

**THE 12<sup>TH</sup> LAWASIA INTERNATIONAL MOOT COMPETITION**

**IN TOKYO, JAPAN**

**2017**

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**BETWEEN**

**ASAMURA INTERNATIONAL DEVELOPMENT CO., LTD. (AID)**

**(CLAIMANT)**

**AND**

**SHWE PWINT THONE CO., LTD. (SPT)**

**(RESPONDENT)**

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**MEMORIAL FOR THE RESPONDENT**

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## STATEMENT OF JURISDICTION

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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.

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## QUESTIONS PRESENTED

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- I. Whether the Respondent is entitled to terminate 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

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### INTRODUCTION

1. This dispute involves the termination of Partnership Agreement between the Claimant, Asamura International Development Co., Ltd (**'AID'**) and the Respondent, Shwe Pwint Thone Co., Ltd. (**'SPT'**). The Respondent decided to end the partnership business because of a breach of agreement by the Claimant.

### THE RELATIONSHIP BETWEEN THE CLAIMANT AND THE RESPONDENT

2. The Claimant is a private international development company specializing in crisis relief and development, founded in Tokyo, Japan. The Respondent runs teashops, jade carving and polishing studios in Mandalay and Yangon, Myanmar. The Respondent also runs training centre.
3. The representative of the Respondent, Mr. U Thein Kyaw contacted Dr. Yugi Asamura from the Claimant to discuss on prospect of partnership. On 9 September 2008, they concluded a Partnership Agreement. The Claimant agreed in the Partnership Agreement that it will provide the partnership with all the machinery and equipment necessary for the carrying on of the business.

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

4. Clause 11 of the Partnership Agreement provides that none of the parties can say or do anything harmful to the national interest or solidarity of Myanmar and vice versa.
5. In lieu of the existence of clause 11 of the Partnership Agreement, Dr. Fiona Lum, a non-executive director made a statement about the state of Rohingya group in Myanmar in her interview with the Asia Influencers Magazine.

6. The content of the interview had resulted in 102 of the Respondent's employees to go on a strike for 7 days because the statement made has implied that the Myanmar government was involved in ethnic cleansing.
7. Since the interview, the morale of the employees and students of the Respondent were at an all-time low, as they have lost respect for their Japanese counterparts.

#### THE CREATION OF JADEYE SOFTWARE

8. On 11 April 2012, Mr. Joe Yamashita, an employee of the Claimant that was seconded to Myanmar under the Partnership Agreement invented a software called JADEYE to allow users to test the quality and viability of the jade at 99% accuracy.
9. The software was immediately installed in all the computers and equipment used on the sites by the Claimant and the Respondent.

#### THE DECISION TO TERMINATE THE PARTNERSHIP BY THE RESPONDENT

10. On 10 January 2017, the Respondent decided to terminate the partnership business as it was brought to the attention of Mr. U Thein Kyaw that the employees and students of the Respondent were still deeply affected by the statement made by the Claimant with regard to the situation of the Rohingya people.
11. While discussing about the termination of the partnership with the Claimant, the ownership of the machinery and equipment was called into question, as well as the JADEYE software created by Mr. Joe Yamashita.

#### SUBMISSION TO ARBITRATION

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

## SUMMARY OF PLEADINGS

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I. THE RESPONDENT IS ENTITLED TO THE TERMINATION OF THE PARTNERSHIP AGREEMENT.

The Respondent is entitled to the termination of the partnership under **section 44 of the Burma Partnership Act 1932** (the '**Partnership Act**'). This is due to the misconduct of Dr. Fiona Lum, which is attributable to the Claimant as she is an agent of the Claimant.

II. THE JADE-MINING MACHINERY AND EQUIPMENT ARE PARTNERSHIP PROPERTY

The jade-mining machinery and equipment purchased for the purposes of the partnership business are considered as partnership property under **section 14 of the Partnership Act**. This is because both the Claimant and the Respondent treated the property as partnership property.

III. COPYRIGHT SUBSISTS IN THE JADEYE SOFTWARE AND IT IS PARTNERSHIP PROPERTY.

Copyright subsists in JADEYE software because the work has passed the test of originality and also is a type of work that is protected under the **Burma Copyright Act 1914** (the ‘**Copyright Act**’). The Respondent contends that the JADEYE software is a partnership property by virtue of **section 14 of the Partnership Act**. The Respondent also submits that it is necessary for this tribunal to decide that both the Claimant and the Respondent jointly own the JADEYE software because of the existence of fiduciary relationship.

