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THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2017

BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT CO. LTD.

(CLAIMANT)

AND

SHWE PWINT THONE CO. LTD.

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

The parties, the Asamura International Development Co., Ltd. (AID) and the Shwe Pwint Thone Company have agreed to submit the present dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules ("KLRCA i-Arbitration Rules").

QUESTIONS PRESENTED

1. Whether the termination of the Agreement by the Respondent is invalid?
    - **a.** Whether the termination of the Agreement by the Respondent was done according to the law?
    - **b.** Whether the Claimant has breached the Partnership Agreement?
2. Whether the Claimant owns the jade-mining machinery and equipment?
    - **a.** Whether the jade-mining machinery and equipment are partnership property?
    - **b.** Whether the Claimant's rights as the original owner of the jade-mining machinery and equipment are protected?
    - **c.** Whether the Respondent holds the jade-mining machinery and equipment as trustee?
3. Whether the Claimant owns and subsists the rights in the JADEYE Software?
    - **a.** Whether there is any copyright protection over software under the Myanmar Copyright Act 1914?
    - **b.** Whether the Claimant is the lawful owner of the JADEYE Software under the Copyright Act 1914?
    - **c.** Whether the software are partnership property?
    - **d.** Whether the source code of the JADEYE Software is a confidential information?

STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd. ("AID") is a private international development company, founded in Tokyo, Japan. Specializing in crisis relief and development, assisting bilateral donors and the private sector to manage projects in developing countries. Its core competencies are the design, management and implementation of projects fostering economic growth and local trade, supply chain solutions, biodiversity conservation, and environmental and natural resource management.

2. The Respondent, Shwe Pwint Thone Co., Ltd. ("SPT"), is a local company in Myanmar, SPT was established with the aim of providing secular and vocational training to students from underprivileged families. SPT runs teashops, jade carving and polishing studios, and training centres in Mandalay and Yangon.

3. On 9 September 2008, AID and SPT (each a "Party" and collectively, "the Parties") Asamura decided to enter into a partnership for the purpose of venturing into the jade mining industry in the Hpakant mines in Myanmar in one of SPT's teashops in Yangon. A Partnership Agreement ("the Agreement") was signed by the Parties after three rounds of negotiations. From the Agreement, it is agreed that AID will source for second hand jade mining machinery and equipment from Japan, purchase, and recondition them; the importation of these items were to be handled by SPT and further operated by both of the parties. SPT handled all the visa and accommodation requirements of AID's employees. SPT also obtained the necessary jade mining and

equipment permit from the government to ensure the smooth flow of works at the jade field.

4. The Agreement was entered into in the context of AID's desire to expand into the Myanmar market. On the other hand, SPT entered into the Agreement seeking to utilise AID's experience in natural resource management.

5. The Agreement did not specify any date of expiry of the partnership, Clause 8 of the Agreement merely described the partnership as a brotherhood for the long term. Furthermore, the Agreement outlines the obligations of the Parties with regard to the operation of the business, per Clause 6, the jadeite venture involves four main business activities:

   (i) Exploration and extraction;

   (ii) Breaking and cutting;

   (iii) Processing and production;

   (iv) Distribution and sales.

   For extracting and cutting AID will take charge and give the direction and instructions. For processing and selling, SPT will play the main role. For financial and money decisions, both AID and SPT will decide together.

6. On 11 April 2012, one of AID's finance executives, Joe Yamashita, informed Dr. Yugi Asamura (The director of AID) that he developed a process optimisation and operations

management software known as JADEYE, following a test run which yielded positive results, JADEYE was installed in all the computers at the Hpakant mining sites. On 4 January 2013, Joe Yamashita resigned from AID and the source code of JADEYE was handed to the Head of Finance of AID in Tokyo on his last day.

7. On 1 November 2016, AID was approached by Hashimoto Co., Ltd ("HCL") to provide assistance in sourcing for jades from Hpakant, as HCL had won a contract to produce official jadeite souvenirs and merchandise for the Tokyo Olympics in 2020, AID and HCL then entered into a USD 1.2 million contract on 1 November 2016, wherein AID will supply jades from the Hpakant mines to HCL for the next one year, following a discussion with SPT concerning the contract, the profit from the contract between AID and HCL was shared between AID and SPT.

