

**IN THE COURT OF APPEAL OF Malaysia  
(APPELLATE JURISDICTION)  
CIVIL APPEAL NO: W-02(NCC)-1287-2011**

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**BETWEEN**

**GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC**

**.. APPELLANT**

**AND**

- 1. THAI-LAO LIGNITE CO., LTD ("TLL"), A THAI COMPANY**
- 2. HONGSA LIGNITE CO., LTD ("HLL"), A LAO COMPANY**

**.. RESPONDENTS**

**(In the Matter of High Court of Malaya at Kuala Lumpur  
(Appellate and Special Powers Division)  
Originating Summons No. 24 NCC (ARB)-7-2010**

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**In the Matter of an Arbitration between Thai-Lao Lignite Thailand Co. Ltd. And Hongsa Lignite (Lao Pdr) Co. Ltd. And the Government of the Lao People's Democratic Republic**

**AND**

**In the Matter of the Arbitration Award dated 4.11.2009 and delivered on 4.11.2009**

**AND**

**In the Matter of Section 24 (2) of the Arbitration Act 1952**

**AND**

**In the Matter of Section 37(1), Section 37(1)(a)(iv)(v) and 37(1)(a)(3) of the Arbitration Act 2005 and Section 50 of the Arbitration Act 2005**

**AND**

**In the Matter of Orders 7, 28, and 92(4) of the Rules of the High Court 1980**

**Between**

**Government of the Lao People's Democratic Republic**

**.. Plaintiff**

**And**

- 1. Thai-Lao Lignite Co., Ltd ("TLL"), A Thai Company**
- 2. Hongsa Lignite Co., Ltd ("HLL"), A Lao Company**

**.. Defendants)**

**QUORUM:**        **RAMLY HJ ALI, JCA**  
                          **JEFFREY TAN KOK WHA, JCA**  
                          **ZAHARAH IBRAHIM, JCA**

**JUDGMENT OF THE COURT**

1. This is an appeal by the Appellant, the Government of Laos, against the decision of the Kuala Lumpur High Court dated 15 April 2011, refusing to grant the Appellant an extension of time to set aside an arbitral award outside the stipulated timeframe.
  
2. The Appellant and the Respondents were parties to an arbitration agreement which had Malaysia as its seat. The agreement was governed by the laws of the United States. The arbitral award was delivered on 4 November 2009. The Appellant sought to set aside the award pursuant to section 37 of the Arbitration Act 2005, in particular section 37(1)(a)(iv), on the ground that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; and section 37(1)(a)(v), on the ground

- that the award contained decision on matters beyond the scope of the submission to arbitration.
3. The Appellant filed an application at the Kuala Lumpur High Court to extend time to set aside the award and to set aside the arbitral award on 5 October 2010, 9 months after the expiry of the 90 days timeframe provided by section 37(4) of the Act. The High Court judge dismissed the application to extend the time and consequently, the entire application to set aside the arbitral award. Hence, the present appeal.
  4. The parties in the present proceedings are foreign entities. The Appellant is the Government of Laos; the 1<sup>st</sup> Respondent is a company incorporated in Thailand; and the 2<sup>nd</sup> Respondent is also a company incorporated in Thailand and 75% owned by the 1<sup>st</sup> Respondent and 25% by the Appellant.
  5. The 1<sup>st</sup> Respondent entered into a mining contract with the Appellant on 29 May 1992. Pursuant to the same, the 1<sup>st</sup> Respondent was granted a concession by the Appellant, to mine lignite over a defined area in Hongsa, which is on the Laos border with Thailand. The 2<sup>nd</sup> Respondent was then

- formed by the 1<sup>st</sup> Respondent and licensed by the Appellant to perform the lignite mining work in Laos. The mining contract was governed by the laws of Laos. Disputes under the said contract were to be referred not to arbitration but to the Laotian Board of Economic Conciliation or the Laotian Court or the International Economic Dispute Settlement Organisation.
6. The Appellant then executed a Project Development Agreement (“PDA”) with the 1<sup>st</sup> Respondent on 22 July 1994. Pursuant to the PDA, the Appellant granted the 1<sup>st</sup> Respondent a concession to build a power plant at Hongsa to produce electricity. The PDA was governed by New York law, and in the event of disputes, arbitration was the dispute resolution mechanism.
  7. The 1<sup>st</sup> Respondent but not the 2<sup>nd</sup> Respondent was a signatory to the PDA. Disputes arose when the 1<sup>st</sup> Respondent failed to move the power plant project forward for 10 years. The Appellant terminated the PDA and mining contract as conditions precedent in the contract were not satisfied.

