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 RESPONDENT

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STATEMENT OF JURISDICTION

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

QUESTIONS PRESENTED

1. Whether Myanmar law is the law governing all substantive disputes in the arbitration:
    a. Whether Myanmar law governs all substantive disputes in the arbitration pursuant to the parties' choice of law in the agreement between SPT and AID ("**Agreement**"); and
    b. Even if parties' choice of law does not apply to all substantive disputes, whether the applicable choice-of-law rules indicate that Myanmar law governs the disputes that do not fall within the parties' choice of law clause.
2. Whether the Agreement was validly terminated:
    a. Whether the parties were in a purely contractual relationship or were otherwise in a partnership;
    b. If the parties were in a purely contractual relationship, whether SPT had validly terminated the Agreement under the Myanmar Contract Act; and
    c. If a partnership is found to exist between the parties, whether the partnership between SPT and AID was validly dissolved.
3. Whether SPT is the legal owner of the jade-mining machinery and equipment:
    a. Whether AID transferred ownership of the jade-mining machinery and equipment to SPT through a gift; and
    b. In the event that a partnership is found to exist between the parties, whether the jade-mining machinery and equipment constituted partnership property.
4. Whether the issues of subsistence and ownership of rights in JADEYE are arbitrable:
    a. Whether the curial law governing the arbitration is that of Japanese law; and
    b. Whether intellectual property issues are arbitrable under Japanese law.

5. Whether JADEYE is protected by a copyright in Myanmar:

    a. Whether JADEYE is protected under the Myanmar Copyright Act as a literary work; and

    b. Whether JADEYE was published in Myanmar or authored when Joe Yamashita was a resident of Myanmar.

6. Whether SPT owns the JADEYE copyright:

    a. Whether Joe Yamashita owned the JADEYE copyright; and

    b. Whether Joe Yamashita assigned the JADEYE copyright to SPT and AID jointly in equity.

7. Whether SPT had infringed on the JADEYE copyright.

STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd ("**AID**"), is a private international development company specialising in crisis relief and development. AID is managed by Dr Yugi Asamura ("**Asamura**"). Asamura is married to Dr Fiona Lum ("**Lum**"), a non-executive director of AID and the President of Second Life, a regional organisation which champions human rights.

2. The Respondent, Shwe Pwint Thone Co., Ltd ("**SPT**"), is owned by U Thein Kyaw ("**Kyaw**"). SPT is a Myanmar company which aims to provide secular and vocational training to students from underprivileged families. SPT runs teashops, jade carving and polishing studios, and training centres.

3. In 2007, the junta gifted 80 acres of land in Hpakant to Kyaw, which was believed to contain a huge amount of jade deposits. SPT's main objectives regarding the land were to develop new skill sets for its students, to create jobs in Hpakant for the local community, to increase revenue to fund training centres, and to ensure sustainable and safe extraction of jade. However, while familiar with jade carving and polishing techniques, Kyaw had no experience in jade exploration and production.

4. In May 2008, Cyclone Nargis hit Myanmar, destroying thousands of buildings and taking away many lives. AID participated in rebuilding the town of Labutta. Kyaw was deeply moved by AID's efforts in Labutta.

5. Subsequently, Kyaw contacted Asamura to discuss the prospects of SPT working together with AID in relation to a jadeite venture ("**Venture**"). Asamura was very impressed by Kyaw's aspirations and on 9 September 2008, SPT and AID (collectively, "**Parties**") entered into an agreement ("**Agreement**"). Clauses 3, 4, and

6 list the delegation of duties between the Parties for the Venture. Clause 5 emphasises the priority to be given to the employees and students of SPT, while clause 11 states that AID "cannot do or say anything harmful to the national interest and solidarity of Myanmar". Clause 10 states the Parties' choice of law as Myanmar law.

6. In accordance with the Agreement, AID sourced, purchased and reconditioned the jade-mining machinery and equipment ("**Equipment**"), which were imported into Myanmar by SPT in January 2009. SPT was addressed as the consignee of the Equipment on the bill of lading. AID provided employees on secondment from Japan to assist in the technical aspects of the Venture as well as to impart knowledge to SPT's employees and students. In return, SPT handled the paperwork required for the AID employees and obtained the government permits necessary to run the Venture, which listed SPT as the owner and importer of the Equipment.

7. Three years later, Joe Yamashita ("**Yamashita**"), an AID finance executive, developed a process optimisation and operations management software named "JADEYE" which expedited assessment work of the jade. After a successful trial, Asamura ordered the software to be installed on all computers and equipment used by the Venture. Delighted with JADEYE, Kyaw attempted to pay Yamashita for the software, but he declined, stating that the software was "for the benefit of all of us".

8. Throughout this time, the Venture was largely successful. However, problems arose after an interview with Asian Influencers Magazine involving Asamura and Lum was published in September 2016. During the interview, Lum made a statement concerning the Rohingya minority in the Rakhine state. Many of SPT's employees and students were upset by Lum's statement as it implied that the government was

involved in ethnic cleansing. As a result, 102 of these employees and students went on a seven-day strike. Kyaw eventually managed to coax the employees and students to resume their duties, but four months later, their morale remained at an all-time low as they had lost respect for their Japanese counterparts.

9. On 10 January 2017, Kyaw informed Asamura that SPT wanted to end the Venture with AID. Kyaw cited the interview and its impact on employee morale as a reason for being unable to continue working with AID. Asamura protested that SPT had no right to terminate the Agreement.

10. Kyaw claimed ownership over the Equipment as SPT had imported the Equipment, and were listed as owners and operators of the Equipment. Kyaw also claimed ownership over the JADEYE software. However, Asamura disputed the ownership claims, and refused to provide Kyaw with the JADEYE source code.

11. Unable to resolve matters, the Parties submitted the disputes to binding arbitration. The venue 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 law governing the substantive disputes contested in this arbitration is Myanmar law

Shwe Pwint Thone Co., Ltd ("**SPT**") and Asamura International Development Co., Ltd ("**AID**", collectively "**Parties**") chose Myanmar law to govern all substantive disputes arising from their relationship. Alternatively, should the Parties' choice of law only apply to contractual disputes arising from the "Partnership Agreement" ("**Agreement**"), Myanmar law applies to all remaining substantive disputes under the relevant choice-of-law rules.

B. The Agreement between the Parties was validly terminated

The legal nature of the Agreement between the parties is purely contractual. The statement made by Dr. Fiona Lum during the Asian Influencers Magazine interview is attributable to AID. By way of the Statement, AID breached Clauses 5 and 11, which allowed SPT to elect to terminate the Agreement. SPT validly elected to terminate the Agreement. In the event a partnership exists between the Parties, SPT terminated the Agreement through section 39 of the Myanmar Contract Act as section 39 still applies to partnership contracts.

C. SPT is the legal owner of the jade-mining machinery and equipment

SPT is the legal owner of the jade-mining machinery and equipment ("**Equipment**") as there was a valid consensual transfer of ownership of the Equipment by gift from AID to SPT. AID delivered the Equipment to SPT with the intention to transfer ownership to SPT. SPT had also accepted the Equipment.