8. On 21 November 2016, SPT was approached by Patrick Green of New Ventures Corporation, who expressed his interest in forming a new partnership with SPT in regard to the jade business. The proposed profit split by New Ventures Corporation was 85% for SPT, this is higher than the current profit split enjoyed by SPT in their partnership with AID.

9. On 10 January 2017, U Thein Khaw (Director of SPT) communicated his intention to end the partnership between AID and SPT to Dr. Yugi Asamura, this was not received well by AID, following this communication of intention to end the partnership, disputes arose concerning the validity of the termination, ownership of the jade mining

machineries and equipment, and subsistence and ownership of rights in the JADEYE software.

10. Unable to resolve the matter, the Parties have submitted the dispute to binding arbitration. The place of arbitration is Tokyo, Japan, and the arbitration is to be conducted in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

SUMMARY OF PLEADINGS

A. The termination of the agreement by the Respondent is invalid

The partnership between the parties is a partnership at will, pursuant to Section 7 of the Myanmar Partnership Act 1932, this is due to the fact that there exists no provision in the partnership agreement between the parties concerning the date of expiry of the partnership. The invalidity of the termination is due to the non-fulfilment of the legal requirement to dissolve a partnership at will provided in section 43 of the Myanmar Partnership Act 1932 which requires a notice in writing to be delivered to the other partner.

B. The Claimant did not breach the Partnership Agreement

There was no breach of the partnership agreement particularly Clause 11 of the agreement from the statement made by Dr. Fiona Lum, the statement was made not exclusively in her capacity as a non-executive director of the Claimant's company, but rather on the basis of her personal business in Myanmar as well as her position as the President of Second Life.

C. The jade-mining machineries and equipment belong to the Claimant

The properties purchased by the Claimant were not intended to be partnership property and following the absence of designation of ownership in the Partnership Agreement as well as the circumstances of the case, Claimant retains sole ownership as it was the sole purchaser of the jade mining machineries and equipment.

D. Claimant's rights are protected under the Myanmar Bills of Lading Act 1856

The Claimant is the transferor of the jade mining machineries and equipment per the bill of lading present, however there was no transfer of ownership from the transferor to the Respondent as the transferee, as the position of the bill of lading as a document of title is to be read together with the agreement, in the partnership agreement, no transfer of ownership was agreed between the parties, thus the Claimant retains ownership over the properties as its sole purchaser.

E. The Respondent held the jade mining machineries and equipment in trust

Alternatively, the Respondent does not hold any legal tile over the properties as it was only held in trust by the Respondent for the purpose of the partnership, it follows that as the Respondent wishes to end the partnership, and its beneficial ownership over the properties ceases to exist as well.

F. The Claimant is the lawful owner of the JADEYE software

Copyright protection of software under the Myanmar Copyright Act 1914 can be extended by virtue of inclusion of protection over software in laws that are in pari matiria with the Myanmar Copyright Act 1914, this application of the copyright protection over software affords ownership of copyrighted works under the Myanmar Copyright Act 1914 to the Claimant, the law provides that the owner of the software, if it was created by the employee during the course of employment, shall be the employer, as the JADEYE software was created by the Claimant's employee, the first owner of the software is the Claimant.

PLEADINGS

(I) THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY SHWE PWINT THONE CO. LTD. (SPT) WAS NOT VALID

A. The termination of partnership at-will by the Respondent was not done with a notice of dissolution as required by law.

In the law of partnership, stoppage of the partnership business is, one thing; dissolution of partnership is another. Carrying on business is no, doubt, the purpose of partnership, and discontinuance of business ordinarily puts an end to the main partnership activity, but it does not, by itself under the legal relationship between the partners. Indeed, there are cases, where even after dissolution; the business can be carried on, if only for the purpose of the more beneficial winding up of the affairs of the partnership.[1]

In the present case, to determine the manner in which Claimant and Respondent's Partnership Agreement can be terminated, it is essential to address firstly, the nature of the partnership. According to the Myanmar Partnership Act 1932, Section 7[2]:

[1] *V.V.P. Thangaraju Versus K.V. Perumal Chettiar and others* (1979) 2 MLJ 469
[2] Myanmar Partnership Act 1932, Section 7

7. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will".

