Asamura, from the Claimant to discuss on prospect of partnership because the Respondent has zero experience in jade exploration and production. On 9 September 2008, they concluded a partnership agreement after three rounds of discussion. Generally, the Claimant will be responsible in exploring, extracting, cutting and breaking the jade from the mining site while the Respondent will process the jade and sell them. This also prompt the Claimant into buying machinery and equipment to be used during the extraction and exploration stage.

THE INTERVIEW OF DR. FIONA LUM AND DR. YUGI ASAMURA

5. In September 2016, the Asian Influencers Magazine published a statement made by Dr. Fiona Lum about the state of Rohingya people in Myanmar.
6. The content of the interview resulted in hundred and two (102) of the Respondent's employees to go on a strike for seven (7) days. This is because they were upset by the statement made as it implied that the Myanmar government was involved in ethnic cleansing.
7. Despite the unrest, the Respondent persuaded their workers to come back to work and the business continued as usual.

THE CREATION OF JADEYE SOFTWARE

8. On 11 April 2012, an employee of the Claimant, Mr. Joe Yamashita invented a software called JADEYE to allow users to test the quality and viability of the jade at 99% accuracy. Furthermore, the software can expedite assessment work, and assist in determining the scalability and economic value of the site.
9. The software was immediately installed in all the computers and equipment used on the sites.

THE OFFER OF PARTNERSHIP OPPORTUNITY BY MR. PATRICK GREEN

10. On 21 November 2016, the Respondent was approached by Mr. Patrick Green that offered them a higher percentage of profit sharing than what was shared between the Claimant and the Respondent.
11. In consequence of that, the Respondent terminated the existing partnership business with the Claimant. The ownership of the machinery and equipment that was bought by the Claimant was called into question, as well as the JADEYE software created by the Claimant's employee.

SUBMISSION TO ARBITRATON

12. Both the Claimant and the Respondent had agreed to attend arbitration in Tokyo using the KLRCA i-Arbitration Rules.

SUMMARY OF PLEADINGS

I. THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY THE RESPONDENT IS NOT VALID

Partnership agreement shall be terminated with consent of all partners which is absent in this dispute as the Claimant did not consent to the termination. Even if the partnership is a partnership at will, a written notice must be given to terminate the partnership which is also absent as the Respondent did not give any written notice to that effect. In any event, the Respondent has no valid ground to terminate the partnership agreement under Section 44 of the Partnership Act.

II. THE CLAIMANT OWNS THE JADE MINING MACHINERY AND EQUIPMENT EXCLUSIVELY

The Claimant owns the jade-mining machinery and equipment because the legal title remains with them as the purchaser. In addition to that, circumstances of this case show that the machinery and equipment are not partnership property.

III. COPYRIGHT SUBSISTS IN THE JADEYE SOFTWARE AND IT IS EXCLUSIVELY OWNED BY THE CLAIMANT

Copyright subsists in the JADEYE software as it is a literary work and Mr. Joe Yamashita was in Myanmar during the creation of the software. In furtherance of that, the Claimant is the rightful owner of the JADEYE because Mr. Joe Yamashita was an employee of the Claimant. In any event, it is not a partnership property because it does not form an integral part of the business and does not fall under Section 14 of the Partnership Act.

PRELIMINARY ISSUE: THE APPLICATION OF COMMON LAW IN MYANMAR

It was agreed by both Parties that the dispute will be governed by Myanmar law.[1] The principal sources of law in Myanmar are customary law dealing with personal law issues, English common law, legislation and judicial decisions.[2] In the absence of any statutory provisions, the Myanmar courts must apply Myanmar's general law that reflects the principles of equity, justice and good conscience.[3] This general law is based on English common law and shaped by Myanmar case laws.[4]

I. THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY THE RESPONDENT IS NOT VALID

Pursuant to **Section 40 of the Myanmar Partnership Act 1932** (the **"Partnership Act"**)**,** consent of all partners must be acquired to terminate a partnership. **Section 43 of the Partnership Act** further provides that a unilateral termination is allowed for partnership at will, provided that the notice to terminate is given in writing. The Court may also dissolve a partnership at the suit of a partner on any grounds provided for in **Section 44 of the Partnership Act**.