In the event a partnership exists between the Parties, the Equipment does not constitute partnership property as the Parties did not intend for the Equipment to constitute partnership property.

D. The issues of subsistence and ownership of rights in the JADEYE software are arbitrable in the arbitration

The issues of subsistence and ownership of rights over the JADEYE software are arbitrable as the curial law governing this arbitration is that of Japanese law, and copyright issues are arbitrable under Japanese law.

E. AID cannot prevent SPT from reverse engineering JADEYE

AID cannot prevent SPT from reverse engineering JADEYE as JADEYE is not protected under the Myanmar Copyright Act. JADEYE is not considered a literary work under the Copyright Act, and was not published in Myanmar or made whilst Yamashita was a resident in Myanmar. Even if JADEYE was protected under the Copyright Act, SPT owns the JADEYE copyright in equity.

F. Even if AID owns the JADEYE copyright, SPT had not infringed on the copyright

SPT has neither committed nor threatened any acts of reverse engineering. Even if SPT has threatened to reverse engineer JADEYE it is not presently possible to determine whether it constitutes a copyright infringement.

PLEADINGS

I. ALL SUBSTANTIVE DISPUTES IN THIS ARBITRATION ARE GOVERNED BY MYANMAR LAW

1. Shwe Pwint Thone Co., Ltd ("**SPT**") and Asamura International Development Co., Ltd ("**AID**", collectively "**Parties**") chose Myanmar law to govern all substantive disputes arising from their relationship (**A**). Alternatively, should the Parties' choice of law only apply to contractual disputes arising from the "Partnership Agreement" ("**Agreement**"), Myanmar law applies to the remaining substantive disputes under the relevant choice-of-law rules (**B**).

A. The Parties chose Myanmar law to govern all substantive disputes arising from their relationship

2. The KLRCA i-Arbitration Rules ("**KLRCA Rules**") apply to this arbitration.[1] Under Article 35(1) of the KLRCA Rules, parties to the arbitration are free to select the substantive law applicable to their disputes.[2] The Parties have stipulated a choice-of-law clause in the Agreement which provides that "everything will be in accordance with and interpreted" under Myanmar law.[3]

3. Under Myanmar law, contractual clauses are interpreted based on the parties' intentions at the point of contracting, objectively ascertained through the circumstances.[4] Where there is a written contract, the intention of the parties is to be

[1] Moot Problem at [47].
[2] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014, 2nd Ed) ("Born") at 2670.
[3] Moot Problem, Annexure 1, Clause 10.
[4] *Mohamed Valli Patel v The East Asiatic Co Ltd* AIR 1936 Ran 319, discussed in Adrian Briggs, Andrew Burrows, *The Law of Contract in Myanmar* (Ashford Colour Press, 2017) at 133.

assessed by giving every term its ordinary meaning.[5] Thus, when a choice-of-law clause is phrased broadly, the clause would have been intended by the parties to govern all substantive disputes arising from their relationship.[6]

4. Given the expansiveness of the term "everything", clause 10 of the Agreement evidences the Parties' intention for Myanmar law to govern all aspects of their relationship. Therefore, in accordance with parties' intentions and the terms of the Agreement, Myanmar law governs all substantive disputes arising from their relationship.

B. Alternatively, should the Parties' choice of law only apply to contractual disputes arising from the Agreement, Myanmar law applies to the remaining substantive disputes under the applicable choice-of-law rules

5. Should a choice-of-law clause be limited to contractual disputes arising from the contract, the law governing any remaining substantive disputes is determined by the relevant choice-of-law rules.[7] Here, Japanese choice-of-law rules apply to determine the law governing the remaining substantive disputes in this arbitration (**1**) and Japanese choice-of-law rules indicate that the remaining disputes in this arbitration are governed by Myanmar law (**2**).

[5] *Tan Byan Seng v Ellermans Arracan Rice & Trading Co Ltd* (1948) BLR 148 at 151-152.
[6] *Travel Servs. Network, Inc. v. Presidential Fin. Corp.* (1997) 959 F.Supp. 135 at 146; Born, *supra* n 2, at 2741.
[7] Born, *supra* n 2 , at 2624.

(1) Japanese choice-of-law rules apply to determine the law governing the remaining substantive disputes in this arbitration

6. Where parties have not indicated the applicable substantive law, the choice-of-law rules stated in the institutional rules chosen by the parties should apply.[8] Article 35(1) of the KLRCA Rules provides that the tribunal is to apply the substantive law it deems "appropriate" by selecting any choice-of-law rule.[9]

7. In selecting a choice-of-law rule, the choice-of-law rule of the arbitral seat should be applied.[10] The parties' choice of arbitral seat constitutes an implied acceptance of the choice-of-law rules of that state.[11] Subject to contrary agreement, the place of arbitration is taken to be the arbitral seat.[12] Here, the Parties agreed for the place of arbitration to be Tokyo and did not draw a distinction between the place and seat of arbitration.[13] Therefore, Japan is deemed as the arbitral seat and Japanese choice-of-law rules apply to the remaining substantive disputes in this arbitration.

(2) The remaining substantive disputes in this arbitration are governed by Myanmar law

8. There are two remaining substantive disputes in this arbitration. First, the ownership of rights in the jade-mining machinery and equipment ("**Equipment Dispute**") and secondly, the ownership and subsistence of rights in the JADEYE software ("**JADEYE Dispute**").

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[8] *Id*, at 2634–2635.
[9] *Id*, at 2643.
[10] *Id*, at 2658; Award in *ICC Case No. 9771*, IXXX Y. B. Comm. Arb. 46 (2004) at 52-53; Franco Ferrari, Stefan Kröll, *Conflict of Laws in International Arbitration* (Sellier European Law Publishers, 2010) at 286.
[11] Award in *ICC Case No. 8619*, discussed in Grigera Naón, Horacio A., *Choice-of-Law Problems in International Commercial Arbitration (Volume 289)* (The Hague Academy of International Law, 2001) at 230.
[12] Preliminary Award in *ICC Case No. 5505*, XIII Y. B. Comm. Arb. 110 (1988) at [9]-[14]; *Dicey, Morris and Collins on The Conflict of Laws* (L. Collins Gen. Ed.) (Sweet & Maxwell, 2006, 14th Ed) ("*Dicey*") at [16-035]; Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015, 6th Ed) ("Blackaby") at [3.53].
[13] Moot Problem at [47].

