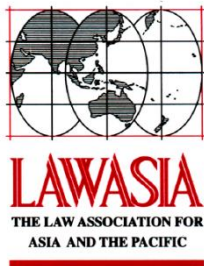




12th LAWASIA International Moot

MOOT PROBLEM 2017



Organiser of the LAWASIA International Moot Competition

MOOT PROBLEM

THE BACKGROUND

1. Asamura International Development Co., Ltd. (AID) was founded in 1958 in Tokyo, Japan by Atsuko Asamura.
2. AID is a private international development company 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.
3. Over the years, AID has been involved in various rehabilitation and rebuilding projects across the world. The company was particularly lauded for its work in Somalia and Rwanda during the 1990s' conflicts, and in Sumatra after the 2004 Indian Ocean tsunami.
4. Upon the untimely death of Atsuko Asamura in 2005, the leadership of AID was passed on to his only son, Dr. Yugi Asamura. Apart from managing AID, Dr. Yugi Asamura is also a professor of urban and environmental engineering at the University of Tokyo.
5. Dr. Yugi Asamura is married to Dr. Fiona Lum Ka Ching, the youngest daughter of the Hong Kong tycoon, Lum Ho Wai. The couple met when Dr. Fiona Lum was a visiting professor of economics at the University of Tokyo. Since their union in 2000, Dr. Fiona Lum left her life in academia, and had since dedicated her life to philanthropic pursuits. She also became the President of Second Life, a regional organization which champions for human rights. Through her association with some of Asia's wealthiest families and socialites, Dr. Fiona Lum developed an interest in the collection of precious gems, especially rubies and jades.

6. In May 2008, Cyclone Nargis hit Myanmar, destroying thousands of buildings and taking away over a million lives. By recommendation of the Japan International Cooperation Agency, AID participated in rebuilding the town of Labutta in Ayeyarwady, funded by the Japanese government.
7. U Thein Kyaw, the owner of Shwe Pwint Thone Co., Ltd. (SPT), a local Myanmar company, was deeply moved by AID's efforts in Labutta. Ordained as a monk at the age of 12, U Thein Kyaw left the monastic order on his 30th birthday and started SPT with the aim of providing secular and vocational training to students from underprivileged families, offering them an alternative pathway to monastic schools.
8. SPT runs teashops, jade carving and polishing studios, and training centres in Mandalay and Yangon. Students work at the teashops and jade studios from 6am – 11am daily, and attend classes at the training centres from 12pm – 6pm on weekdays. 50% of the revenues from the teashops and the jade carving and polishing studios are used to fund the training centres.

THE FACTS

9. In recognition of his contribution to the community, the junta gifted 80 acres of land in Hpakant, located in the Kachin State, to U Thein Kyaw in 2007. The piece of land was believed to contain a huge amount of jade deposits.
10. SPT's main objectives were to develop new skill sets for its students, to increase the revenues of SPT so that at least 70% of such revenues can be channelled back to the training centres, while ensuring sustainable and safe extraction of jade on the piece of land.
11. Apart from that, U Thein Kyaw also hoped to create jobs in Hpakant for the local community, and to start a new training centre there. Across the years, numerous deadly landslides have happened in Hpakant, caused by man-made slag heaps left by irresponsible jade-mining companies.
12. While familiar with jade carving and polishing techniques, U Thein Kyaw had zero experience in jade exploration and production. He decided to contact Dr. Yugi Asamura to discuss the prospects of a partnership between SPT and AID.

13. Dr. Yugi Asamura was very impressed by U Thein Kyaw's aspirations. He too, wanted to expand the influence and impact of AID's work to the Kachin state. The name Kachin also reminded him of his wife's Chinese first name, Ka Ching, and he believed that this new jadeite venture would be the perfect dedication to her.
14. After three rounds of discussion, U Thein Kyaw and Dr. Yugi Asamura decided to enter into a partnership over a hearty mohinga breakfast in one of SPT's teashops in Yangon on 9 September 2008. Delighted, Dr. Yugi Asamura suggested that he would have his Japanese lawyers draw up an investment agreement for U Thein Kyaw's review. U Thein Kyaw laughed at the suggestion, and said "This is Myanmar, my brother. We trust each other, let's not get the lawyers involved." Both men shook hands and said cheers.
15. Dr. Yugi Asamura was nonetheless unsettled by U Thein Kyaw's dismissal of his suggestion for a proper contract to be executed. Without wanting to offend his new business partner, he decided not to engage a lawyer, but insisted that both parties sign an agreement. Albeit reluctant, U Thein Kyaw eventually agreed. That afternoon, both men sat down with their pens and paper and drafted their own contract. See Annexure 1.
16. Under the arrangement, AID sourced for second hand machinery and equipment from Japan, purchased them, and reconditioned them. This included, amongst others, dump trucks, excavators, and drilling machines. Such machinery and equipment were then imported into Myanmar by SPT in January 2009, where the jade extraction and production business officially began. 25 of AID's employees were also placed in SPT's base and at the jade fields in Hpakant on secondment from Japan. AID's employees operated some of the equipment, took charge of geological surveys and strategic prospecting, while imparting technical knowledge to SPT's employees and students. SPT's employees and students were trained on how to operate and maintain the jade-mining equipment and machinery. AID also developed and implemented a set of health, safety and environment (HSE) standards.
17. As Dr. Yugi Asamura started to feel the burden of the operational costs borne by AID, he suggested for both AID and SPT to make capital contributions to the partnership so that further operational costs will be derived from this fund, until at least the end of the