[1] Clause 10 of the Partnership Agreement.
[2] *History of State and Law* (Yangon University, Department of Law, University of Distance Education, University Translation and Publication Department, 1992) 83-89; Alec Christie, *Myanmar's legal System and Contract Law* (2006) <http://www.mondaq.com/australia/article.asp?articleid=42668> accessed 10 December 2013.
[3] Article 13(3) of Burma Law Act 1898.
[4] Nang Yin Kham, *An Introduction to the Law and Judicial System of Myanmar* (2014) http://law.nus.edu.sg/cals/pdfs/wps/CALS-WPS-1402.pdf accessed on 1 August 2017.

A. No consent was given by the Claimant to dissolve the partnership.

1. According to **section 40 of the Partnership Act**, consent of all parties must be acquired to dissolve a partnership. From the facts of the case, it is undisputed that the Claimant did not consent to the dissolution by the Respondent.

B. Even if it was a partnership at will, there was no written notice given by the Respondent to terminate the partnership.

2. **Section 43 of the Partnership Act** provides that in a partnership at will, the partnership can be dissolved by one partner by giving a written notice to all the other partners to terminate the partnership. Oral or verbal notice will not suffice the condition as provided in **section 43 of the Partnership Act**.

3. No written notice was ever given by the Respondent to the Claimant to terminate the Partnership Agreement. Only oral communication was made by Mr. U Thein Kyaw to Dr. Yugi Asamura[5].

4. Therefore, the method of dissolution of partnership by the Respondent was invalid as it did not fulfil the requirements of the law under the Partnership Act.

C. The Respondent has no valid grounds to ask for dissolution of the partnership under Section 44 of the Partnership Act.

5. A partnership can be dissolved on 7 possible grounds by an adjudicating authority under **section 44 of the Partnership Act**. In our situation, there are 2 possible grounds that most likely will be pleaded by the Respondent to dissolve the partnership, that is firstly (a) a partner is guilty of a conduct which is likely to affect

[5] Para 40 of Moot Problem.

prejudicially the carrying on of the business and (b) that a partner wilfully or persistently commits breach of agreement relating to the management of the affairs of the firm. However, it is submitted that this would not be the case in the present dispute, as will be demonstrated in the following headings.

i. The alleged misconduct of Dr. Fiona Lum has not affected prejudicially the carrying on of the Jadeite business.

6. **Section 44(c) of the Partnership Act** reads:

> *"44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely…*
>
> *(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business regard being had to the nature of the business;"*

7. It must be noted that in order to dissolve a partnership on this ground, it is necessary to prove that a partner must be guilty of a conduct keeping in view the nature of the business that is shared between partners.

8. In **Snow v Milford**[6], a suit was brought by partners of banking firm to dissolve the partnership because one of the partners was guilty of adultery. However, it was dismissed by the court. This was because the misconduct of the partner had nothing to do with the nature of business for banking.

9. In the present dispute, the Respondent might allege that the conduct of Dr. Fiona Lum in uttering a few statements in the Asian Influencers Magazine to have prejudicially affected the jadeite business.[7] However, it must be noted that the

[6] [1868] 18 LT 142.
[7] Paras 28 & 29 of the Moot Problem.

statement uttered by Dr. Fiona Lum has nothing to do with the nature of jadeite business. Therefore, **section 44(c) of the Partnership Act** cannot be invoked against the Claimant to dissolve the partnership.

ii. The alleged breach of term by Dr Fiona Lum has not render it to be not reasonably practicable for the Respondent to carry on the business in partnership with the Claimant.

10. In **M/S V.H. Patel & Company & Ors vs Hirubhai Himabhai Patel & Ors**[8], it was held that:

"*mere disagreement or quarrel arising from impropriety of partners is not sufficient ground for dissolution, interference should not be refused where it is shown to the satisfaction of the adjudicating authority that the conduct of a partner has been such that it is not reasonably practicable for other partners to carry on the business in partnership."*

11. It cannot be concluded that it was not reasonably practicable for the Claimant and the Respondent to carry on the business in partnership after the statement made by Dr. Fiona Lum. This is because after the publication of the statement, the Respondent was willing to persuade its own workers who went on a strike to come back to work. This shows that the Respondent had no issue with the statement made by Dr. Fiona Lum.

12. It must be emphasized that it was not until the Respondent was approached by another potential business partner who was willing to offer the Respondent more

[8] [2000] RD 228.

profit than what the Respondent and the Claimant used to share that the Respondent made the decision to terminate the partnership. Therefore, the Respondent cannot invoke **section 44(d) of the Partnership Act** against the Claimant to dissolve the partnership business.