9. Under Japan's choice-of-law rules, both disputes are governed by Myanmar law. Japan's Arbitration Law provides that barring an agreement on the substantive law applicable, the substantive law of the state most closely connected to the dispute should be applied.[14] This rule identifies the facts of the dispute connected to the various states, weighs their significance, and applies the laws of the prevailing state.[15]

10. Regarding the Equipment Dispute, the state of closest connection for property disputes should be the state where the property was situated when the alleged transfer took place.[16] Any alleged transfer of the jade-mining machinery and equipment ("**Equipment**") between the Parties would have occurred in Myanmar.[17] Additionally, the Equipment was situated and employed in Myanmar for the past 8 years.[18]

11. Regarding the JADEYE Dispute, the state of closest connection for intellectual property disputes is either the state where the intellectual property originated from or is to be protected.[19] JADEYE was created mainly in Myanmar by Joe Yamashita ("**Yamashita**"),[20] and was first tested and implemented at the Hpakant site in Myanmar.[21] JADEYE is also to be protected in Myanmar as the Parties are contesting the rights to use JADEYE in Myanmar. SPT threatened to reverse engineer JADEYE[22] whilst AID seeks to enforce a copyright against SPT in Myanmar.[23]

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[14] Arbitration Law (Law No. 138 of 2003) (Japan) ("Japan Arbitration Law"), Art 36(2).
[15] Final Award in *ICC Case No. 14667*, XL Y. B. Comm. Arb. 51 (2011) at [121]-[122].
[16] *Dicey*, *supra* n 12, at [24R-001].
[17] Moot Problem at [43].
[18] *Id* at [16] and [50].
[19] Trevor Cook and Alejandro L. Garcia, *International Intellectual Property Arbitration* (Kluwer Law International, 2010) ("Cook") at 98.
[20] Additional Clarification, Question 15.
[21] Moot Problem at [23].
[22] *Id* at [44].
[23] *Id* at [48].

12. Therefore, Myanmar law governs both disputes under the choice-of-law rules of Japan. Accordingly, Myanmar law governs all substantive disputes contested in this arbitration.

II. THE AGREEMENT BETWEEN THE PARTIES WAS VALIDLY TERMINATED

13. The relationship between the Parties is purely contractual as a partnership did not exist (**A**). As such, SPT validly terminated the Agreement under s 39 of the Myanmar Contract Act ("**Section 39**") (**B**). Even if a partnership exists between the Parties, the Agreement was validly terminated (**C**).

A. The relationship between the Parties is purely contractual as a partnership did not exist

14. Given that a partnership is based on a contract, where a partnership is not found, the relationship between the parties is purely contractual.[24] In determining whether a partnership exists, the substance rather than the label of the contract is determinative.[25] Here, even though the Parties labelled the Agreement "Partnership Agreement", this label is not determinative and the substance of the Agreement must be examined.

15. As s 4 of both the India Partnership Act[26] and Myanmar Partnership Act[27] are identical, Indian case law is persuasive. Under Myanmar law, a partnership exists if three elements are met:[28]

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[24] *McPhail v Bourne* [2008] EWHC 1235 (Ch) at [256].
[25] *Laxmibai And Anr. vs Roshan Lal* AIR 1972 Raj 288 at [9].
[26] Partnership Act 1932 (Act No. IX of 1932) (India) ("India Partnership Act").
[27] The Partnership Act (Burma Code Vol. IX Part XIV) (Myanmar) ("Myanmar Partnership Act").
[28] *Dulichand Lakshminarayan v The Commissioner of Income Tax, Nagpur* AIR 1956 SC 354 at [14].

a. an agreement entered into by two or more persons;

b. an agreement to share the profits of a business; and

c. a business carried on by all persons, or any of those persons acting for all.

16. There was no partnership between the Parties as the Agreement was not entered into by two or more persons (**1**) and the jadeite venture ("**Venture**") was not carried on by all persons (**2**).

(1) The Agreement was not entered into by two or more persons

17. For companies to be considered "persons" under s 4 of the Myanmar Partnership Act, express authorisation from their articles or memorandum of association ("**MOA**") to enter a partnership is required.[29] This is to safeguard against shareholders being subject to obligations they did not agree to. Without such authorisation, the board of directors can bind the company to the liabilities of another, or grant access to the company's books and funds to third parties, without approval from the company's shareholders.[30]

18. Here, the Parties are incorporated companies, as evidenced by their registered names.[31] The facts do not suggest that the Parties had express authorisation by their MOAs to enter into a partnership. Therefore, the Parties cannot be "persons" capable of entering into a partnership.

[29] *Ganga Metal Refining Co. Pr. Ltd. vs Commissioner of Income Tax* AIR 1967 Cal 429 at [20]-[22].
[30] *Id*, at [17]-[21].
[31] Moot Problem at [1], [7] and Annexure 1, Clause 1.

(2) The Venture was not carried on by all persons

19. For a partnership to be carried on by all persons, it is required to operate as a single business entity.[32] In ascertaining whether a business operates as a single entity, two factors are indicative:[33]

    a. the business possesses its own capital; and

    b. the business possesses its own employees.

20. The Venture did not possess its own capital. While the Parties injected capital contributions into the Venture in March 2009,[34] such contributions were only made to fund operational costs for the first financial year.[35] Further, the funds were held in SPT's bank account,[36] and not one belonging to the Venture.

21. Additionally, the Venture did not have its own employees. In ascertaining whether one is an employee of a party, two factors are indicative:[37]

    a. the party's control and management over the employee; and

    b. the nature of payments made to the employee.

22. The Venture did not exercise control over the employees as the Parties only exercised control over their own respective employees. AID seconded their employees from Japan to Myanmar[38] and Yamashita implemented the JADEYE software on-site only on instruction from Yugi Asamura ("**Asamura**").[39] Further, the salaries of the AID

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[32] *Sitaram Kalani v Manmal* AIR 1956 MP 60 at [8].
[33] *Ibid*.
[34] Moot Problem at [17].
[35] *Ibid*.
[36] *Ibid.*
[37] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184-185.
[38] Moot Problem at [16].
[39] *Id* at [23]; Additional Clarifications, Question 32.

employees working for the Venture were paid by AID.[40] Similarly, SPT, through U Thein Kyaw (“**Kyaw**”), managed to convince its employees to cease the strike, despite them remaining unhappy about working with AID.[41] Kyaw also recognised that the employees worked for SPT alone.[42]

23. As the Venture did not possess its own capital or employees, it was not carried on by all persons. Therefore, the Venture was not operating as a single business entity. Accordingly, there was no partnership and the relationship between the Parties is purely contractual.

B. SPT validly terminated the Agreement under Section 39

24. Given that the relationship between the Parties is purely contractual, termination of the Agreement is governed by the Myanmar Contract Act.[43]

25. During an interview with the Asian Influencers Magazine, Dr. Fiona Lum (“**Lum**”) stated that “[e]veryone must work together to end the persecution of the Rohingyas, and the new Myanmar government… must end the problem immediately. Especially the ethnic cleansing...” (“**Statement**”).[44] SPT relied on the Statement made by Lum to terminate the Agreement.[45]

26. In this regard, SPT validly terminated the Agreement under Section 39. The Statement is attributable to AID (**1**). Due to the Statement, AID breached clauses 5 and 11 of the Agreement (“**Clause 5**” and “**Clause 11**” respectively), which allowed SPT to terminate the Agreement (**2**). SPT then validly elected to terminate the Agreement (**3**).

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[40] Additional Clarifications, Question 14.
[41] Moot Problem at [30] and [38].
[42] *Id* at [41].
[43] The Contract Act (Burma Code Vol. IX Part XI) (Myanmar) (“Myanmar Contract Act”).
[44] Moot Problem at [27]-[28].
[45] Moot Problem at [41].