## PLEADINGS

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### **PRELIMINARY ISSUE: THE APPLICATION OF COMMON LAW IN MYANMAR**

It was agreed by both Parties that the dispute will be governed by Myanmar law.<sup>1</sup> The principal sources of law in Myanmar are customary law dealing with personal law issues, English common law, legislation and judicial decisions.<sup>2</sup> 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.<sup>3</sup> This general law is based on English common law and shaped by Myanmar case laws.<sup>4</sup>

### **I. THE RESPONDENT IS ENTITLED TO THE TERMINATION OF THE PARTNERSHIP AGREEMENT**

The Respondent is entitled to the termination of the partnership under section 44 of the Partnership Act. This is due to the misconduct of Dr. Fiona Lum, which is attributable to the Claimant as she is an agent of the Claimant.

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<sup>1</sup> Clause 10 of the Partnership Agreement.

<sup>2</sup> *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.

<sup>3</sup> Article 13(3) of Burma Law Act 1898.

<sup>4</sup> 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. The partnership is a partnership at will.**

1. Section 7 of the Partnership Act provides that if there is no provision between the partners on the duration or determination of their partnership, the partnership is a partnership at will.<sup>5</sup> As explained by the court in **Moss v Elphick**,<sup>6</sup> every partnership is a partnership is one at will unless there is an agreement to the contrary.
  
2. As illustrated in **Keshavlal Lallubhai Narnadas v Patel Bhailal Narandas**,<sup>7</sup> the duration of the partnership may be express or implied, having regard to the contract and the nature of the partnership business.<sup>8</sup> The period of time has to be fixed as noted in **Deoki Prasad Rajgarhiah And Anr. v Smt. Anar Dai Poddar And Ors**<sup>9</sup>. For example in **Arunachalarn & Co. And Ors. v M. Sadasivarn**,<sup>10</sup> the contract between the partners was fixed to be terminated in 3 years, which was considered to be a fixed duration.<sup>11</sup>
  
3. Therefore, the partnership between the Claimant and the Respondent is a partnership at will, as the Partnership Agreement does not stipulate any express or implied duration of the partnership, nor did it set out a method of determination of

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<sup>5</sup> Section 7 of the Partnership Act.

<sup>6</sup> [1910] 1 KB 846.

<sup>7</sup> AIR 1968 Guj 157.

<sup>8</sup> Ibid, para 2.

<sup>9</sup> AIR 1999 Pat 22, at para 9.

<sup>10</sup> AIR 1985 Mad 354.

<sup>11</sup> Ibid, para 7.



the partnership. **Clause 8 of the Partnership Agreement** merely states that the partnership will be “*for the long term*”.<sup>12</sup>

4. A partnership at will may be terminated by way of notice in writing under **section 43 of the Partnership Act**.<sup>13</sup> However, the notice given by the Respondent to the Claimant on 10 January 2017<sup>14</sup> was not in writing.<sup>15</sup> Therefore, although it is a partnership at will, it was not unilaterally terminated by the Respondent as the said section requires a notice to be given in writing.
5. As illustrated in the case of **Sm. Lilabati Rana v Lalit Mohan Dey and Ors**,<sup>16</sup> **section 43 of the Indian Partnership Act** requires the notice to be in writing conveying the intention to dissolve the firm.<sup>17</sup>
6. However, the court in the same case further explained that the provisions under **section 43 of the Indian Partnership Act** does not control the other provisions in the same Chapter, and that it is possible to have the partnership of a firm dissolved even when no notice in writing had been given as required under **section 43**.<sup>18</sup>

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<sup>12</sup> Appendix 1 of Moot Problem.

<sup>13</sup> Section 43 of the Partnership Act.

<sup>14</sup> Para 40 of Moot Problem.

<sup>15</sup> Q13 of Clarifications.

<sup>16</sup> AIR 1952 Cal 499.

<sup>17</sup> Ibid, para 7.

<sup>18</sup> Ibid, para 13.