II. THE CLAIMANT OWNS THE JADE MINING MACHINERY AND EQUIPMENT EXLUSIVELY

The legal title of the jade mining machinery and equipment rest with the Claimant at all material times and is not a partnership property.

A. The legal title remains with the Claimant as the purchaser at all material times.

13. The legal title of the jade-mining machinery and equipment rest with the Claimant exclusively as the Claimant was the one who purchased them. In addition to that, the machinery and equipment do not form part of partnership property.

14. According to **section 54 of the Transfer of Property Act 1882**[9], 'sale' is defined as a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

15. The Claimant was the one who purchased the machinery and equipment from Japan[10]. The Respondent did not make any contribution to the purchase price of the machinery and equipment.[11] In addition, there are receipts and invoices for the purchase of the machinery and equipment held by the Claimant in Japan.[12] Therefore, the Claimant submits that the legal title of the jade-mining machinery and equipment rest with the Claimant as the purchaser at all material times.

[9] Enforced in Myanmar through Burma Code Volume X, p 138 on 22nd December 1924.
[10] Para 16 of the Facts.
[11] Q5 of the Clarifications.
[12] Q27 of the Additional Clarifications.

B. Bill of lading does not confer title on the machinery and equipment.

16. The legal title of the machinery and equipment did not pass to the Respondent just because they were addressed as the consignee of the goods on the Bill of Lading.

17. According to **Sewell v Burdick**[13]**,** the transfer of property in the goods to the consignee addressed in the bill of lading should be determined by the contract of sale between the seller and the buyer and the ownership of the property was transferred according to the parties' intention that was to be found in the contract for sale of the goods. The legal effect of the bill is only as document to confer on the lawful holder of the bill the right to receive delivery from the carrier.[14]

18. In the present dispute, there was no contract of sale between the Claimant and the Respondent with regard to the machinery and equipment. Therefore, there was no intention by the Claimant to transfer the ownership of the machinery and equipment to the Respondent.

C. The government permit that recorded the Respondent as the owner of the machinery and equipment does not confer the legal title to the Respondent.

19. According to **section 82 of India Trusts Act 1882**[15], it is provided that

"*When a property is transferred to one person for a consideration paid or provide by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."*

[13] [1884] 10 App Cas 74.
[14] Curwen, Nick. (2007). *The bill of lading as a document of title at common law.* In: Mountbatten yearbook of legal studies. Southampton Solent University, Southampton, pp. 140-163.
[15] Enforced in Myanmar through Burma Code Volume IX, p110 on the 30th September 1904.

20. The Claimant has never intended to purchase the machinery and equipment for the benefit of the Respondent. The reason why the Claimant agreed to purchase the machinery and equipment was because this was agreed in the Partnership Agreement.[16]

D. The machinery and equipment do not form part of the partnership property.

21. **Section 14 of the Partnership Act** provides that:

> "*Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business."*

22. In **Arjun Kanoji v. Santha Ram Kanoj Tankar**[17], the Supreme Court held that property belonging to a person in the absence of an agreement to the contrary does not, on the person entering into a partnership with others become the property of the partnership merely because it is used for the business of the partnership. It would become property of the partnership only if there is an agreement, express or implied that the property under the agreement of partnership is to be treated as the property of the partnership.

23. To determine whether or not an asset is acquired by a partner has in truth been acquired 'on account of the firm, or for the benefit of the firm and in the course of its business', all the surrounding circumstances must be taken into account.[18]

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[16] Clause 4 of Partnership Agreement.
[17] [1969] UJSC 405.
[18] Banks, R. C. I. A., Lindley, N. L., & Lindley, N. L. (1990). *Lindley & Banks on partnership.* London: Sweet & Maxwell.

24. It cannot be said that the Claimant has intended for the machinery to be jointly owned by both parties. This is firstly, because the Claimant had only used its own money to purchase the property, and has never asked for any contribution from the Respondent.[19] Secondly, the machinery and equipment were only used by the employee of the Claimant, as they were used in the first and second stages of the jadeite venture in which the Claimant was responsible for.[20] Therefore, it can be concluded that it was never the intention of the Claimant to treat the machinery and equipment as partnership property.

[19] Supra note 10.
[20] Q11 of the Additional Clarifications.

III. COPYRIGHT SUBSIST IN JADEYE SOFTWARE AND THE CLAIMANT OWNS THE JADEYE SOFTWARE EXLUSIVELY

Copyright subsists in JADEYE software as literary work and is protected under the Burma Copyright Act. The owner of the JADEYE software is the Claimant exclusively and it is not a partnership property.