(1) The Statement is attributable to AID

27. The Statement is attributable to AID as AID assumed full responsibility for Lum's Statement by ratifying the Statement through its conduct regarding the issue. Ratification by a principal through conduct occurs if three elements are met:[46]

    a. the ratification must be carried out by the principal or a party who is authorised to carry out or ratify the act in question;

    b. the ratifying party must know of all the material circumstances of the act in question; and

    c. the ratifying party's conduct must objectively show an intention to adopt the act in question.

28. Here, all three elements have been satisfied. The first element is satisfied as AID itself failed to qualify the Statement as being made in Lum's own capacity, or issue any clarifications regarding the Statement.

29. The second element is also satisfied as AID knew about the circumstances surrounding the Statement. Knowledge of a director relevant to the company's affairs can be imputed to the company.[47] Here, Asamura, the Chairman of AID,[48] knew about the Statement as he was present during the interview.[49] Such knowledge was relevant to AID's affairs as the Statement caused SPT's employees and students to go on strike

[46] *Sea Emerald SA v Prominvestbank* [2008] EWHC 1979 (Comm) at [102]; *Suncorp Insurance and Finance v Milano Assicurazioni SPA* [1993] 2 Lloyd's Rep 84 at 234.
[47] *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [98].
[48] Moot Problem at [29].
[49] Moot Problem at [27].

and request Asamura and Lum to apologise and retract the Statement.[50] As such, Asamura's knowledge can be imputed to AID.

30. The third element is satisfied as the actions of AID and Asamura evidenced an intention by AID to adopt the Statement. AID failed to clarify or qualify the Statement and Asamura refused to retract the Statement or apologise.[51] This is despite knowledge of the hurt caused to SPT's employees and students[52] and the economic damage caused to the Venture by the strike.

31. Therefore, as all three elements are satisfied, the Statement was ratified by AID.

(2) AID breached Clauses 5 and 11 due to the Statement which allowed SPT to terminate the Agreement

32. Section 39 provides that a contract may be terminated when a party has refused to perform or has disabled himself from performing his promise in his entirety.[53] As Section 39 is identical to s 40 of the Malaysia Contracts Act,[54] Malaysian case law is persuasive. Under Section 39, an innocent party can elect to terminate a contract if the other party breached an essential part of the contract ("**Fundamental Term**").[55] Here, Clauses 5 and 11 are Fundamental Terms (**a**). AID refused to perform both Clause 5 (**b**) and Clause 11 (**c**), which allowed SPT to terminate the Agreement.

[50] *Id* at [29].
[51] *Id* at [30].
[52] *Id* at [29].
[53] Myanmar Contract Act, *supra* n 43, s 39.
[54] Contracts Act 1950 (Act No. 136 of 1974) (Malaysia).
[55] *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308 at [21]; V. Sinnadurai, *Law of Contract Vol. 2* (LexisNexis, 2011, 4th Ed) ("Sinnadurai") at [12.30].

(a) Clauses 5 and 11 are Fundamental Terms

33. A term is fundamental where the promisee would not have contracted unless assured of substantial performance of that term and this ought to have been apparent to the promisor.[56] In ascertaining whether a term is fundamental, several factors are indicative:[57]

a. the construction of the contract when it was made;

b. the surrounding circumstances at the formation of the contract; and

c. the intention of the parties.

34. Here, the underlying rationale for the Parties to enter into the Agreement was to benefit the local Myanmar community, especially SPT's employees and students. SPT approached AID to partake in the Venture, despite AID having no expertise in jade-mining,[58] solely on the basis of SPT's appreciation for AID's earlier rebuilding works in Labutta, Myanmar.[59] Similarly, Asamura was impressed by Kyaw's aspirations to give back to the local community and wanted to expand AID's work to the Kachin state.[60] It was due to this mutual commitment to improve the lives of the local Myanmar community that the Parties agreed to embark on the Venture.

35. Clause 5 is a Fundamental Term as it evidences the underlying rationale of the Agreement of benefiting the local Myanmar community. Clause 5 emphasises the benefits that the Venture is to bring to the local Myanmar community and imposes on the Parties an obligation to prioritise SPT's employees and students. Given the

[56] *Tan Tien Seng & anor v Grobina Resorts Sdn Bhd* (2005) 7 MLJ 590 at 602A.
[57] *Id* at 601G.
[58] Moot Problem at [2].
[59] *Id* at [6]-[7].
[60] *Id* at [13].

circumstances, SPT would not have entered into the Agreement unless it had been assured of substantial performance of Clause 5, which would have been apparent to AID. Therefore, Clause 5 is a Fundamental Term of the Agreement.

36. Similarly, Clause 11 is a Fundamental Term. Clause 11 was to ensure that the Parties "show respect towards [Myanmar]" by not saying or doing anything harmful to the national interest or solidarity of Myanmar.[61] The inclusion of Clause 11 is in furtherance of the underlying rationale of the Agreement to benefit the local Myanmar community.[62] Given that the Myanmar community is very nationalistic,[63] a breach of Clause 11 is likely to severely upset the Myanmar community and inflame existing ethnic tensions. Hence, SPT would not have entered into the Agreement unless it had been assured of substantial performance of Clause 11, which would have been apparent to AID. Therefore, Clause 11 is a Fundamental Term of the Agreement.

(b) AID breached Clause 5

37. AID breached Clause 5 as it did not prioritise SPT's employees and students. Clause 5 should be interpreted in accordance with the Parties' intentions at the formation of the Agreement, ascertained objectively from the circumstances.[64]

38. Clause 5 states that AID is obliged to prioritise SPT's employees and students.[65] The intention of the Parties was for the Venture to benefit the Myanmar people holistically. Besides creating more jobs through the Venture,[66] Kyaw also wanted to provide

[61] Moot Problem, Annexure 1, Clause 11.
[62] Respondent Memorial at [34].
[63] Mikael Gravers, *Nationalism as Political Paranoia in Burma* (Taylor & Francis, 2005, 3rd Ed) at 135-136.
[64] Respondent Memorial at [3].
[65] Moot Problem, Annexure 1, Clause 5.
[66] Moot Problem at [11].

secular training for the Myanmar community[67] and ensure that the Venture ran safely and sustainably.[68] Additionally, Asamura wanted to expand AID's humanitarian work to Kachin state.[69] Therefore, Clause 5 ought to be interpreted as requiring AID to prioritise the holistic well-being of the employees and students, which includes their economic and social well-being.

39. AID, through its silence on the Statement, failed to reasonably prioritise the social well-being of SPT's employees and students.[70] The Statement caused 102 of SPT's employees and students to go on strike for 7 days.[71] While Kyaw was able to coax the employees and students back to their duties,[72] their morale remained low as they had lost respect for AID.[73] Had AID prioritised the social well-being of the employees and students, Asamura and Lum could have simply retracted the Statement and apologised. AID could at least have adopted a neutral stance by qualifying the Statement as not being representative of the company's views. Yet, AID failed to do so. Therefore, AID was in breach of Clause 5.