Applying the provision to the contents of the Partnership Agreement between Claimant and Respondent[3] in which the clause of the agreement that indicates duration can be seen in clause 8 of the agreement[4]:

"8. Our partnership and brotherhood will be for the long term. The party causing the partnership to end must pay compensation"

It is clear that there is no clear provision for the duration of the partnership between Claimant and Respondent, and by law[5], this renders the status of the partnership as "partnership at will".

Following the identification of the partnership as a partnership at will, the method of dissolution for such partnerships are provided in the legislation[6], in Chapter IV, the specific provision governing dissolution of partnership at will is Section 43:

"43. (1)Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention partnership to dissolve the firm,

[3] Moot Problem, Annexure 1
[4] Moot Problem, Annexure 1, Clause 8
[5] *Supra* n. 2
[6] Myanmar Partnership Act 1932

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."[7]

The effect of section 43 is that it provides for dissolution as a certain consequence of even a mere unilateral notice by a single partner[8]. But this necessarily implies that until the eventuality occur the continuance of the partnership relationship is not only a verifiable fact, but is unquestionable in law.[9]

The necessity that the notice be required in writing has been presided before in the courts and in fact as the law stipulates in its clear language that the notice of dissolution is referred to as "notice in writing"[10] thus making such notice in writing is requisite in making such dissolution.

Per the decision in the High Court of Judicature at Madras in the case of *Latchumanan v. Subramaniam and others*[11], the appeal court reaffirmed the trial court's decision that unless there is notice of dissolution, a partnership firm cannot be dissolved in light of Section 43 of the Indian Partnership Act 1932[12] which is in *pari materia* with the Myanmar Partnership Act 1932.

The fact stands that Respondent never delivered any notice in writing[13] for the purpose of dissolution of the partnership between Claimant and Respondent, and the only indication of any such notice was on 10 January 2017 when both men met up in

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[7] Myanmar Partnership Act 1932, Section 42
[8] *Supra* n.1
[9] *Supra* n.1
[10] Myanmar Partnership Act 1932, Section 42(1)
[11] *Latchumanan v. Subramaniam and others* (1991) 2 MLJ 125
[12] Indian Partnership Act 1932, Section 43
[13] Clarifications to the Moot Problem, ¶ 13

the Sarkies Bar at the Strand Hotel, where Dr. Yugi Asamura (Claimant) was informed of U Thein Kyaw's decision to end the partnership.[14]

In furtherance to the legal position concerning dissolution of partnership at will, with specific reference to Section 43(1) of the Myanmar Partnership Act 1932, it should be conclusive that Respondent did not fulfil the legal requirement to terminate the partnership at will between Claimant and Respondent.

B. AID has not breached the partnership agreement.

Arguendo, Respondent may rely on other factors to justify the validity of the termination or dissolution, as stipulated in Section 44 of the Myanmar Partnership Act 1932[15]:

> "44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely:—
>
> …
>
> (d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;"

In communicating the termination of the partnership to Dr. Yugi Asamura, U Thein Kyaw explained that his team is unable to continue working with Claimant as his

[14] Moot Problem, ¶ 40
[15] Myanmar Partnership Act 1932, Section 44

workers and students were unable to look past the interview with the Asian Influencers.[16] It is therefore in the best interests of the company and the very people he is seeking to help under SPT, to work with a new partner.[17]

Referring to the content of the interview with Asian Influencers which was directed at and answered by Dr. Fiona Lum Ka Ching, who is the President of Second Life, a regional organization which champions for human rights[18]; in the interview concerning her views on the plea of the Rohingya minority in the Rakhine state, given her existing business involvement in Myanmar and Dr. Fiona's position in Second Life she stated that "Everyone must work together to end the persecution of the Rohingyas, and the new Myanmar government under the leadership of Daw Su must end the problem immediately; Especially the ethnic cleansing. They should not be deprived of their basic human rights. We will continue to champion for their rights."[19] This is an answer which reflected her capacity as the President of Second Life, therefore her statement should not be attributed to Claimant but rather Second Life.