A. Copyright subsists in JADEYE software as the requirement of originality is fulfilled.

25. In **Henkel KGaA v Holdfast New Zealand**[21], it was held that:

> "*To be original for copyright purposes, it must originate from its authors and must be the product of more than minimal skill and labor of the author."*

26. It is submitted that a work must be original before it can attain the right of subsistence under copyright law. A work need not be novel before it can qualify it for copyright protection.

27. In this case, the issue of originality is not an issue, as nowhere in the facts suggest that Mr. Joe Yamashita, the creator of JADEYE software has copied the source code from other software. In fact, it is mentioned that Mr. Joe Yamashita has also spent some time in creating the JADEYE software.[22]

[21] [2007] 1 NZLR 577.
[22] Para 21 of Moot Problem.

B. Copyright subsists in JADEYE software as it fulfils the requirement of Article 1 of Burma Copyright Act.

i. The software is protected under 'literary' work in Article 1 of Burma Copyright Act.[23]

28. **Article 1(1) of Burma Copyright Act** [24]provides that 'copyright shall sub the term hereinafter mentioned in every original literary, dramatic and artistic work.' Although Burma Copyright Act does not expressly provide protection for software, the Claimant relies on **Article 10 of TRIPS Agreement**[25], which provides that:

"Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)"

29. As Myanmar is a signatory to the WTO Agreement on 1 January 1995, Myanmar is bound by the TRIPS Convention. Although it may be argued that the provisions in the TRIPS Convention were never adopted to the domestic laws of Myanmar, the Claimant opines that Myanmar has an obligation to refrain from acts which would defeat the object and purpose of TRIPS Convention as it has signed the said Convention.[26]

[23] [India Act III, 1914].
[24] Ibid.
[25] TRIPS Agreement, 1 January 1995.
[26] Article 18 of VCLT, 23 May 1969.

ii. The JADEYE software is considered as an unpublished work, therefore the only requirement that has to be fulfilled is that the author must be within the Union of Burma.

30. **Article 1(1)(b) of Burma Copyright Act** provides:

> "*In the case of **an unpublished work**, the author was at the making of the work a citizen of the Union or **within the Union of Burma.***"

31. The JADEYE software is considered as an unpublished work because it was never sold to the public, and was only used for internal purposes, albeit between two separate companies.

32. "Published" is defined in the case of **Microsoft Corporation v DHD Distribution Pty Ltd**[27] as:

> "*…to issue or cause to be issued in copies made by printing or other processes for sale or distribution to the public as a book, periodical, map, piece of music engraving or the like*"

33. Therefore, construing the definition of unpublished work as such, the requirement that has to be fulfilled is that the author must be within the Union of Burma when the work was created. The Claimant opines that the wording of 'within the Union of Burma' should be read literally and in accordance to its purpose. The Claimant argues that the interpretation of 'within the Union of Burma' simply means that the author has to be physically present within the Union of Burma during the creation of the software. **Article 1(1)(b) of Burma Copyright Act** should be compared with other similar provisions in the other jurisdictions. For instance, in **Article 10(1)** and **Article 3 of Malaysian Copyright Act**[28], have provided expressly that

[27] [1999] 45 IPR 549
[28] Copyright Act 1987, Act 332

copyright shall only be protected when a citizen or a permanent resident makes it. The Claimant provides that if it was the intention of the legislatures of the Burma Copyright Act, that the author has to be a resident/permanent resident, it would have been expressly provided. The Claimant is in the opinion that the requirement has been fulfilled since Mr. Joe Yamashita was mainly in Myanmar when he created the software.[29]

C. The Claimant is the rightful owner of the JADEYE software

34. **Section 5(1) Burma Copyright Act 1914** provides that:

> "*Where the author was in the employment under a contract of service 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*"

i. The contract of service

35. In **Lee v. Chung Shun Shing Construction & Engineering Co.,**[30] the question of whether not the employee is an independent contractor or employee of the company is a question of fact. Therefore, in this case all circumstances evidence must be taken into account to establish the existence of contract of service.

36. It should be noted in **Market Investigations v Minister of Social Security,** [31] that the test is whether or not the person performs services on his own account. If the answer is no, that the court will consider that he is an employee of the company. The court explained what is meant by own account; the factors needed to be considered is whether the man was performing the services on his own equipment,

[29] Question 15 of Additional Clarification.
[30] [1990] IRLR 236.
[31] [1969] 2 QB 173.

the degree of financial risk he takes, the degree of responsibility for investment and management he has for himself and whether has an opportunity of profiting from the performance of his task.