(c) AID breached Clause 11

40. AID breached Clause 11 as the Statement was harmful to the national interest and solidarity of Myanmar. As a contract ought to be interpreted according to the intentions of the parties objectively ascertained,[74] where the contracting parties are

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[67] *Id* at [7].
[68] *Id* at [10].
[69] *Id* at [13].
[70] *Id* at [30].
[71] *Id* at [29].
[72] *Id* at [30].
[73] *Id* at [38].
[74] Respondent Memorial at [3].

laymen, the contract ought to be given its ordinary meaning ascertained from the circumstances.[75]

41. Here, both Asamura and Kyaw drafted the Agreement as laymen without any legal advice.[76] The ordinary meaning of the terms "national interest" and "solidarity" in Clause 11 may be ascertained from English newspapers in Myanmar or dictionaries, as the Parties would likely have been influenced by such sources as non-native English users.

42. National interest ought to refer to the promotion of peace and stability within Myanmar. Community peace and stability in Myanmar were published as objectives of Myanmar in one of the few English newspapers widely available in Yangon,[77] "The New Light of Myanmar".[78] This meaning is further corroborated by the dictionary meaning of national interest, which has been defined as the interests of a state, usually determined by its government.[79] The Government of Myanmar prioritises ensuring peace and stability within Myanmar, and has repeatedly called for the observation of harmony with respect to the Rohingya minority in the Rakhine state.[80]

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[75] *U Nyo v U Ko Ko Gyi* [1950] BLR 147 at 150; *Cosmos Holidays Plc v Dhanjal Investments Ltd* [2009] EWCA Civ 316 at [15]-[16].
[76] Moot Problem at [14]-[15].
[77] "Myanmar Newspapers - Myanmar Newspaper & News Media Guide", *ABYZ Web Links Inc.*, <http://www.abyznewslinks.com/myanm.htm> (accessed 29 July 2017).
[78] Ministry of Information, *The New Light of Myanmar* (9 September 2008) <http://www.burmalibrary.org/docs5/NLM2008-09-09.pdf> (accessed 29 July 2017) at 1.
[79] Iain McLean *et al,* "The concise Oxford dictionary of politics (Oxford University Press, 2003, 2nd Ed) at p 360.
[80] The Government of the Republic of the Union of Myanmar Ministry of Foreign Affairs, "Press Release on Situation in Rakhine State" <http://www.mofa.gov.mm/?page_id=43> (accessed 4 July 2017).

43. Solidarity has been defined as the unity or agreement of feeling or action.[81] The meaning of solidarity ascribed by the Parties would be the solidarity of all persons residing in Myanmar. In Clause 11, the term "of Myanmar" was used. This is in contrast with the narrower phrase used in Clause 5, the "local Myanmar people". As the Parties did not choose to qualify Clause 11 to apply to a particular group within Myanmar, the term "solidarity" ought to refer to the solidarity of all persons residing in Myanmar, including the Rohingya.

44. The Statement is against the national interest and solidarity of Myanmar. When interpreting a statement, the meaning a reasonable man, in the circumstances that the statement was made, would be likely to understand ought to be given.[82]

45. Here, the Statement was interpreted by 102 of SPT's employees and students, who are representative of a reasonable man in Myanmar, as implying that the Myanmar government was involved in ethnic cleansing.[83] Such a statement, made in the context of Myanmar, where the persecution of ethnic minorities is a controversial topic, has the capacity to incite unrest.[84] This potential unrest is demonstrated by SPT's employees and students going on strike because of the Statement.[85] Therefore, the Statement is against the national interests of promoting peace and stability within Myanmar.

46. The Statement is also against the solidarity of Myanmar as it is inciting division within Myanmar. The local Myanmar community has always been divided on the

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[81] English Oxford Living Dictionary at "solidarity", *Oxford University Press*, <https://en.oxforddictionaries.com/definition/solidarity> (Accessed 5 July 2017).
[82] *Rubber Improvement Ltd v Daily Telegraph* [1963] 2 WLR 1063 at 1069.
[83] Moot Problem at [29].
[84] "Myanmar Conflict Alert: A Risky Census", *International Crisis Group* (12 February 2014), available at <https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-conflict-alert-risky-census> (Accessed 29 July 2017).
[85] Moot Problem at [29].

events taking place in Rakhine state, with support both for and against the discrimination of Rohingyas.[86] Illustrative of this divide is the fact that is that 102 out of SPT's 300 employees and students went on strike in protest of the Statement.[87] Implying that the Myanmar government is involved in ethnic cleansing would divide Myanmar further and is harmful to the solidarity of Myanmar. Therefore, AID breached Clause 11.

(3) SPT validly elected to terminate the Agreement

47. Given AID's breaches, SPT validly elected to terminate the Agreement as SPT did not affirm the continuance of the Agreement (**a**), and unequivocally communicated its election to terminate (**b**).

(a) SPT did not affirm the continuance of the Agreement

48. Where a party fails to perform a Fundamental Term, the innocent party may elect to affirm the continuance of the contract or terminate the contract.[88] The innocent party is allowed a period of time after the breach to contemplate its decision to affirm or terminate the contract ("**Contemplation Period**").[89] This is especially so when the relationship between the parties is complex and the consequences of the breach take time to ascertain.[90] The performance of contractual obligations by the innocent party

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[86] A. K. M. Ahsan Ullah, "Rohingya Crisis in Myanmar: Seeking Justice for the 'Stateless'" 2016 32(3) Journal of Contemporary Criminal Justice 285 at 286.
[87] Moot Problem at [18] and [29].
[88] Sinnadurai, *supra* n 55, at [12.01].
[89] *Stocznia Gdanska SA v Latvian Shipping Co & Ors (No. 2)* [2002] EWCA Civ 889 ("*Stocznia*") at [87].
[90] *Force India Formula One Team Ltd v Etihad Airway PJSC, Aldar Properties PJSC* [2010] EWCA Civ 1051 at [113] and [122].

during the Contemplation Period does not constitute an affirmation of the contract's continuance.[91]

49. Here, the relationship between the Parties was complex. The Parties had worked together for approximately 8 years[92] on the Venture.[93] Termination of the Agreement would signal the end of the Venture, resulting in immense repercussions for both companies. Further, due to the imperceptible nature of Clauses 5 and 11, SPT required time to properly ascertain the consequences of the Statement.

50. As such, SPT required a reasonable Contemplation Period from the time the Statement was published to appropriately assess whether it should terminate the Agreement.[94] During this Contemplation Period, SPT's actions, such as coaxing its employees back to work, did not constitute an affirmation of the Agreement as it had merely continued to perform its contractual obligations.

51. It was only when U Soe Myint informed Kyaw that the morale of SPT's employees and students remained at an all-time low[95] that Kyaw realised the relationship with AID was no longer tenable. Hence, Kyaw elected to terminate the Agreement on 10 January 2017.[96] This was a Contemplation Period of only 4 months, which was reasonable in light of the parties' long-standing relationship and the potential repercussions of termination.