8. The Respondents then commenced arbitration proceedings in Kuala Lumpur on 26 June 2007 challenging the termination. As agreed the law governing the arbitration is New York law and the seat of the arbitration was Kuala Lumpur. The arbitrators concluded that the Appellant had improperly and invalidly terminated the PDA by issuing a unilateral notice of termination and failed to follow the procedures required by Article 15.1 of the PDA in getting a prior approval of the arbitration panel constituted in accordance with Article 14 thereof. This, the tribunal held, was a requirement of the termination provision in the PDA. As a consequence, the Appellant was required to pay the Respondents a total sum of US\$56, 210,000.00 and costs of US\$1 million. The award was issued and delivered to the Appellant on 4 November 2009.
  
9. The Appellant applied to set aside the award on grounds, inter alia, that the arbitrators exceeded their jurisdiction by exercising jurisdiction over the Appellant's disputes with the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent under the mining contracts which are governed by law of Laos and in respect of

- which the arbitrators have no jurisdiction. Further, the arbitrators wrongly exercised jurisdiction over non parties to the arbitration agreement, i.e. the 2<sup>nd</sup> Respondent and awarded damages in their favour against the Appellants.
10. The application to set aside the award carried with it a prayer to extend time to set aside the award. That prayer was disallowed by the High Court and consequently the entire application to set aside the award was dismissed on that basis.
  11. The Appellant's application to set aside an arbitral award is made under section 37(4) of the Arbitration Act 2005, which provides that:

*"an application to set aside an award may not be made after expiry of ninety days from the date on which the party making the application had received the award"*.
  12. Reading the grounds of judgment (particularly paragraphs 13 – 14 at page 34 of the Appeal Record), the learned High Court judge seemed to recognize that the High Court had the jurisdiction to grant an extension of time to set aside an arbitral award but refused to exercise the same on the ground that the

- nine months delay was an inordinate delay and the grounds stated by the Appellant for the delay “*prima facie do not warrant the court to condone the delay*”. The learned High Court judge also agreed with the Appellant’s contention that section 37(4) of the Arbitration Act 2005 was directory and not mandatory, in a limited sense.
13. The learned High Court judge further held that “*the substantive merit of the application to set aside the award cannot be sine qua non to consider an application to condone delay relating to AA 2005 where parties have agreed to arbitration proceedings voluntarily – submitted to the jurisdiction – represented by counsels and have received the award from the tribunal, but failed to file the application within time*”.
14. On the issue of jurisdiction, this court is in agreement with the learned High Court judge, that the High Court has the jurisdiction to grant an extension of time to set aside an arbitral award, based on the wording of section 37(4) of the Arbitration Act 2005. The court has an unfettered discretion to grant an extension of time. The court may extend such period of time

- although the application is only made after the expiration of the said period. This is supported by item 8 of the schedule to Courts of Judicature Act 1964 which empowers the court to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefore is not made until after the expiration of the time prescribed. Order 3 Rule 5(1) and (2) of the Rules of the High Court 1980, also provides for the same power to the court.
15. Therefore, the only issue in the present appeal is whether in the circumstances of the case and in the exercise of the court's discretion an extension of time to set aside an arbitral award should be granted or not.
  16. In an application for extension of time of this nature, the court needs to consider the following factors:
    - (a) the length of the delay;
    - (b) the reason for the delay;
    - (c) the prospect of success; and
    - (d) the degree of prejudice to the Respondents if the applications is granted.



(See: **The Government of India v. Cairn Energy India Pty Ltd & Ors [2003] 1 MLJ 348**).

17. In **Thiruchelvasegaram a/l Manickavasegar v. Mahadevi a/p Nadchatiram [1998] 4 MLJ 297**, the Court of Appeal held:

*“Order 3 r 5(1) and (2) of the Rules of the High Court 1980 (‘the RHC’), the court has jurisdiction to extend time even if the application is made after the expiry period. The primary consideration ... is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.*

....

*‘... . Such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.’ (per Sir Nicolas Browne-Wilkin VC, in **Re Fokai Tea Holdings Ltd p [1993] 1 All ER 630 at p 637**).*”

(See also: **Finnegan v. Parkside Health Authority [1998] 1 All ER 595, the Court of Appeal UK**).