Given that the statement is detached from her capacity as non-executive director of AID, it could not be said that Claimant did or said anything harmful to the national interest and solidarity of Myanmar, thus not warranting the ground of breach of partnership agreement[20] for a valid termination of the agreement by Respondent.

[16] Moot Problem, ¶ 28
[17] Moot Problem, ¶ 36-38
[18] Moot Problem, ¶ 5
[19] *Supra* n. 16
[20] Moot Problem, Annexure 1, Clause 11

C. Fiona Lum Ka Ching made the statement under her position as the President of Second Life

Dr. Fiona Lum Ka Ching made a statement regarding the issue of Rohingyas.[21] The statement shall be read in disjunctive form. Furthermore, Dr. Fiona Lum Ka Ching is not acting in her position as the independent non-executive director of AID. Even if the Respondent were to argue that she made the statement under her position as the non-executive director of AID, under the common law, there is a conflicting interest such as the director having a third party interest other than the company, the statement should be regarded as not in the good faith of the company. Therefore, the statement cannot be said to be made in the director's capacity in the company but rather his personal position or his other position. Applying this rule to the current case, the statement made by Dr. Fiona cannot be attributed to the partnership between Claimant and Respondent and the statement made was under her capacity as the President of Second Life.

[21] Moot Problem, ¶ 28

(II) THE CLAIMANT OWNS THE JADE-MINING MACHINERY AND EQUIPMENT

A. **<u>The jade-mining machinery and equipment are not partnership property</u>**

Section 14 provides the definition of partnership property[22], in which among the importance factors that must be considered together to determine whether a property is a partnership property or not, are by looking to the partnership agreement and the source which it was financed[23].

There was no transfer of ownership intended by parties in the Partnership Agreement[24] and the jade-mining machinery and equipment were not being purchased by using partnership fund but solely by the Claimant's own expenses[25]. Thus, by virtue of Section 14, the jade-mining machinery and equipment cannot be considered as partnership property.

In an English case of *Miles v Clarke*[26], the Defendant who was the owner of the studio with no photography skills invited the Plaintiff, a popular freelance photographer to enter into a Partnership with their respective assets. Upon dissolution, the Court in determining on the issue of partnership assets declared that the property used in the course of the partnership to be separate property of each partner because that was the inevitable result due to the failure of the parties to make any agreement on the issue of partnership property.

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[22] Partnership Act 1932, Section 14
[23] Roderick I'Anson Banks, Lindley & Banks on Partnership, Sweet & Maxwell, 19th Edition, Sweet & Maxwell, 2010
[24] Moot Problem, Annexure I, Clause 4
[25] Moot Problem, Paragraph 21
[26] *Miles v Clarke* [1953] Ch. D. 779

Similarly, the Respondent who owned the land[27] with no experience in jade exploration and production invited the Claimant[28], a well-established international development company[29] to join the partnership with their own assets. Since both parties did not make any agreement to regard the property as partnership property, the jade-mining machinery and equipment shall be declared as a separate property of the Claimant.

Therefore, the jade-mining machinery and equipment cannot be considered as partnership property.

B. Rights of the Claimant are protected under the Bills of Lading Act 1856

Bill of Lading operates as a document of title in a commercial transaction[30] and it has three different functions: (i) to show the contractual relationship between the transferor and the transferee; (ii) as a proof that the goods have move from one port to another port; and (iii) symbolize the ownership of the transferor over the goods[31].

Section 1 of the Myanmar Bills of Lading Act 1856 further stated that bill of lading is capable of transferring rights over the property from the transferor to the transferee[32].