[91] *Id* at [122]; *Stocznia*, *supra* n 89, at [87].
[92] Moot Problem at [16].
[93] *Id* at [26].
[94] *Id* at [29]-[30].
[95] *Id* at [38].
[96] *Id* at [40].

(b) SPT unequivocally communicated its election to terminate

52. A contract is terminated under Section 39 by the innocent party's unequivocal assertion that he is no longer bound by the contract.[97] Here, Kyaw, representing SPT on 10 January 2017, expressed SPT's intention to terminate the Agreement to Asamura.[98] Therefore, SPT unequivocally communicated its election to terminate the Agreement to AID.

53. Accordingly, SPT had validly terminated the Agreement.

C. Even if a partnership exists between the Parties, the Agreement was still validly terminated

54. Given that a partnership relationship is principally contractual,[99] it should be subjected to the same incidents as other contractual relationships, so long as it is not inconsistent with partnership law.[100] Further, the doctrine of repudiation may be applied to partnership contracts in the same manner as other contracts and results in a dissolution of the partnership.[101]

55. Here, Section 39 is co-extensive with the doctrine of repudiation.[102] As such, Section 39 should apply to the Agreement. AID breached Clauses 5 and 11, which are Fundamental Terms of the Agreement.[103] SPT is thus entitled to elect to terminate the Agreement under Section 39, and did validly do so, as described above.[104]

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[97] Sinnadurai, *supra* n 55, at [12.21].
[98] Moot Problem at [40].
[99] M. Saharay, *Textbook on Indian Partnership Law with Limited Liability Partnership Act* (Universal Law Publishing, 2010) at 39; *Goldstein v Bishop* [2013] EWHC 881 at [115].
[100] *Ryder v Frohlich* [2004] NSWCA 472 (NSW) at [133].
[101] *Id* at [121]-[126].
[102] Sinnadurai, *supra* n 55, at [12.07].
[103] Respondent Memorial at [32]-[46].
[104] Respondent Memorial at [47]-[53].

Accordingly, the Agreement would have been validly terminated even if a partnership had existed between the Parties.

III. SPT IS THE LEGAL OWNER OF THE EQUIPMENT

56. SPT is the legal owner of the Equipment through a gift by AID (**A**). Even if a partnership is found between the Parties, SPT is still the legal owner of the Equipment (**B**).

A. SPT is the legal owner of the Equipment through a gift by AID

57. For ownership of movable property to pass, the parties must have entered into a valid consensual transfer of title in the property.[105] Movable property may be transferred voluntarily and without consideration by a gift.[106]

58. Under Myanmar law, movable property may be gifted if three elements are met:

    a. the gift must be effected by delivery or a registered instrument under certain conditions;[107]

    b. the transferor must have had the intention to transfer ownership to the transferee;[108] and

    c. the gift must be accepted by the transferee.[109]

A gift, when validly made, subsequently cannot be revoked.[110] Any subsequent conduct after the completion of the gift is irrelevant.[111]

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[105] Michael Bridge, *Personal Property Law* (Oxford University Press, 2015, 4th Ed) ("Bridge") at 153-193.
[106] Transfer of Property Act (Burma Code Vol. X Part XVII) (Myanmar) ("Myanmar Transfer of Property Act"), s 122.
[107] *Id*, s 123.
[108] Bridge, *supra* n 105, at p 171.
[109] Myanmar Transfer of Property Act, *supra* n 106, s 122.

59. Here, SPT is the legal owner of the Equipment as all the elements for a valid gift were satisfied. There was sufficient delivery of the Equipment to SPT (**1**), AID had the intention to transfer ownership of the Equipment to SPT (**2**) and the Equipment was accepted by SPT (**3**).

(1) There was sufficient delivery of the Equipment to SPT

60. The element of delivery is satisfied. For a gift to be delivered, there must be a clear and unequivocal transfer of possession.[112] Here, AID provided for the Equipment to be imported into Myanmar by SPT.[113] SPT was addressed as the consignee for the Equipment on the bill of lading.[114] Only the consignee of a bill of lading is entitled to possession upon the importation of goods.[115] Thus, only SPT could take possession of the Equipment upon its importation into Myanmar, with AID having no control over the Equipment. Therefore, there was a clear and unequivocal transfer of possession of the Equipment constituting sufficient delivery.

(2) AID had the intention to transfer ownership of the Equipment to SPT

61. The requirement of intention to transfer ownership is satisfied. An intention to transfer ownership can be inferred from the surrounding circumstances.[116]

62. Here, AID intended to gift the Equipment to AID. First, SPT was named as the owner of the Equipment on the operation and importation permits ("**Permits**").[117] AID was

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[110] *Asokan v Lakshmikuty* 2008 (70) ALR 311 at [28].
[111] *Ibid.*
[112] Bridge, *supra* n 105, at p 172.
[113] Moot Problem at [16].
[114] Additional Clarifications, Question 25.
[115] *LMJ International v Owners and Parties Interested in the Vessel M.V. Osm Arena* 2011 (2) CHN 674 at [29].
[116] *Kuppuswamy Chettiar v A.S.P.A. Arumugam Chettiar* AIR 1967 SC 1395 at [5].
[117] Moot Problem at [43] and Additional Clarifications, Question 8.

aware of this arrangement,[118] yet did not protest for 8 years until the commencement of the present dispute.[119]

63. Secondly, there is no requirement for SPT to be identified as the owner of the Equipment on the Permits. AID could have but failed to request for the owner of the Equipment on the Permits to be listed as either itself or its wholly owned Myanmar subsidiary.[120] Hence, SPT being named as the owner on the Permits evidences an intention by AID to recognise SPT as the owner of the Equipment. Therefore, AID had an intention to transfer ownership of the Equipment to SPT.

(3) SPT accepted the Equipment

64. The element of acceptance is satisfied. Here, SPT's acceptance of the Equipment is evidenced by SPT's willing importation of the Equipment,[121] SPT's identification as owner and operator on the Permits,[122] and SPT's claim that it "[has] all the equipment".[123] Therefore, SPT has accepted the Equipment.

65. Accordingly, as the elements for a gift are satisfied, SPT became the legal owner of the Equipment by gift.

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[118] Clarifications, Question 14.
[119] Moot Problem at [16].
[120] Additional Clarifications, Question 33.
[121] Moot Problem at [16] and [18].
[122] *Id* at [43].
[123] *Id* at [39].

B. Even if a partnership is found between the Parties, SPT remains the legal owner of the Equipment

66. SPT remains the legal owner of the Equipment as the Equipment would not constitute partnership property. As s 14 of the Myanmar Partnership Act [124] and India Partnership Act[125] are identical, and similar to s 20(1) of the UK Partnership Act,[126] Indian and English case law is persuasive.