first financial year of the partnership. In March 2009, AID and SPT injected capital contributions of USD 1.5 million and USD 2.5 million respectively. The funds were held in SPT's bank account.

18. 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. The granted permit was due to expire on 31 March 2019. 50 students were assigned to work at the Hpakant base, and 250 new workers were also hired.
19. The jadeite venture involves four main business activities:
 - (i) exploration and extraction;
 - (ii) breaking and cutting;
 - (iii) processing and production;
 - (iv) distribution and sales.
20. Exploration and extraction, and breaking and cutting are conducted at the Hpakant jade mines. The processing and production of jades are done at existing studios of SPT, where jewellery such as jade pendants, bangles, necklaces, cabochons, and other jade carvings are made. These products are then sold to retailers all around Myanmar. Nonetheless, the majority of the commercial quality jades are sold to major jade production companies in Myanmar right after they leave the Hpakant jade mines. Thrice a year, shipments are also made to Japan by Dr. Fiona Lum's in her personal capacity, where friends and contacts will purchase these rough jades from her.
21. On 11 April 2012, one of AID's finance executives, Joe Yamashita, informed Dr. Yugi Asamura that he has been working on the development of a process optimisation and operations management software, and that he was now confident that the software was ready to be used.
22. According to Joe Yamashita, the software, which he named "JADEYE", once installed on the computer systems and mining equipment, will allow the user to test the quality and viability of the jade at 99% accuracy. Through its statistical and optimisation algorithms,

JADEYE can expedite assessment work, also assisting in the determination of scalability and economic value of the site.

23. Trial tests yielded positive results, and Dr. Yugi Asamura immediately ordered the software to be installed in all the computers and equipment used on the sites.
24. U Thein Kyaw, pleased by JADEYE, presented Joe Yamashita with USD 18,000 in cash. Joe Yamashita declined the cash, and said that JADEYE was “for the benefit of all of us”.
25. Joe Yamashita resigned from AID on 4 January 2013. During the exit clearance process, the source code of JADEYE was saved in a hard disk drive together with other documents and handed to Head of Finance of AID in Tokyo on his last day.
26. The partnership was largely successful, and the jade business made an average net profit of USD 7.5 million a year.
27. During an interview with the Asian Influencers Magazine for its 2016 edition of “Asia’s Top 20 Power Couples”, Dr. Yugi Asamura and Dr. Fiona Lum were asked about their views on the plea of the Rohingya minority in the Rakhine state, given their existing business involvement in Myanmar and Dr. Fiona’s position in Second Life.
28. Dr. Fiona Lum answered 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.”
29. The interview which was published in September 2016 came to the attention of SPT. Many of SPT’s employees and students were very upset by Dr. Fiona Lum’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.
30. As the couple did not bow down to the protests and requests of SPT’s workers, U Thein Kyaw took it upon himself to coax the angry workers to resume their duties.
31. In October 2016, the United States lifted its trade sanctions against Myanmar. Notwithstanding the Myanmar government’s announcement in August 2016 that it

would not issue any new permits or renew any existing permits for jade mining and mining equipment until new legal reforms are implemented, the lifting of the sanctions has opened up new opportunities for the Myanmar jade trade.

32. In mid October 2016, Dr. Yugi Asamura was invited to speak at a conference held by the Japanese Association of Mineralogical Sciences, which had recently announced its selection of jade as the national stone of Japan.
33. One of the attendees, Yuri Hashimoto, decided to engage Dr. Yugi 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. It was also increasingly difficult for her to source for good quality jades, and the jade supply appeared to be at a low.
34. She did not want to work directly with SPT as Dr. Yugi Asamura did not hold any shares in the company, and her Board of Directors did not have a lot of confidence in the general business climate in Myanmar.
35. Dr. Yugi Asamura discussed this matter with U Thein Kyaw, who then told him to proceed with the engagement via AID and not let go of such a business opportunity. 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.
36. On 21 November 2016, U Thein Kyaw was approached by Patrick Green, a very successful American businessman, who expressed his interest in forming a new partnership with SPT in regard to the jade business.
37. As he had little experience in the jade trade, Green proposed a profit split of 85% for SPT, and 15% for his company, New Ventures Corporation. Green will provide a team of qualified English teachers from the United States to teach English at SPT's training centres. A New Ventures Foundation scholarship will also be granted to a deserving student at one of SPT's training centres every year to support his or her tertiary education in the United States.