Nevertheless, in interpreting the provision which is in *pari materia* with Section 1 of the United Kingdom Bills of Lading Act 1855[33], the House of Lords in the case of

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[27] Moot Problem, Paragraph 9
[28] Moot Problem, Paragraph 12
[29] Moot Problem, Paragraph 2
[30] *John F Wilson*, Carriage of Goods by Sea, 7th Edition, Pearson Education Ltd, 2010
[31] *Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd and another (Bergesen DY A/S, third party) The Berge Sisar* [2001] UKHL 17
[32] Myanmar Bills of Lading Act 1856, Section 1
[33] United Kingdom Bills of Lading Act 1855, Section 1

Borealis AB v Stargas Ltd stated that the extent of the transfer would still depend on the intention and circumstance of each case[34]. In that case, the House of Lords considered the contract entered into by the Appellant and the Respondent which stated that *'as soon as all the original bills of lading for the above goods shall have arrived and/or come into our possession, to produce and deliver the same to you whereupon our liability hereunder shall cease'*[35]. On that note, the Court held that there was an absolute transfer of ownership effected between the parties.

The Partnership Agreement entered by the Claimant and the Respondent was totally silent on the issue of transfer of ownership. Thus, by looking to the Partnership Agreement and the surrounding circumstance of the present case, there was no transfer of ownership intended by the Claimant and the Respondent, despite the fact that the Respondent was addressed as the consignee of the bill of lading[36]. It can be further substantiated by the fact that only the Claimant's name was found on the receipts and invoices with respect to the purchase of the jade-mining machinery and equipment.

Since there was no transfer of ownership occurred, the rights of the Claimant as the transferor of the goods[37] are protected under the Myanmar Bills of Lading Act 1856 specifically Section 2 which granted such protection.

[34] *Supra* n. 31
[35] *Supra* n. 31
[36] Additional Clarifications to the Moot Problem, Paragraph 25
[37] Myanmar Bills of Lading Act 1856, Section 2

C. <u>The Respondent held the jade-mining machinery and equipment as a trustee throughout the partnership</u>

The general rule under equity is that a property is held on trust for the person who puts up the money regardless of whoever's name the property is held on[38]. This is the case when *"a transfer of property has occurred with a consequent transfer of legal title, but the transferor has failed to show an intention to divest himself fully of all his interest in that property, the transferee will not be permitted to receive the property absolutely for his own benefit"*[39]. The equitable interest is, thereafter, said to 'result back' to the transferor, thus ensuring that he retains his interest in the property[40]. While it is true that cases involving resulting trust are usually concerned on family matters, however, a recent development shows that court is also ready to introduce resulting trust into dispute involving partnership[41].

Regardless the Respondent holds the legal title of the jade-mining machinery on the permits in Myanmar[42], they merely hold the jade-mining machinery and equipment as trustee as the Claimant is the only one who puts up the money for the purchase of the machinery and equipment[43]. Hence, after the Partnership ends, the jade-mining machinery and equipment shall 'result back' to the Claimant because the Respondent merely holds the property as trustee throughout the partnership.

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[38] *Richard Clements & Ademola Abass*, Equity and Trusts (Text, Cases and Materials), 4th Edition, Oxford University Press, 2013
[39] *Yong Ching See v Lee Kah Choo Karen* [2008] 3 SLR(R) 957
[40] *Ibid.*
[41] *Pham v Doan* [2005] NSWSC 601
[42] Moot Problem, ¶ 43
[43] Moot Problem, ¶ 16

(III) THE CLAIMANT OWNS AND SUBSISTS THE RIGHTS IN THE JADEYE SOFTWARE

A. Myanmar Copyright Act 1914 confers protection over software

While it is true that there is no specific copyright protection was granted over software in the Myanmar Copyright Act 1914, the protection can still be extended into Myanmar.

In dealing with such problem, a Canadian case of *Mackintosh Computers v Apple Computer Incorporation*[44] interpreted Section 3 of the Canada Copyright Act 1970 which is in *pari materia* with Section 1 of the Myanmar Copyright Act 1914. The Federal Court came to the conclusion that software can be afforded with copyright protection due to the three reasons: (i) the definition of the term "in any material whatsoever" in Section 3 includes words which cannot be read by human and it is opened to any development in the future; (ii) software also comes within the definition of literary work as it covers work which is expressed in print or writing, irrespective whether the quality or style is high; and (iii) it has been a trend of many court in various jurisdictions abroad such as Canada, Africa and Australia.