7. In conclusion, the Respondent is entitled to terminate the partnership under any of the grounds stipulated in **section 44 of the Partnership Act**.<sup>19</sup>

**B. The statement made by Dr. Fiona Lum is attributable to the Claimant through the principle of agency.**

8. Dr. Fiona Lum is a non-executive director of the Claimant<sup>20</sup> and is considered as an agent of the Claimant. Therefore, her statements are representative of and should be attributable to the Claimant.

9. As illustrated in the case of **Ferguson v Wilson**,<sup>21</sup> directors are considered as agents of the company under the law. As a company is not a person, it can only act through directors and representatives. The court regards those directors as agents of the company and the company is their principal.<sup>22</sup>

10. As further illustrated in the case of **Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd**,<sup>23</sup> a non-executive director is entrusted to look after the affairs of the company and to keep close watch on the company's managers and other directors in order to safeguard the investment of shareholders.<sup>24</sup>

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<sup>19</sup> Section 44 of the Partnership Act.

<sup>20</sup> Additional Clarifications, Question 3, Page 1.

<sup>21</sup> [1866] L.R. 2 Ch.App. 77

<sup>22</sup> Ibid, at 89.

<sup>23</sup> [2008] 8 MLJ 450

<sup>24</sup> Ibid, at para 10, at 457.

11. An agent with authority to carry on a business has the authority to do every lawful thing necessary for, or usually done for, the conducting of such a business.<sup>25</sup> A director publicly represents a company, and would make statements on behalf of the company. Therefore, the statements made by Dr. Fiona Lum during her interview with the Asian Influencers Magazine<sup>26</sup> are binding upon the Claimant. Moreover, Dr. Fiona Lum was invited for the interview due to her business involvement in Myanmar through the Claimant.<sup>27</sup>
12. Furthermore, despite demands to issue an apology by the Respondent,<sup>28</sup> the Claimant did not respond to the said demands nor retract the statement.<sup>29</sup> Therefore, the Claimant can be said to have endorsed the statement made by Dr. Fiona Lum.

**C. The partnership should be terminated by this tribunal under section 44 of the Partnership Act.**

13. A partnership may be terminated by way of dissolution by this tribunal under the grounds stipulated in **section 44 of the Partnership Act**.<sup>30</sup>
14. An arbitral tribunal has the same power to dissolve the firm similar to a court as illustrated in **Vijayalakshmi Jayaram v M.R. Parasuram and Others**.<sup>31</sup> The

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<sup>25</sup> Section 188 of the Contracts Act.

<sup>26</sup> Paras 27-29 of Moot Problem.

<sup>27</sup> Para 27 of Moot Problem.

<sup>28</sup> Para 29 of Moot Problem.

<sup>29</sup> Para 30 of Moot Problem.

<sup>30</sup> Section 44 of the Partnership Act.

<sup>31</sup> AIR 1995 AP 351.

court in this case explained that there is nothing in law preventing an arbitrator to award a dissolution of partnership if the question of dissolution is left for the tribunal to decide upon.<sup>32</sup>

15. **Section 44 of the Partnership Act**<sup>33</sup> provides several grounds for a partnership to be dissolved by a court or tribunal.

**i. Section 44(c) of the Partnership Act**

16. Firstly, the partnership should be dissolved under **section 44(c) of the Partnership Act**, which provides that the partnership may be dissolved if a partner is guilty of conduct which is likely to affect prejudicially the carrying on of the business with regard being had to the nature of the business.<sup>34</sup>

17. If the partnership business could be prejudicially affected by a partner's conduct, it is irrelevant if the conduct might have had nothing to do with the business itself.<sup>35</sup> For example, in **Carmicheal v Evans**,<sup>36</sup> a partner was arrested and convicted for fraud due to evasion of railway fares. Although such conduct had no connection with the firm's drapery business, it was held that the publicity surrounding his

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<sup>32</sup> Ibid, para 10.

<sup>33</sup> Supra note 30.

<sup>34</sup> Supra note 30.

<sup>35</sup> Lindley and Banks, 17<sup>th</sup> Edn, paras 24-63.

<sup>36</sup> [1904] 1 Ch 486.

conviction would probably have an adverse effect on the firm's reputation in the eyes of its customers, and therefore amounted to prejudicial conduct.