38. U Thein Kyaw discussed Green's proposal with one of his closest confidantes in AID, U Soe Myint. U Soe Myint informed U Thein Kyaw that the morale of the employees and students are at an all time low, as they have lost respect for their Japanese counterparts.
39. U Soe Myint strongly recommended U Thein Kyaw to end the partnership with AID to save SPT, which he has single-handedly built over the years. "We have all the equipment and now our people have the skills to handle things on our own, we don't need that much control and involvement from a third party anymore. Yugi will understand this, he is a good man. Anyway our mining permit is going to end very soon and he needs to find new things to do. Maybe he and his wife can now concentrate fully on the Bengalis," said U Soe Myint.
40. On 10 January 2017, U Thein Kyaw made up his mind to end the partnership between AID and SPT. Both men met up in the Sarkies Bar at the Strand Hotel that evening, where Dr. Yugi Asamura was informed of U Thein Kyaw's decision to end the partnership.
41. U Thein Kyaw explained that his team is unable to continue working with AID as his workers and students were unable to look past the interview with the Asian Influencers. 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. U Thein Kyaw also offered to have SPT bear all relocation costs for AID's employees currently seconded to Myanmar.
42. Dr Yugi Asamura protested, saying that SPT had no right to terminate the agreement like that, and that even in the event of a termination, AID has to compensate SPT more than just on the relocation costs.
43. The men then argued over the ownership of the jade-mining machinery, equipment, and in particular the JADEYE software. U Thein Kyaw said that SPT held the title to all such machinery and equipment since they were the ones who imported them into Myanmar, and have obtained the government permits required to operate them. In any event, SPT was recorded as the owner and operator of these machineries and equipment on those permits.

44. Dr. Yugi Asamura refused to provide U Thein Kyaw with the source code to JADEYE, and U Thein Kyaw informed him that SPT will reverse engineer or create their own version of JADEYE.
45. As parties were not able to settle their differences, they sought to seek the advice of a mutual acquaintance, Farid Zakwan, a Yangon-based Malaysian lawyer whom both U Thein Kyaw and Dr. Yugi Asamura met at a business event once. Farid Zakwan recommended the parties to consider going for arbitration at the Kuala Lumpur Regional Centre for Arbitration in Malaysia.
46. Dr. Yugi Asamura expressed his wish to have the arbitration held in Tokyo – since the partnership agreement stipulated that Myanmar laws, which he is rather unfamiliar with, would apply, he felt that having the matter heard in Japan would confer upon him some sense of familiarity.
47. Parties eventually agreed to attend arbitration in Tokyo using the KLRCA i-Arbitration Rules.

THE ARBITRATION

48. The Parties agreed that the issues to be decided in the arbitration are as follows:
 - (i) The validity of the termination of the agreement by SPT;
 - (ii) The ownership of the jade-mining machinery and equipment; and
 - (iii) Subsistence and ownership of rights in the JADEYE software.
49. The determination of damages, if any, will be done in a separate hearing.
50. The arbitration has been fixed for hearing on the 18 – 21 September 2017.

Annexure 1

Partnership Agreement

We, Asamura International Development Co., Ltd. and Shwe Pwint Thone Co., Ltd. are in agreement of the following at Lucky Moon Tea Shop on 9 September 2006:

1. Dr. Yugi Asamura will represent Asamura International Development Co., Ltd., also known as AID, and U Thein Kyaw will represent Shwe Pwint Thone Co., Ltd., also known as SPT.
2. We decide to become business partners for the jade business in Hpakant, Kachin state. The land will continue to belong to U Thein Kyaw, the owner of SPT.
3. 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.
4. AID will buy and provide all equipment required, and provide technical expertise for the term of the agreement. AID will train the local people of Myanmar so that they can learn new skill sets and be independent.
5. It is the strong will of SPT that this partnership is to help the local Myanmar people, to improve their livelihoods, to help them to be competitive and compatible with the evolving world and economy. Both AID and SPT will always prioritize the employees and students.
6. Our 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 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.
7. All the profits from the jade business will be shared: 65% goes to SPT, and 35% goes to AID.
8. Our partnership and brotherhood will be for the long term. The party causing the partnership to end must pay compensation.

9. If there is any disagreement to this agreement in the future, as gentlemen of Japan and Myanmar, we will try to solve everything in a polite manner.
10. Everything will be in accordance with and interpreted under the law of the Golden Land of Myanmar.
11. To show respect towards the Golden Land, AID cannot do or say anything harmful to the national interest and solidarity of Myanmar, and vice versa.

Signed by U Thein Kyaw for SPT

[thumbprint]

U Thein Kyaw

Witnessed by U Thet Aung

[thumbprint]

U Thet Aung

Signed by Yugi Asamura for AID

[thumbprint]

Yugi Asamura

Witnessed by Daw Ye Ye Zin Hlaing

[thumbprint]

Daw Ye Ye Zin Hlaing