67. Property acquired by a partner would only constitute partnership property if there was an agreement between the partners to treat the property as partnership property.[127] Such agreement is required even if the property was used for the purposes of the partnership business. [128] In ascertaining the presence of an agreement, all the circumstances surrounding the acquisition of the property must be considered.[129]

68. Here, there was no agreement that the Equipment would constitute partnership property. First, the issue regarding the Equipment belonging to the Partnership was neither explicitly drafted in the Agreement nor mentioned orally, despite the numerous interactions between Asamura and Kyaw, and the Venture having operated for more than eight years.[130]

69. Secondly, there was no intention by the Parties to treat the Equipment as partnership property. AID had intended to gift the Equipment to SPT.[131] Even after the Parties' relationship had broken down, both parties claimed complete ownership of the

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[124] Myanmar Partnership Act, *supra* n 27.
[125] India Partnership Act, *supra* n 26.
[126] Partnership Act 1890 (53 & 54 Vict. c. 39) (UK).
[127] *Boda Narayana Murthy And Sons v Valluri Venkata Suguna* AIR 1978 AP 257 at [8]-[9].
[128] *Id* at [9]; *Arjun Kanoji Tankar v Santaram Kanoji Tankar* (1969) 3 SCC 555 at [15].
[129] Roderick I'anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 19th Ed, 2010) at [18-12].
[130] Moot Problem at [16].
[131] Respondent Memorial at [61]-[63].

Equipment, with neither party suggesting that the Equipment was partnership property.[132]

70. Therefore, since there was no agreement between the Parties that the Equipment constitutes partnership property, the Equipment would not constitute partnership property.

IV. THE JADEYE DISPUTE IS ARBITRABLE IN THIS ARBITRATION

71. The JADEYE Dispute is arbitrable as the curial law governing the arbitration is Japanese law (**A**), and copyright issues are arbitrable under Japanese law (**B**).

A. The curial law governing the arbitration is Japanese law

72. Where parties do not indicate a choice of curial law, it is presumed that the curial law follows the law of the seat,[133] which would be deemed as the place of arbitration unless otherwise stipulated by parties.[134] Here, the Parties chose Japan as the place of arbitration.[135] Therefore, the seat of arbitration is Japan, and the curial law applicable to this arbitration would be Japanese law.

B. Copyright issues are arbitrable under Japanese law

73. Whether an issue is arbitrable would depend on the curial law governing the arbitration.[136] The curial law governing the arbitration is Japanese law.[137] The Arbitration Law of Japan allows for the arbitration of all civil disputes capable of

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[132] Moot Problem at [43].
[133] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [26] and [29].
[134] Respondent Memorial at [7].
[135] Moot Problem at [47].
[136] Blackaby, *supra* n 12, at [3.46].
[137] Respondent Memorial at [72].

being settled by parties, except divorce or separation cases.[138] The existence and ownership of a copyright is capable of being settled by parties.[139] Therefore, the JADEYE Dispute is arbitrable under Japanese law.

74. Accordingly, the JADEYE Dispute is arbitrable in this arbitration.

V. JADEYE IS NOT PROTECTED BY A COPYRIGHT IN MYANMAR

75. Should JADEYE not be protected under the Myanmar Copyright Act,[140] SPT can freely reverse engineer JADEYE. Under the Myanmar Copyright Act, two elements must be satisfied before a work will be protected:[141]

   a. the work is an original literary, dramatic, musical or artistic work; and

   b. the work is published in Myanmar or made when the author was a citizen or resident of Myanmar.

JADEYE is not protected under the Myanmar Copyright Act as JADEYE is not a literary work (**A**), JADEYE is not published in Myanmar (**B**) and Yamashita was not a resident in Myanmar when JADEYE was made (**C**).

A. JADEYE is not a literary work

76. Software is not considered an original literary work protected by the Myanmar Copyright Act. Under Myanmar law, a statute is to be interpreted according to the intention of the legislature when the statute was enacted.[142] In order for a new object to be subsumed under an existing term in a statute, the legislature must have

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[138] Japan Arbitration Law, *supra* n 14, Art 13(1).
[139] Cook, *supra* n 19, at 72.
[140] Copyright Act (Burma Code Vol. X Part XXI) (Myanmar) ("Myanmar Copyright Act").
[141] *Id*, First Schedule, s 1.
[142] *U On Khin v The Union of Burma* [1952] BLR 158 at 168; Francis Bennion, *Bennion on Statutory Interpretation* (2008, LexisNexis, 5th Ed) at p 470.

contemplated that object's inclusion under the existing term if that object had existed when the statute was enacted.[143]

77. Here, the relevant term in the Myanmar Copyright Act is "literary work". It is unclear whether the legislature of Myanmar would have intended for software to be subsumed under literary work when the Myanmar Copyright Act was enacted. Whether software should be subsumed under literary work is controversial. While English courts have considered software under literary work,[144] Australian courts have held otherwise, that certain forms of software ought not to be considered literary work[145] and there has been academic commentary suggesting the same.[146] Patents are also a widely discussed possible solution for the protection of intellectual property in software.[147]

78. As such, whether software should be subsumed under literary work should be left to the legislature. In several jurisdictions, the controversy over whether software is considered as literary work under copyright law was only put to rest by legislation.[148] Therefore, given that the Myanmar legislature has not included software under the definition of literary work in the Myanmar Copyright Act, JADEYE should not be considered a literary work.

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[143] *Simpson v Teignmouth and Shaldon Bridge Company* [1903] 1 KB 405 at 413.
[144] *Sega Enterprises Ltd v Richards* [1983] FSR 73 at 75.
[145] *Computer Edge Pty Ltd v Apple Computer Inc* [1986] 65 ALR 33 at 39-40.
[146] Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs" (1970) 84 Harv. L. Rev. 281 at 340-350.
[147] Andreas Grosche, "Software Patents – Boon or Bane for Europe?" (2006) Int'l J.L. & Info. Tech. 257.
[148] Neil Hawke, "The Problems and Perspectives of Copyright Protection for Computer Software in English Law" (1986) 2 Y.B.L. Computers & Tech at 84.

B. JADEYE was not published in Myanmar

79. The term "publication" is defined under the Myanmar Copyright Act as "the issue of copies of the work to the public".[149] The term "public" has been defined as an indeterminate class, implying a fairly large number of people.[150] Factors indicative of publication would be placing the works on sale and a willingness to supply the work on demand.[151]

80. Here, JADEYE was not issued to the public. JADEYE was only issued to a determinate class of two parties, SPT and AID.[152] Further, there was no sale or any intention to place JADEYE on sale by the Parties. Therefore, JADEYE was not published in Myanmar.

C. Yamashita was not a resident of Myanmar when JADEYE was made

81. The term "resident" can be interpreted in two ways. First, it could mean physical presence in the country at a certain point in time ("**First Resident Interpretation**").[153] Secondly, it could mean one's "settled or usual abode"[154] of a permanent nature[155] in the country ("**Second Resident Interpretation**"). The term must also be interpreted according to the context in which it occurs.[156]

82. Here, the Second Resident Interpretation should be adopted (**1**) and Yamashita does not fulfil the Second Resident Interpretation (**2**).

