

T1710-R

THE 12<sup>th</sup> LAW ASIA INTERNATIONAL MOOT COURT COMPETITION

AT THE JAPAN REGIONAL CENTRE FOR ARBITRATION

2017

CASE CONCERNING PARTNERSHIP AGREEMENT

BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT CO., LTD.

(CLAIMANT)

AND

SHWE PWINT THONE CO., LTD.

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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## **STATEMENT OF JURI**

### **SDICTION**

The parties, Asamura International Development Co., Ltd. (“AID”) and Shwe Pwint Thone Co., Ltd (“SPT”), 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**

- I. The validity of the termination of the agreement by SPT.
- II. The ownership of the jade-mining machinery and equipment.
- III. Subsistence and ownership of rights in the JADEYE software.

## **STATEMENT OF FACTS**

1. Asamura International Development Co., Ltd. (“CLAIMANT”) is founded in 1958  
  
in Tokyo, Japan.
  
2. Shwe Pwint Thone Co., Ltd. (“RESPONDENT”) is a local Myanmar Company.
  
3. The junta gifted SPT 80 acres of land in Hpakant, where the piece of land was  
  
believed to contain a huge amount of jade deposits.
  
4. Dr. Yugi Asamura (“Dr. Asamura”) who is the leader of CLAIMANT and U Thein  
  
Kyaw (“Mr. Kyaw”) who is the owner of SPT decided to enter into a partnership of  
  
the jade mining business in Myanmar on 9 September 2008.
  
5. Both parties concluded the agreement (“the Agreement”) as the partnership

agreement of the venture business.

6. Under Article 4 of the Agreement, CLAIMANT will buy and provide all equipment required, and provide technical expertise for the term of the agreement. CLAIMANT sourced for second hand machinery and equipment from Japan, purchased them, and reconditioned them.
  
7. RESPONDENT imported the jade-mining machinery and equipment into Myanmar in January 2009.
  
8. Under Article 6 of the Agreement, the jade mining business is divided into four parts: extract the jade, cutting the jade, process the jade, and then sell the jade. Based on both sides' expertise, the control of the activities will be split. For extracting and cutting CLAIMANT will take charge and give the direction and instructions. For processing and selling, RESPONDENT will play the main role.

9. Following the Agreement, CLAIMANT's employees operated some of the equipment, took charge of geological surveys and strategic prospecting, while imparting technical knowledge to RESPONDENT's employees and students.
  
10. Under Article 3 of the Agreement, RESPONDENT is in charge of obtaining and settling all the permits and requirements to do the jade-mining business and all related matters with the government of Myanmar.
  
11. RESPONDENT obtained the necessary jade mining and equipment permit from the government to ensure the smooth flow of works at the jade field. The granted permit was due to expire on 31 March 2019.
  
12. Joe Yamashita ("Mr. Yamashita") who was one of CLAIMANT's finance executives created the JADEYE software on 11 April 2012.
  
13. When the JADEYE software operated, Mr. Kyaw pleased its result.

14. Joe Yamashita declined USD 18,000 in cash from Mr. Yamashita and he said that JADEYE was “for the benefit of all of us”.
  
15. On 4 January 2013, Mr. Yamashita resigned from AID. He handed the source code of the JADEYE software to Head of Finance of AID in Tokyo on his last day.
  
16. Dr. Yugi Asamura and Dr. Fiona Lum (“Dr. Fiona”) who is a wife of Dr. Asamura were chosen as “Asia’s Top 20 Power Couples” on the Asian Influencers Magazine for its 2016 edition.
  
17. Dr. Fiona answered about the Rohingyas, “They should not be deprived of their basic human rights. We will continue to champion for their rights”.
  
18. On September 2016, many of SPT’s employees and students were very upset by Dr. Fiona’s statement as it implied that the government was involved in ethnic

cleansing. 102 of SPT's workers went on strike for seven days, requesting Dr. Fiona

Lum and Dr. Yugi Asamura to issue an apology and to retract the statement.