Since Section 1 of the Myanmar Copyright Act 1914 is in *pari materia* with the Section concerned in the above case as well as it has been a well-developed trend in other jurisdictions, copyright protection over software shall also be extended into the Myanmar Copyright Act 1914.

Apparently, copyright protection over software has also been recognized in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS

[44] *Mackintosh Computers v Apple Computer Incorporation* [1988] 1 F.C. 673

Agreement), in which Myanmar is a signatory party to the Agreement[45]. Article 10 specifically provides "computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)"[46].

B. <u>Claimant is the lawful owner of the JADEYE Software under the Myanmar Copyright Act 1914</u>

Generally, ownership of a copyright work belongs to the first person who makes of creates the work[47]. However, there is an exception to this rule, in which if an employee created this work 'in the course of his employment under a contract of service', the ownership of the work shall belong to the employer, provided that there was no agreement showing the contrary[48].

In order to determine whether the employer has indeed created the work under his course of employment under a contract of service, there are three crucial factors that need to be considered: (i) nature of the employer's business; (ii) nature of the employee's duties in terms of the employment contract; and (iii) a close causal connection between the employee's employment and the creation of the programme[49].

(i) Nature of the employer's business

[45] Contracting parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) [http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22]
[46] TRIPs Agreement, Article 10
[47] Myanmar Copyright Act 1914, Section 5
[48] Myanmar Copyright Act 1914, Section 5 (1) (b)
[49] *Pieter Johannes King v The South African Weather Service* [2008] ZASCA 143

Claimant is a well-known international development company[50] established since 1958[51] which has involved in numerous projects locally and internationally[52].

(ii) Nature of the employee's duties in terms of the employment contract

On this factor, the matter must be looked broadly and not restrictively[53].

Mr. Joe Yamashita is the one of the Claimant's finance executives[54] who is seconded to Myanmar to work for the Partnership[55]. Since his employer is competent in designing, managing and implementing projects[56], therefore, his jobscope in developing a software to optimize the operational management[57] can be inferred to be his duty in terms of the employment contract.

(iii) A close causal connection between the employee's employment and the creation of the programme

This last significant factor means the employment was the causa causans of the programs[58].

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[50] *Supra* n. 29
[51] Moot Problem, ¶ 1
[52] Moot Problem, ¶ 3,6
[53] *Supra* n. 49
[54] Moot Problem, ¶ 21
[55] *Supra* n. 43
[56] *Supra* n. 29
[57] *Supra* n. 54
[58] *Supra* n. 49

The very purpose of him creating the software was to improve the efficiency of his employer's business for financial efficacy[59]. He has also mainly created the software while he is working in Myanmar[60]. In fact, despite he later resigned from the Claimant's company, he did not keep the software himself, and rather he handed it over back to the Claimant's parent company in Tokyo[61]. These facts show that Mr. Joe Yamashita indeed has created the software for his employment as the finance executives of the Claimant. The fact that he was seconded to Myanmar for the partnership[62] does not mean that he is also an employee of the Respondent[63].

As Mr. Joe Yamashita created the JADEYE Software in his course of employment under his contract of service as the Claimant's employee, by virtue of Section 5 (1) (b) of the Myanmar Copyright Act 1914, the Claimant is the lawful owner of the JADEYE Software.

For that very reason, the Respondent is not allowed to infringe the Claimant's software as protection against infringement is also covered in Myanmar Copyright Act 1914, specifically Section 2. 'Reverse engineering' can also be a case of infringement[64] if it fulfills the infringement test which is whether there has been a substantial part taken out of the protected work[65].

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[59] Additional Clarifications to the Moot Problem, ¶ 26
[60] Additional Clarifications to the Moot Problem, ¶ 15
[61] Moot Problem, ¶ 25
[62] *Supra* n. 29
[63] *Comex Services Asia Pacific Region, Miri v Grame Ashley Power* [1987] 2 ILR 34
[64] *Hector MacQueen, Charlotte Waelde, Graeme Laurie & Abbe Brown*, Contemporary Intellectual Property (Law and Policy, 2nd Edition, Oxford University Press, 2008
[65] *Sawkins v Hyperion Records Ltd* [2004] 4 All ER 418

C. The JADEYE Software is not a partnership property

The issue of partnership property in the absence of an express agreement can be resolved by considering the factual circumstances of cases[66].