37. In the present case, there are three evidences that points to the fact that there was a contract of service. First, the salary of Mr Joe Yamashita was still paid by the Claimant.[32] Second, the Claimant has control over the Mr Joe Yamashita.[33] Third, the term used to describe Mr Joe Yamashita is the AID's employee, which refers to the Claimant.[34] In addition to that, the Claimant opines that although Mr Joe Yamashita was seconded in Myanmar while creating the work[35], the relationship of employer and employee still remains between the Claimant and Mr Joe Yamashita. This is because, secondment is only a temporary transfer, which means that the employee is subject to recall by his employer as provided in **Bank Simpanan Nasional Finance v Omar Hashim** [36]. For as long as the old contract is not terminated, a new contract is not made. Therefore, the employee continues to be in the employment of the original employer as can be found in **Comex Services Asia Pacific Miri v Grame Ash**[37].

38. In this case, there is no evidence that leads to the conclusion that there exists new contract between Mr. Joe Yamashita and the Respondent. Therefore, although Mr. Joe Yamashita was seconded, in absence of any new contract concluded between him and the Respondent, it could not be said that the Respondent is the new employer.

[32] Q14 & Q17 of Additional Clarifications.
[33] Para 23 of Moot Problem.
[34] Q17 of Additional Clarifications.
[35] Ibid.
[36] [2002] 1 ILR 272.
[37] [1987] 2 ILR 34.

ii. Scope of employment

39. In **Beloff v Pressdram Ltd** [38], the court concluded that a work is considered to be of the employer's if the employee created such work during the time of when he was employed to do so and in the capacity of his/her job scope for which he/she was employed to do. In this case, the Claimant argues that it is clear that Mr. Joe Yamashita created the work when he was employed and no point suggests that he does it outside his working hours. In addition to that, the purpose of the creation of the JADEYE software has to be taken into account. The purpose of JADEYE software was to improve financial efficacy of their operations.[39] This is in line with Mr Joe Yamashita's job scope, as he was the then Finance Executive of the Claimant.

40. Furthermore, in **Electrolux v Hudson** [40], the relevant employee was a senior storekeeper for Electrolux (a home and electronic appliances company). He and his wife devised an adapter for use in vacuum cleaners whereby an open mouthed bag could be made to fit into the vacuum cleaner to collect dust sucked up by it. Electrolux claimed that the invention was made while he was in their employment and that they were entitled to its benefit under the Standard Conditions of Employment for Staff. The relevant clause was held unenforceable as an unreasonable restraint of trade. Despite the absence of the clause, the court held that it could be implied into the contract that inventions made in the course of employment should be held upon trust for employer. It should be noted that such

[38] [1973] FSR 33.
[39] Question 26 of Additional Clarifications.
[40] [1977] FSR 31.

principle is only applicable if the employee made the invention during the working hours.

41. Similarly in our present case, it matters not that Mr. Joe Yamashita is not a computer programmer for the JADEYE software to belong to the Claimant. This is because, for as long as it was done during working hours, for the benefit of the company and has relation to the company's nature of business, there could be an implied contract that the work was created for the benefit of the Claimant and that Mr. Joe Yamashita was only holding it on trust for the benefit of the Claimant. The facts in this case clearly reinforces this point, as when Mr. Joe Yamashita resigned, the source code of the JADEYE software was passed to the Claimant,[41] which suggests that Mr. Joe Yamashita acknowledges that the work was created for the benefit of the Claimant.

42. Lastly, in **British Reinforced Concrete Engineering v Lind**[42], the court held that in dealing with question of whether or not a particular invention is to be retained by the servant or has been made by him for the benefit of the employer; it is necessary to regard not only the contract of service, and the relative positions which the servant and the employer occupy, but also the circumstances in which the particular invention was made. As mentioned before, job scope of Mr. Joe Yamashita was in line with the purpose of the creation of the JADEYE software, therefore, it can be implied that the software was created for the Claimant.

D. JADEYE software is not a partnership property.

[41] Para 25 of Moot Problem.
[42] [1917] 34 RPC 101.

i. The JADEYE software does not form an integral part of the business

43. According to **Coward v Phaestos**[43], one of the reasons the software is deemed to be a partnership property is because it forms an integral part of the business. The implementation of the mathematical models and software were the cornerstone of the success of the business. The business was built upon the computer programme of the software. The court further reinstated that only if the property is necessary to the partnership that it would be deem as a partnership property.