19. Yuri Hashimoto ("Ms. Hashimoto"), decided to engage Dr. Asamura's assistance to source for jades from Hpakant, as her company, Hashimoto Co., Ltd ("HCL") had won a contract to produce official jadeite souvenirs and merchandise for the Tokyo Olympics in 2020.

20. Before CLAIMANT concluded the contract with HCL on 1 November 2016, Dr. Asamura discussed with Mr. Kyaw, who then told him to proceed with the engagement via CLAIMANT and not let go of such a business opportunity.

21. U Soe Myint ("Ms. Myint") who is one of Ms. Kyaw closest confidantes in CLAIMANT, strongly recommended to end the partnership with CLAIMANT to save RESPONDENT.

22. On 10 January 2017, Dr. Kyaw made up his mind to end the partnership between

CLAIMANT and RESPONDENT.

23. Dr. Asamura protested that RESPONDENT had no right to terminate the agreement

and that even in the event of a termination, RESPONDENT has to compensate

CLAIMANT more than just on the relocation costs.

24. Ms. Kyaw said that RESONDENT held the title to all machinery and equipment

since they were the ones who imported them into Myanmar, and have obtained the

government permits required to operate them. Moreover, RESPONDENT was

recorded as the owner and operator of them on those permits.

25. Mr. Kyaw informed that RESPONDENT will reverse engineer or create their own

version of JADEYE.



cannot say anything harmful to the national interest of Myanmar. Dr. Fiona Lum, who is a director of CLAIMANT made a statement criticizing the policy of Myanmar. Her statement harmed the national interest of Myanmar and constituted the breach of Article 11 of the Agreement. Thus, RESPONDENT is entitled to terminate the Agreement and the termination of the Agreement by DEFENDANT is valid.

3. Secondly, under Article 43 of the Partnership Act, RESPONDENT may terminate the Agreement at any time if the partnership is at will. In this case, the Agreement is the partnership at will according to the interpretation of Article 8 of the Agreement if a party pays compensation. RESPONDENT has said it would pay all relocation costs for CLAIMANT's employees in Myanmar as the compensation. Therefore, RESPONDENT is entitled to terminate the Agreement and the termination by the RESPONDENT is valid.

4. Lastly, under the Article 42 (b) of the Partnership Act, RESPONDENT is entitled to

terminate the Agreement if the Agreement is constituted to carry out a project, and it is completed. In this case, the project is to develop jade-business. The jade-business is completed because it has been making a successful average net. Therefore, it is clear that the purpose of the Agreement is completed, and the termination of the Agreement by RESPONDENT is valid.

**Issue (ii): The ownership of the jade-mining machinery and equipment**

5. The jade-mining machinery and equipment shall be owned by RESPONDENT.

Under Article 3 of the Agreement, SPT obtained the necessary jade mining and equipment permit from the government to ensure the smooth flow of works at the jade field. Although both parties of the joint venture understood that RESPONDENT was recorded as the owner of the jade-mining machinery and equipment, CLAIMANT made no demur of the ownership of them. Therefore, RESPONDENT owns that the jade-mining machinery and equipment.

**Issue (iii): Subsistence and ownership of rights in the JADEYE software**

6. The ownership of right in the JADEYE software is also owned by RESPONDENT and RESPONDENT is allowed to reverse engineer or create its own version of the JADEYE software. This is because the JADEYE software has been invented for the joint venture business and both parties have been using it after its invention. Also, the inventor of the JADEYE software has stated that it is for the benefit of all of us, indicating his intention that it was invented for both parties.

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## Pleadings

### Issue (i): The validity of the termination of the agreement by SPT

#### **Termination of the Agreement by RESPONDENT is Valid**

##### **Summary of RESPONDENT's claim**

1. RESPONDENT respectfully requests the Tribunal to find that the termination of the partnership agreement, which was entered by CLAIMANT and RESPONDENT on 9 September 2008, by RESPONDENT is valid.