In an English case of *Coward v Phaestos Ltd*[67], the Court held that the software shall be partnership property due to these two circumstances: (i) the software was fundamentally important to the partnership and (ii) the Plaintiff as the author of the software did not assert his ownership over the software but he continuously treated the property as partnership property by signing several documents in his capacity as partner.

Distinguishing the facts with our present case, firstly, the JADEYE Software is not fundamentally important to the partnership because the partnership is largely successful even without the JADEYE software[68]. Secondly, Claimant has been asserting ownership over the property since the initial introduction of the JADEYE software into the partnership by asking the Claimant's employee to install the software on the sites[69] and kept the source code of the software in the parent company in Tokyo[70] despite they also owned a subsidiary company in Myanmar[71]. The Claimant also refused to accept any contributions from the Respondent[72] and this further reinforced the fact that the Claimant did not want to treat this property as partnership property.

Based on these facts, the JADEYE software shall not be considered as partnership property.

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[66] *Ponnukon v Jebaratnam* [1980] 1 MLJ 282
[67] *Coward v Phaestos Ltd & Others* [2013] EWHC 1292
[68] Moot Problem, ¶ 26
[69] Additional Clarifications to the Moot Problem, ¶ 32
[70] *Supra* n. 61
[71] Additional Clarifications to the Moot Problem, ¶ 33
[72] Moot Problem, ¶ 24; Additional Clarifications to the Moot Problem, ¶ 34

D. The source code of the JADEYE Software is a confidential information

Confidential information differs based on circumstances of each case[73]. However, a Canadian case of *Pharand Ski Corporation v Alberta*[74] listed down several factors to be considered in the determining confidentiality of an information[75]. Among the factors are:

(i) The extent to which it is known by employees and the others involved in the owner's business

The very existence of the JADEYE software is only known between the Claimant and the Respondent. Nevertheless, the source code of the Software was never made known to anyone after its creation. This shows the confidentiality of the source code towards the Claimant's company.

(ii) The extent of measures taken by him to guard the secrecy of the information.

The fact that the Claimant kept the source code of the JADEYE software in its parent company in Tokyo[76] despite Mr. Joe Yamashita, the creator of the software was one of Claimant's 25 employees seconded in Myanmar[77] and the Claimant owned a subsidiary company

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[73] *Supra* n. 64
[74] *Pharand Ski Corporation v Alberta* [1991] A.J. No. 471
[75] *Ansell Rubber v Allied Rubber* [1967] V.R. 37; *Deta Nominees Pty Ltd. v Viscount Plastics Products Pty Ltd.* [1979] V.R. 167
[76] *Supra* n. 61
[77] Additional Clarifications to the Moot Problem, ¶ 17

in Myanmar[78]. These facts clearly reflect the exclusivity of the source code for the Claimant.

Hence, as the source code of the JADEYE software is a confidential one, the Respondent is imposed with duty of confidence. Duty of confidence arises due to the relationship of parties as partners and it does not necessarily be put expressly in a written agreement[79]. This duty obliges one partner to respect the restriction on the usage of the confidential information as has been used by the other partner[80].

Since both the Claimant and the Respondent are partners, the Respondent thus is imposed with duty of confidence to respect the usage of the JADEYE software as has been allowed by the Claimant as the owner of the Software in the Partnership. The Respondent is not allowed to use the software as a springboard to create a new software[81]. Failure to observe this obligation amount to breach of confidence[82].

[78] *Supra* n. 70
[79] *Supra* n. 73
[80] *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574
[81] *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1960] RPC 128
[82] *Coco v AN Clark Engineers Ltd* [1968] FSR 415

PRAYER FOR RELIEF

For the foregoing reasons, the Claimant respectfully requests the Tribunal to declare that:

1. The termination of the Agreement by the Respondent is invalid;
2. The Claimant owns the jade-mining machinery and equipment; and
3. The Claimant owns and subsists the rights in the JADEYE Software.