18. The statement made by Dr. Fiona Lum is prejudicial to the business of the partnership as the statement had upset the Respondent's employees and students. Furthermore, as a result of the statement, 102 workers went on strike for 7 days requesting for the Claimant to issue an apology.<sup>37</sup>
  
19. Furthermore, the statement sparked quarrelling between the Claimant and the Respondent, and resulted to subsequent loss of mutual confidence and trust between them. In **Blobel v Blobel**,<sup>38</sup> continued quarrelling and a state of animosity without reasonable hope of reconciliation and friendly cooperation was considered as conduct prejudicial to the carrying on of the business, and is sufficient to justify a dissolution.<sup>39</sup> All that must be shown is that it is impossible for the partners to place confidence in each other.<sup>40</sup>
  
20. As decided by Lord Romilly in **Harrison v Tenant**,<sup>41</sup> if there is mistrust between partners and there is no longer any mutual trust and confidence between partners, it is impossible for the partnership business to be conducted as originally contemplated in the partnership agreement, the partnership must be dissolved.<sup>42</sup>

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<sup>37</sup> Para 29 of Moot Problem.

<sup>38</sup> [2005] SADC 117

<sup>39</sup> Ibid, para 79.

<sup>40</sup> Ibid, para 81.

<sup>41</sup> (1856) 52 ER 945

<sup>42</sup> Ibid, at 951.

21. Furthermore, as illustrated in **M/S V.H. Patel & Company & Ors v Hirubhai Himabhai Patel & Ors**,<sup>43</sup> dissolution should be ordered if it is shown that the conduct of a partner has resulted in the destruction of mutual trust or confidence which is the very basis for proper conduct of partnership, and it is not necessary to seek an explanation for the reasons which induced the disputes between the partners.<sup>44</sup>
22. Similarly, as explained in **Helmore v Smith**,<sup>45</sup> mutual confidence between the partners are the life-blood of the partnership. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on.<sup>46</sup>
23. In the present dispute, the loss of morale of the employees and students of the Respondent,<sup>47</sup> their inability to forgive the misconduct of the Claimant,<sup>48</sup> coupled with the subsequent quarrelling between the Claimant and the Respondent,<sup>49</sup> clearly illustrates the loss of mutual confidence and trust between them, which justifies the dissolution of the partnership.

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<sup>43</sup> 2000(4) SCC 368.

<sup>44</sup> Ibid, para 13.

<sup>45</sup> (1886) 35 Ch D 436

<sup>46</sup> Ibid, at 444.

<sup>47</sup> Para 38 of Moot Problem.

<sup>48</sup> Para 41 of Moot Problem.

<sup>49</sup> Para 42 and 43 of Moot Problem.

**ii. Section 44(d) of the Partnership Act**

24. Alternatively, the partnership should be dissolved under **Section 44(d) of the Partnership Act**, which provides that a partnership may be dissolved if a partner has wilfully or persistently committed a breach of agreement relating to the conduct of the business or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for other partners to carry on the business in partnership.<sup>50</sup> The Claimant has wilfully breached clauses 5 and 11 of the Partnership Agreement, which is sufficient to cause the partnership to be dissolved.
25. As illustrated in **Loscombe v Russel**,<sup>51</sup> the court held that with respect to occasional breaches of agreements between partners, if the acts complained of are of such a character as to show that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the partnership should be dissolved.<sup>52</sup>
26. Furthermore, in **Golstein v Bishop**,<sup>53</sup> if there are continued breaches of the partnership agreement which were not remedied, it may result in the partnership being irretrievably broken down.<sup>54</sup>

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<sup>50</sup> Section 44(d) of the Partnership Act.

<sup>51</sup> (1830) 58 ER 4.

<sup>52</sup> *Ibid*, at 5.

<sup>53</sup> [2014] 3 All ER 397.

<sup>54</sup> *Ibid*, at paras 36-37.