##### **A. Governing Law of the Agreement in Myanmar laws**

2. As stipulated in Article 10 of the Agreement, CLAIMANT and RESPONDENT have agreed that the governing law of the Agreement is the law of the Golden Land of Myanmar. Therefore, the validity of the termination of the Agreement should be determined under the laws of Myanmar. As explained in the following paragraphs, in Myanmar, the Partnership Act 1932 (the 'Partnership Act') and the Contract Act (the 'Contract Act') contain provisions concerning conditions under which a partnership agreement may be terminated.

### **A-1. Conditions for Termination under the Contract Act Shall be Applied**

3. According to Article 39 of the Contract Act; ‘When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance’. Therefore, under the Contract Act, if there is a breach of contract by one party, the other party may terminate the contract as a matter of remedy.

### **A-2. Conditions of A Termination Under the Partnership Act Shall be Applied**

#### **The Partnership Act is Applied to the Issue**

4. The Partnership Act is applied to this case because the Agreement is considered as the partnership to which the Partnership Act shall be applied. The Article 4 of the Partnership Act stipulates that “Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into the partnership with one another are called individually “partners” and collectively “a firm”.

5. In this case, Article 4 of the Agreement stipulates, 'We decide to become business partners for the jade business in Hpakant, Kachin state'. Article 7 of the Agreement stipulates, 'All the profits from the jade business will be shared: 65% goes to SPT and 35% goes to AID'. These articles of the Agreement clearly show that CLAIMANT and RESPONDENT have agreed to share the profit by the jade business, and have entered into a partnership agreement as defined in the Partnership Act. Therefore, Partnership Act shall be applied to solve this issue.

**A-2. (1) Termination of a partnership agreement under the Partnership Act**

6. Article 43 of the Partnership Act stipulates, '(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 to dissolve the firm'. As explained in detail in paragraph 18, the Agreement is at will and the Agreement may be terminated under this Article 43.

7. In addition, Article 42 of the Partnership Act stipulates, ‘Subject to contract between the partners, a firm is dissolved (a) if constituted for a fixed term, by the expiry of that term; (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof; (c) by the death of a partner; and (d) by the adjudication of a partner as an insolvent.’ First, it should be pointed out that there is no provision regarding the termination of the Agreement. Also, it is clear that the condition of (c) and (d) is not applied to this case. As proven below, (a) is also not applied, because there is no fixed term of the Agreement, but, the termination by RESPONDENT.

8. To conclude, under the articles of the Partnership Act the Contract Act, termination of the Agreement is possible if any of the following conditions are met; (I) if a party to contract has refused or failed to perform or there is a breach of the Agreement, (II) if the partnership is at will and a party gives notice of its intention to terminate the Agreement, or (III) if a partnership constituted to carry out one or more adventures or undertakings, and the adventures or undertakings are completed. In

this case, as explained below, all three conditions are satisfied. Therefore, the termination of the Agreement by RESPONDENT is valid.

**( I ) CLAIMANT Has Breached the Article 11 of the Agreement**

9. Under Article 39 of the Contract Act, if a party had a breach of the Agreement, the other party is entitled to terminate the Agreement. Article 11 of the Agreement stipulates; ‘AID cannot do or say anything harmful to the national interest and solidarity of Myanmar, and vice versa.’ However, with the statement of Dr. Fiona Lum during the interview with the Asian Influencers Magazine, CLAIMANT breached its obligation under Article 11. Therefore, the termination of the Agreement by RESPONDENT is valid.

**A. Dr. Fiona Lum’s Statement is A Breach of the Article 11 of the Agreement**

10. Dr. Yugi Asamura and his wife, Dr. Fiona Lum had an interview with the Asian Influencers Magazine for its 2016 edition. And during this interview, Dr. Fiona Lum and Dr. Yugi Asamura were asked about their views on the plea of the Rohingya minority in the Rakhine state, given their existing business involvement

in Myanmar. And on behalf of Dr. Yugi Asamura, Dr. Fiona Lum had stated, “Everyone must work together to end the persecution of Rohingya people, 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”. (¶28 of Moot Problem)

11. Her statement is clearly a breach of Article 11 of the Agreement because the statement is made on behalf of AID and it criticizes Myanmar government’s policy in such influential magazine.