44. The court adopted the same principle in **Miles v Clark**[44]**.** This was a case in which the judge was required to determine what terms should be implied into a partnership agreement where nothing had been agreed other than the sharing of profits. At para 540, Harman J held that:

> "*In my judgment no more agreement between the parties should be inferred than is absolutely necessary to give business efficacy to that which has happened, and that is the only safe way to proceed."*

45. The Claimant is in the opinion that the JADEYE software could not be regarded to give business efficacy nor it is it an integral to the business. The definition of business efficacy in **The Moorcock**[45], is that it must be obvious and necessary. The JADEYE software was not necessary to the partnership. This is because, the partnership was largely successful and the jade business made an average profit of USD7.5 million a year even before the creation of the JADEYE software [46].

[43] [2013] EWHC 1292.
[44] [1953] 1 All ER 779.
[45] (1889) 14 PD 14.
[46] Para 26 of Moot Problem.

Furthermore, the JADEYE software was only created in 2012[47], while the partnership was established in 2008[48]. The Claimant provides that if it were necessary, the business would have collapsed. Moreover, nothing in the facts suggests that the success of the business rests upon the JADEYE software. It cannot be proved that the JADEYE software was the bedrock of the partnership. In absence of such facts, the JADEYE software should not be considered to be a partnership property.

ii. ***The purpose of the property and the manner in which the JADEYE software was treated shows that it was never meant to be a partnership property.***

46. Section 14 of the Partnership Act provides that:

> "*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 the business of the firm, and includes also the goodwill of the business.*"

47. The question of whether property has become property or not is always a **question of fact** in which one must endeavor to ascertain whether it has been treated by the partners as part of the common stock, or merely used, either at a rent or by gratuitous license, as ancillary to the carrying on of the business.

48. According to Lindley and Banks:

[47] Para 21 of Moot Problem
[48] Preamble in Partnership Agreement

"*It is up to the partners to agree between themselves what are assets should be partnership property. In the absence of the express agreement, there are 3 factors that must be taken into consideration to treat a property as partnership property. First, the circumstances of the acquisition with the particular reference to the derivation of any funding. Second, the manner in which the assets had subsequent been dealt with. Third, the purpose of the acquisition.*"

49. The Claimant opines that since there is no list of partnership properties provided in the partnership agreement, the 3 factors mentioned above should be considered. As for the circumstances of the acquisition of the property, it is clear that no funding was ever given by the Respondent to help create the JADEYE software.

50. As such, the Claimant would focus on the other 2 factors; the manner and purpose of the acquisition of the JADEYE software. It is clear from the facts that the purpose of the acquisition was never to share the JADEYE software. The Claimant contends that although the JADEYE software was installed in the machines, mere usage does automatically turn the JADEYE software into a partnership property.[49] The purpose of which the JADEYE software was created was only to help improve financial efficacy of the Claimant, as the facts suggest that the Claimant is involved in managing other natural resources. [50] In addition to that, the manner in which it was treated is consistent with the fact that it was never meant to be a partnership property because when the author of the JADEYE software resigns, the source code was only sent to the Claimant, and not to the Respondent. [51] Lastly, Mr Joe

[49] Supra Note 19.
[50] Para 2 of Moot Problem.
[51] Para 25 of Moot Problem.

Yamashita's statement uttered to the Respondent should not have any bearing[52], because he was neither the owner of the JADEYE software nor was he an agent to the company that confers his statement to have any weight. The Claimant argues, that it is trite law that the agent of the company is only the director.[53] As Dr. Yugi Asamura has never consented nor did he agree to such statement, the statement should have no effect. In conclusion, looking at all 3 factors, it cannot be said that the JADEYE software was ever intended to be a partnership property.

[52] Para 24 of Moot Problem.
[53] Ferguson v Wilson (1866) 2 ch app 77: 15 lt 230.

PRAYERS FOR RELIEF

For the foregoing reasons, the Claimant respectfully pleads for this Tribunal to adjudge and declare that:

I. The termination by the Respondent is not valid and the Respondent has no valid grounds to get an order of termination from this Tribunal.

II. In the event of dissolution of partnership, the ownership of the jade-mining machinery and equipment remains with the Claimant at all material time and not a partnership property.

III. Copyright subsists in the JADEYE software and the Claimant owns it exclusively.

Respectfully submitted,

Asamura International Development, THE CLAIMANT

11th AUGUST 2017