27. Similarly, as explained in **DB Rare Books Ltd v Antiqbooks**,<sup>55</sup> a material breach of the partnership agreement is when a breach goes to the root of the confidence and good faith which should exist between partners.<sup>56</sup>
28. Clause 11 of the Partnership Agreement provides that the Claimant cannot do or say anything harmful to the national interest and solidarity of Myanmar, in order to show respect to the Golden Land of Myanmar.<sup>57</sup> The act of the Claimant in uttering harmful statements is in breach of this clause.<sup>58</sup>
29. Furthermore, clause 5 of the Partnership Agreement provides that the Claimant will always prioritize the employees and students.<sup>59</sup> The Claimant's prejudicial statement and subsequent refusal to issue an apology is in breach of this clause, and remains as a continuous breach of clause 11 of the Partnership Agreement. Therefore, the partnership should be dissolved under **section 44(d)**.

**iii. Section 44(g) of the Partnership Act**

30. Alternatively, the partnership should be dissolved under **Section 44(g) of the Partnership Act**, which provides that the partnership may be dissolved if it is just and equitable in the circumstances of the case to do so.<sup>60</sup>

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<sup>55</sup> [1995] 2 BCLC 306.

<sup>56</sup> *Ibid*, at 322.

<sup>57</sup> Appendix 1 of Moot Problem.

<sup>58</sup> Para 28 of Moot Problem.

<sup>59</sup> Appendix 1 of Moot Problem.

<sup>60</sup> Section 44(g) of the Partnership Act.



31. As illustrated in **Re Yenidje Tobacco**,<sup>61</sup> the court held that if there is a deadlock between the partners in regards to the management of the business, it is just and equitable for the court to dissolve the partnership. In that case, the two directors would not speak to each other, and therefore no business could have been reasonably conducted.<sup>62</sup>
32. In the present dispute, there is a deadlock between the parties, as the Respondent clearly does not intend to continue with the partnership and be in business with the Claimant.<sup>63</sup> As such, it is just and equitable for the partnership to be dissolved.

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<sup>61</sup> [1916] All ER Rep 1050.

<sup>62</sup> Ibid, at 1053.

<sup>63</sup> Para 41 of Moot Problem.

## II. THE JADE MINING MACHINERY AND EQUIPMENT ARE PARTNERSHIP PROPERTY

The jade-mining machinery and equipment purchased for the purposes of the partnership business is considered as partnership property under **section 14 of the Partnership Act**. This is because the property was treated as partnership property by both the Claimant and the Respondent.

33. Generally, all property brought into the partnership or afterwards acquired on account of the firm is partnership property, unless the contrary can be shown.<sup>64</sup>
34. **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.<sup>65</sup>
35. As illustrated by the Privy Council in **Bhagwanji Morarji Goculdas v Alembic Chemical Works Co. Ltd and others**,<sup>66</sup> a partnership firm has no legal existence, thus the partnership property will vest in all the partners and every partner has an interest in the property of the partnership.<sup>67</sup>

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<sup>64</sup> Lindley and Banks on Partnership, 18<sup>th</sup> edn., para 18-06.

<sup>65</sup> Section 14 of the Partnership Act.

<sup>66</sup> AIR 1948 PC 100.

<sup>67</sup> Ibid, at para 10.

36. The question whether a property becomes partnership property depends on the agreement between the parties, as explained in **O'Brien v Komesaroff**.<sup>68</sup> As illustrated in **Nariman Aspandiar Irani v Adi Merwan Irani**,<sup>69</sup> a property becomes partnership property if there is an agreement to treat it as such either expressly or impliedly.<sup>70</sup>
37. However, there has been no express agreement between the Claimant and the Respondent in regards to the jade mining machinery, as clause 5 of the Partnership Agreement only stipulates that the land will continue to belong to the Respondent.<sup>71</sup>
38. Therefore, this tribunal must consider the surrounding circumstances. As per **Lindley and Banks**,<sup>72</sup> in the absence of an express agreement between the partners as to what assets constitute partnership property, there are three factors that must be taken into consideration in order to treat a certain property as partnership property. Firstly, the circumstances of the acquisition of the property; secondly, the purpose of the acquisition; and thirdly, the manner in which the assets had subsequently been dealt with.

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<sup>68</sup> (1982) 150 CLR 310

<sup>69</sup> AIR 1989 Bom 362

<sup>70</sup> Ibid, para 12.

<sup>71</sup> Appendix 1 of Moot Problem.

<sup>72</sup> Lindley and Banks on Partnership, 18<sup>th</sup> Edn., para 18-06.