**B. Dr. Fiona Lum’s Statement was Made on Behalf of CLAIMANT**

12. Dr. Fiona Lum did not make this statement as a private person, but as a representative of CLAIMANT, since Dr. Lum is a non-executive director of CLAIMANT, she was interviewed because of her business involvement in Myanmar, that is, the jade-mining business by the partnership. Also, the head of

CLAIMANT. Dr. Asamura didn't show any objection to the statement by Dr. Lum and impliedly endorsed his wife's statement.

13. This statement expressly mentioned the name of Ms. Aung San Suu Kyi, the Minister of Foreign Affairs and the Minister of President Office of Myanmar and criticize her work. This statement is harmful to the national interest of Myanmar, and lots of employees and students were very upset by her statement.

14. From the facts shown above, Dr. Fiona Lum's statement constitutes a breach of Article 11 of the Agreement. Thus, RESPONDENT is entitled to terminate the Agreement under the Article 43 of the Contract Act and the termination of the Agreement by DEFENDANT is valid.

**(II) The Partnership is At Will**

15. The partnership between RESPONDENT and CLAIMANT is at will, in other words, this is a partnership that may be terminated by any partner at any time. First of all, this Agreement does not specify any fixed term or any condition to be

satisfied to terminate the Agreement. Article 8 of the Agreement stipulates ‘Our partnership and brotherhood will be for the long term. The party causing the partnership to end must pay compensation’. However, the word ‘long term’ is very vague and this article does not specify any fixed term, and at most, it shows parties’ expectation for longer relationship. In addition, the second sentence of Article 8 says; either party may terminate the Agreement by paying compensation to the other party. RESPONDENT agrees that it would pay all relocation costs for CLAIMANT’s employees currently seconded to Myanmar. (¶41 of Moot Problem)

16. From the facts above, it is clear that the partnership is at will. RESPONDENT informed its intention to terminate the Agreement to CLAIMANT on 10 January 2017 and to pay compensation for all relocation costs. Therefore, the termination of the Agreement by RESPONDENT is valid.

### **(III) The Adventure of the Partnership Had Completed**

17. Under the Article 42 (b) of the Partnership Act, if a partnership is constituted to carry out one or more project, and the project is completed, the partnership may be

terminated. The partnership between SPT and AID is to develop the jade business in Myanmar. And this purpose had fulfilled and already completed.

### **Purpose of the Partnership and its Completeness**

18. In this case, the partnership was made to develop the jade-mining business in

Myanmar. The Article 2 of the Agreement stipulates; ‘We decide to become business partners for the jade business in Hpakant, Kachin state.’.

19. The above-mentioned purpose to develop the jade-mining business in Myanmar has been fulfilled. The jade business was largely successful, and it made an average net profit of USD 7.5 million a year. (¶27) U Soe Myint, who is U Thein Kyaw’s the closest confidantes in RESPONDENT, remarked; “We have all the equipment and now our people have the skills to handle things on our own”.(¶39) These facts show that the jade-mining business in Myanmar has achieved a great success that the Agreement has achieved the purpose.

20. Therefore, the termination of the Agreement by RESPONDENT is valid under the Article 42 (b) of the Partnership Act.

**Issue (ii): The ownership of the jade-mining machinery and equipment**

**The Ownership of the Jade-Mining Machinery and Equipment is Owned by  
RESPONDENT**

**Summary of RESPONDENT' claim**

21. The jade-mining machinery and equipment are owned by RESPONDENT. This is because the purpose of the jade-mining machinery and equipment was to operate the jade mining venture business in Myanmar and RESPONDENT has taken the all required actions to be an owner of the machinery and equipment as proved in the following paragraphs.