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[149] Myanmar Copyright Act, *supra* n 140, First Schedule, s 1(3).
[150] *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 at [31].
[151] *Francis, Day & Hunter v Feldman & Co* [1914] 2 Ch 728 at 731.
[152] Moot Problem at [22]-[23].
[153] *Adoption Application (No 52 of 1951)* [1951] Ch 16 ("*Adoption Application*") at 24.
[154] *Levene v Commissioners of Inland Revenue* [1928] AC 217 ("*Levene*") at 222.
[155] *Capt R.B. D'vaz v Mrs Celine D'vaz* [1947] RangLR 292 at 294.
[156] *D.D. Grover v A.C. Koonda Controller of Rent Mandalay* [1955] BLR 54 at 57.

(1) The Second Resident Interpretation should be adopted

83. In the context of the Myanmar Copyright Act, the Second Resident Interpretation should be adopted. The Second Resident Interpretation has often been favoured by the courts.[157] This is because the First Resident Interpretation could result in an arbitrary situation where persons who are only temporarily within the jurisdiction of the statute are classified as residents whilst persons who mainly reside within but were temporarily outside of the said jurisdiction at the relevant time would not.[158]

84. The arbitrariness that results from the First Resident Interpretation is especially detrimental in the context of the Myanmar Copyright Act. The purpose of copyright law is to encourage the making of works for the benefit of society.[159] Should physical presence suffice, foreign companies could easily attain copyright protection in Myanmar. This would result in a monopoly on copyrights, inhibiting the idea generation process locally and hindering the development of works in Myanmar, contrary to the purpose of copyright law. Therefore, the term "resident" ought to be interpreted according to the Second Resident Interpretation.

(2) Yamashita does not fulfil the Second Resident Interpretation of "resident"

85. In ascertaining whether one has a "settled or usual" abode of a permanent nature in the country, several factors are indicative:

    a. the purpose of the stay in the country;[160] and

    b. the nature of accommodation in the country.[161]

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[157] *Levene*, *supra* n 154, at 222-223; *Adoption Application*, *supra* n 153, at 25.
[158] *Adoption Application*, *supra* n 153, at 24.
[159] *Low v Routledge* [1868] LR 3 HL 100 at 108.
[160] *Levene*, *supra* n 154, at 224.

86. Here, Yamashita's presence in Myanmar was solely due to his work.[162] The accommodation provided was also in connection to his work in Myanmar for AID.[163] Upon resigning from AID, Yamashita did not stay on in Myanmar but went back to Japan.[164] The facts indicate the only connection Yamashita had with Myanmar was his work with AID, which was temporary. Therefore, his "settled or usual" abode is not that of Myanmar and Yamashita is not considered a resident of Myanmar under the Myanmar Copyright Act.

87. Accordingly, JADEYE is not protected by a copyright in Myanmar.

VI. EVEN IF JADEYE WAS PROTECTED UNDER THE MYANMAR COPYRIGHT ACT, SPT OWNS THE COPYRIGHT IN EQUITY

88. SPT owns the JADEYE copyright in equity as Yamashita owned the JADEYE copyright (**A**), and subsequently assigned the JADEYE copyright to the Parties jointly in equity (**B**).

A. Yamashita owned the JADEYE copyright

89. The Myanmar Copyright Act provides that the initial owner of a copyright in works would be the author.[165] The copyright would only belong to the author's employer if the author made the work in the course of his employment.[166] For a work to be made

[161] *Levene*, *supra* n 154, at 224.
[162] Moot Problem at [16]; Additional Clarifications, Question 17.
[163] Moot Problem at [18].
[164] *Id* at [25].
[165] Myanmar Copyright Act, *supra* n 140, First Schedule, s 5(1).
[166] *Id*, s 5(1)(b).

in the course of employment, the development of the work must be part of the employee's duties to the employer.[167]

90. Here, the development of JADEYE was not part of Yamashita's duties at AID. Yamashita was a finance executive while JADEYE was an operations management software unrelated to Yamashita's financial role in AID.[168] Further, AID did not task Yamashita with the development of AID. Yamashita took the initiative to develop JADEYE on his own accord.[169] Asamura only knew of JADEYE when Yamashita informed him upon its completion.[170]

91. Therefore, JADEYE was not made in the course of Yamashita's employment with AID, and Yamashita owned the copyright to JADEYE.

B. Yamashita assigned the JADEYE copyright to the Parties jointly in equity

92. The Myanmar Copyright Act requires a legal assignment of a copyright to be in writing.[171] However, where the requirements of a legal assignment are not met, equitable ownership may be vested in the assignee when the assignor intends to assign the copyright, if supported by consideration.[172] Consideration for an equitable assignment of a copyright need not be executed.[173]

93. Here, Yamashita intended to transfer the JADEYE copyright to the Parties. Yamashita willingly installed JADEYE onto all the computers and equipment used by the

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[167] *Noah v Shuba* [1991] FSR 14 at 25-26; *Byrne v Statist Co.* [1914] 1 KB 622 at 624 and 627; *The Burma Oil Co., Ltd v Ma Hmwe Yin* (1935) I.L.R., Ran 553 at 560.
[168] Moot Problem at [21]-[22].
[169] Additional Clarifications, Question 26.
[170] Moot Problem at [21].
[171] Myanmar Copyright Act, *supra* n 140, First Schedule, s 5(2).
[172] Kevin Garnett *et al*, *Copinger and Skone James on Copyright* (2011, Sweet & Maxwell, 16th Ed) at [5-177] and [5-184].
[173] *Western Front Ltd v Vestron Inc* [1986] FSR 66 at 77-78.

Venture[174] and even handed JADEYE's source code over to AID upon his resignation from AID.[175] These actions evidences Yamashita's intention to transfer the JADEYE copyright, as he did not view JADEYE to be his own. Yamashita further identified the Parties as the beneficiaries of the JADEYE copyright, by stating that JADEYE was "for the benefit of all of us", referring to both SPT and AID.[176] Sufficient consideration was provided by Kyaw's offer of USD 18,000 to Yamashita.[177] Therefore, Yamashita assigned the JADEYE copyright to the Parties and the Parties jointly own the JADEYE copyright in equity.

94. Accordingly, SPT owns the JADEYE copyright in equity and is entitled to reverse engineer JADEYE.

VII. EVEN IF AID OWNS THE JADEYE COPYRIGHT, SPT DID NOT INFRINGE ON THE COPYRIGHT

95. SPT stated that it would not carry out any acts of reverse engineering pending the completion of this arbitration.[178] Additionally, it is possible for reverse engineering to take place without infringing a copyright.[179] Without knowing what form of reverse engineering SPT would carry out, if at all, it is not possible to conclude presently that SPT would infringe on the JADEYE copyright by reverse engineering JADEYE.

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[174] Moot Problem at [23]; Additional Clarifications, Question 32.
[175] Moot Problem at [25].
[176] *Id* at [24].
[177] *Id* at [24].
[178] Additional Clarifications, Question 37.
[179] David Bainbridge, *Software Copyright Law* (Butterworths, 1999, 4th Ed) at 159-160.

PRAYER FOR RELIEF

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

1. The Agreement between SPT and AID was validly terminated,

2. SPT is the legal owner of the jade-mining machinery and equipment, and

3. JADEYE is not protected by a copyright, or

4. Even if JADEYE is protected by a copyright, SPT and AID jointly owned the copyright in equity.