**A. The jade-mining machinery and equipment were acquired for the purposes of the partnership business.**

39. The jade-mining machinery and equipment were acquired by the Claimant and imported into Myanmar by the Respondent during the period of the partnership,<sup>73</sup> for the purposes of the partnership business under clause 3 of the Partnership Agreement.<sup>74</sup>

40. Furthermore, if the property is an integral part of the partnership's business activity, it is regarded as partnership property. In **Waterer v Waterer**,<sup>75</sup> and **Davies v Games**,<sup>76</sup> it was held that, in the absence of contrary intention, where property became involved in partnership dealings it must be regarded as partnership property.<sup>77</sup> Both cases concerned the acquisition of land for the partnership business, and because the land was integral to the business being carried on by the respective partnerships, it was held that proper inference was that the land had been intended to, and there had, become partnership property.

41. In **Miles v Clarke**,<sup>78</sup> the partnership firm was carrying out a photography business, and the defendant leased premises, and purchased furniture and photographic equipment for the partnership. Upon dissolution of the firm, the furniture and

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<sup>73</sup> Para 16 of Moot Problem.

<sup>74</sup> Appendix 1 of Moot Problem.

<sup>75</sup> (1873) LR 15 Eq 402

<sup>76</sup> (1879) 12 Ch D 813

<sup>77</sup> (1873) LR 15 Eq 402 at 406; (1879) 12 Ch D 813, at 817.

<sup>78</sup> [1953] 1 WLR 537.

equipment purchased were not considered as partnership property, as items merely used by the firm are not partnership property unless they are essential to the business efficacy of the firm.<sup>79</sup>

42. In the present dispute, the jade-mining machinery and equipment were integral and essential to the business efficacy of the partnership business, as they were used for exploration, extraction, breaking and cutting of jadeite.<sup>80</sup> These activities are essential to the jadeite venture.<sup>81</sup> Therefore, it is submitted that they are partnership property.

**B. The jade mining machinery and equipment were treated as partnership property.**

43. Furthermore, both the Claimant and the Respondent treated the machinery as partnership property. As illustrated in **Wong Sang Giap & Ors v Wong Keng Giap**,<sup>82</sup> whether or not a property is partnership property or a property deemed to be partnership property depends on the intention of the partners which had to be determined on each individual case.<sup>83</sup>

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<sup>79</sup> Ibid, at 540.

<sup>80</sup> Q11 of Additional Clarifications

<sup>81</sup> Moot Problem, Para 19.

<sup>82</sup> [1999] 1 MLJ 551

<sup>83</sup> Ibid, at 559.

44. The Claimant was aware that the Respondent was recorded as the owner and operator of the jade mining machinery and equipment on the permits required to operate them, yet made no objections.<sup>84</sup> The jade-mining machinery and equipment were also used by the Respondent in the course of the partnership business<sup>85</sup> and the Respondent contributed to its operational costs and maintenance.<sup>86</sup>

### **III. COPYRIGHT SUBSISTS IN THE JADEYE SOFTWARE AND IT IS PARTNERSHIP PROPERTY**

Copyright subsists in JADEYE software because the work has passed the test of originality and is also a type of work that is protected under the **Copyright Act**. The Respondent contends that the JADEYE software is a partnership property by virtue of **section 14 of the Partnership Act**. The Respondent also submits that it is necessary for this tribunal to decide that both the Claimant and the Respondent jointly own the JADEYE software because of the existence of fiduciary relationship.

**A. Copyright subsists in the JADEYE software as it is original and is a protected work under the Copyright Act.**

**i. The requirement of originality has been fulfilled**

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<sup>84</sup> Q14 of Additional Clarifications

<sup>85</sup> Para 16 of Moot Problem.

<sup>86</sup> Para 17 of Moot Problem.

45. In **Henkel KGaA v Holdfast New Zealand**,<sup>87</sup> the court held 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. The court stated 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.”*

46. The issue of originality is not disputed as the facts do not suggest that Mr. Yamashita, the creator of JADEYE software copied the source code from other software. In fact, it is mentioned that Mr. Yamashita spent some time in creating the JADEYE software.<sup>88</sup>

**ii. The JADEYE software falls under the type of work that is protected under Article 1 of the Copyright Act.**

**a. The software is protected under ‘literary works’ in Article 1 of the Burma Copyright Act.<sup>89</sup>**

47. **Article 1(1) of the Copyright Act<sup>90</sup>** provides that copyright shall subsist in every original literary, dramatic, and artistic work.