22. CLAIMANT considered that RESPONDENT was the owner of the jade-mining machinery and equipment

23. First of all, Article 4 of the Agreement stipulates, ‘AID will buy and provide all equipment required, and provide technical expertise for the term of the agreement’.

According to this article, CLAIMANT purchased the jade-mining machinery and equipment and reconditioned in Japan and provided to RESPONDENT for the term of the agreement. Though Article 4 does not specify to whom the machinery and equipment are provided, it is natural and reasonable to consider that they are provided to RESPONDENT, because they were sent to the site of RESPONDENT in Myanmar.

24. In fact, when CLAIMANT shipped the machinery and equipment to Myanmar, it named RESPONDENT as a consignee for the machinery and equipment on the Bill of Lading (Question 25 of Additional Clarifications to the Moot Problem). This fact shows that CLAIMANT had the intention that the ownership of the jade-machinery and equipment were transferred to RESPONDENT when the machinery and equipment are imported into Myanmar.

25. RESPONDENT is recorded as an owner when necessary governmental permission is obtained. Also, it should be pointed out that the jade-mining machinery and equipment has been registered in the name of RESPONDENT. Article 3 of the Agreement stipulates, ‘SPT is in charge of obtaining and settling all the permits and requirements to do the jade-mining business and all related matters with the government of Myanmar’. Following this Article, ‘SPT obtained the necessary jade mining and equipment permit from the government to ensure the smooth flow of works at the jade field’. (¶18) RESPONDENT performed the obligation to obtain the permits from the Myanmar government and the machinery and equipment are duly recorded in the name of RESPONDENT.

26. Importantly, CLAIMANT was aware that RESPONDENT was recorded as the owner and operator of the jade-mining machinery and equipment on the permits required to operate them (Question 14 of Clarification to the Moot Problem).

However, it did not show any doubt or objection to the ownership of

RESPONDENT.

**Issue (iii): Subsistence and ownership of rights in the JADEYE software**

**The Ownership Right in the JADEYE Software is RESPONDENT**

**Summary of RESPONDENT's claim**

27. RESPONDENT is one of the owners of the rights in the JADEYE software and is allowed to reverse engineer or create RESPONDENT's own version of JADEYE.

This is because the JADEYE software has been made for the joint venture business and both parties have been using that software.

**The background of the JADEYE software**

28. Joe Yamashita, who made the JADEYE software, was one of CLAIMANT's finance executives. While he has been seconded for the jade-miming business in Myanmar, he made the JADEYE software. According to Question 15 of Additional

Clarifications to the Moot Problem, ‘Joe Yamashita mainly created the JADEYE software in Myanmar’.

**The JADEYE software was contributed to enhancing the exploration of the jade**

29. This software has increased the efficiency of the jade exploration of the joint venture business. The JADEYE software will allow the user to test the quality and viability of the jade at 99% accuracy. Also, the JADEYE software can expedite assessment work and assist the determination of scalability and economic value of the site. (¶22) It means that JADEYE was invented to contribute the partnership business as a whole and was created as a part of the joint work by RESPONDENT and CLAIMANT

**The JADEYE software is “for the benefit of all of us”**

30. In fact, when U Thein Kyaw presented Joe Yamashita with USD 18,000 in cash, Mr. Yamashita declined it and said that JADEYE was “for the benefit of all of us”, and expressed his intention that the JADEYE software was invented for both parties.

**RESPONDENT is allowed to reverse engineer or create the own version of JADEYE**

31. As stated above, the JADEYE software was made for the joint business of CLAIMANT and RESPONDENT and was not invented as a part of the CLAIMANT’s work by Mr. Yamashita who worked for the joint project. Therefore, the JADEYE software is jointly owned by RESPONDENT and CLAIMANT. As one of the owners of the JADEYE, RESPONDENT is allowed to reverse engineer or create the own version of JADEYE software.