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<sup>87</sup> [2007] 1 NZLR 577. Also refer to *Ladbroke v William Hill* [1964] 1 All ER 465

<sup>88</sup> Para 21 of Moot Problem

<sup>89</sup> [India Act III, 1914.]

<sup>90</sup> *Ibid.*

48. Although the Copyright Act does not expressly provide protection for software, the Claimant relies on Article 10 of TRIPS Agreement<sup>91</sup>, which provides that:

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

49. As Myanmar is a signatory to the WTO Agreement on 1 January 1995,<sup>92</sup> 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 submits 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.<sup>93</sup>

**b. 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.**

50. Article 1(1)(b) of the Copyright Act provides that:

*“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.**”<sup>94</sup>*

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<sup>91</sup> TRIPS Agreement, 1 January 1995

<sup>92</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement]

<sup>93</sup> Article 18 of VCLT, 23 May 1969

<sup>94</sup> [India Act III, 1914.]



51. 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. “Published” is defined in **Microsoft Corporation v DHD Distribution Pty Ltd**,<sup>95</sup> 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.”*

52. 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 submits 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 work (software). The Respondent contends that the requirement has been fulfilled since Mr. Joe Yamashita was in Myanmar when he created the software.<sup>96</sup>

**B. The JADEYE software is partnership property**

**i. The circumstances of the case show that the JADEYE software has always been treated as partnership property.**

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<sup>95</sup> (1999) 45 IPR 459.

<sup>96</sup> Q15 of Additional Clarification.

53. **Section 14 of the Partnership Act** defines partnership property as any property brought into the common stock of the firm or whatever is acquired by or for the firm for the purposes and in the course of the business of the firm.
54. In *Coward v Phaestos*,<sup>97</sup> the plaintiff left the business which he had set up. The business started as partnership and later was incorporated. The Plaintiff had written the original software on which the business was based and now sought to determine the defendant's use of that software as an infringement and contended that he was the copyright owner of the software. The court considered the fact that the Plaintiff had allowed the partnership to use the software in the course of business as indicative of it having been treated as partnership property and held that the partnership as owner of the copyright in the software.
55. The striking similarity between the *Coward* case and the present dispute must be emphasized. After the creation of the JADEYE software, the Claimant immediately instructed the software to be installed on all the machinery and equipment used in the jade mining site.<sup>98</sup> This is indicative of the Claimant's intention to treat the software as partnership property from the beginning. In addition, the JADEYE software was created in the course of the jadeite business that was shared between the partners. In conclusion, the JADEYE software is partnership property.

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<sup>97</sup> [2013] EWHC 1292.

<sup>98</sup> Para 23 of Moot Problem.

**ii. It is necessary to imply that both the Claimant and the Respondent jointly own the JADEYE software because of the existence of a fiduciary relationship between them.**

56. In arriving to its decision in the *Coward* case, the court also considered the fact that as partners, the Plaintiff stood in a fiduciary relationship with all of his other partners. The court held that for the Plaintiff to retain the ownership of the copyright in the software would inevitably have conflicted with his duty of good faith to his partners.<sup>99</sup>

57. In the present dispute, since the Claimant and the Respondent are partners in the jadeite business, they owe each other fiduciary duties. If the Claimant retained the exclusive ownership over the JADEYE software, this would put the Claimant in a position to sell the software to third-party competitors without the consent of the Respondent; this would have resulted in a contravention of the Claimant's duty of good faith to the Respondent and would not make any commercial sense. Accordingly, it is necessary to imply that the JADEYE software is partnership property.

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<sup>99</sup> Supre note 81 at para 222.

**PRAYERS FOR RELIEF**

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The Respondent pleads for this tribunal to adjudge and declare that:

1. The partnership between the Claimant and the Respondent is terminated;
2. The jade mining machinery and equipment is partnership property;
3. Copyright subsists in the JADEYE software, which is partnership property.

Respectfully submitted,

**SHWE PWINT THONE CO. LTD., THE RESPONDENT**

**11 AUGUST 2017**