18. When considering an application for extension of time, the court has the widest measure of discretion and the court shall look

into all circumstances of the case and must recognize the overriding principle that justice must be done.

19. An application for extension of time can be made or prayed for in the same application seeking to set aside the award. The applicant need not file a separate application for that. This was made clear by the Court of Appeal in **Percon Corp Sdn Bhd v. Yap Choon Loy [1998] 3 MLJ 867**, where Siti Norma Yaakob JCA stated:

*“The learned trial judge had misdirected himself when he held that an application for extension of time had to be separately made and could not be prayed for in the same originating motion seeking to set aside the award (**Prodexport State Company for Foreign Trade v. ED & F Man Ltd [1972] 2 Lloyd’s Rep 375 – followed**)”.*

20. In the present case the Appellant is a foreign sovereign. This matter involves an award made against another foreign state, the Government of Laos in the sum of US\$56 million. The main complaint against the award is that it was made in excess of jurisdiction against the Government of Laos; one of the

contracts was not covered within the ambit of the agreement to arbitrate; and one of the parties was not a party to the agreement to arbitrate. The High Court's dismissal of the application to set aside the award on the basis that it was filed out of time is tantamount to requiring the Government of Laos to pay out sums in respect of an award which is in excess of jurisdiction. Refusing the extension of time was tantamount to shutting out the Government of Laos from challenging an award in respect of a national project in excess of jurisdiction in the only country competent to hear the application i.e. Malaysia, the country of the seat.

21. The Appellant in this case, is not an individual. It is a sovereign state. A government is impersonal machinery and decisions are taken at a slow pace. Implicit in the nature of governmental functioning is procedural delay incidental to the decision making process. The court must acknowledge that an individual may be quick in taking decision but a state machinery works through its officers; when the state is an applicant, various factors including the functioning of the government which is not

- individual but institutional, involving decision making process at various levels, have also to be taken into consideration. (See: **State of Haryana v. Chandra Mani & Others [1996] AIR SC 1623** and **Genuine Paints & Chemicals Co. v. Union of India 73 [1998] DLT 296, [1998] 2 (Raj) 206 (Del)**).
22. In the **Government of India v. Cairn Energy India Pty Ltd (supra)**, the applicant being a foreign state filed an application to set aside an arbitration award out of time. The Malaysian Court accepted that the delay by a foreign sovereign in filing the application was excusable. (The Court of Appeal overturned the High Court's decision on other grounds and the matter is pending in the Federal Court). The court accepted the fact that the foreign state did not intend to flout local laws; had filed an application for an extension of time; had good grounds to set aside the award and no prejudice was caused to the Respondent.
23. The Appellant averred on affidavit that the Respondents began worldwide proceedings to enforce the award in New York, France and London. The Appellant was put to the time costs

and effort of engaging counsel in each of such jurisdiction. It was only after the commencement of enforcement proceedings that the Appellant was advised by its legal advisers of the need to set aside the award in Malaysia and the applicable timeframes. The Appellant never intended to flout or ignore the provisions of the Malaysian Arbitration Act 2005 and had made an application to extend time as soon as it discovered it was out of time.

24. The Appellant should not be prejudiced by the fact that it was not conversant with local law requirements and did not receive adequate advice from its legal advisers to enable the application to set aside the award to be made within time in Malaysia. Where there is a failure by legal advisers to advice on timeframes, the party (the Appellant) should not be prejudiced (see: **Percon Corp Sdn Bhd v. Yap Choon Loy (supra)**). The delay was not deliberate and not on account of culpable negligence or on account of *mala fides*. (See: **Thomas v. Booty, Edwards & Partners [1964] MLJ 359** – where the Federal Court had acknowledged that delay cannot

- be regarded as a strong feature to deprive the applicant of his opportunity to be heard at the first instance).
25. One of the factors to be considered in an application of this nature is whether the applicant was acting reasonably in all the circumstances (See: **ASM Shipping Ltd of India v. TTMI Ltd of England (The Amer Energy) [2009] 1 Lloyd's Rep 293**).
  26. In the present case the Appellant had acted expediently to the application as soon as it was informed by its legal advisers about the applicable timeframes. The Appellant did not remain idle while the time limit lapsed. The Appellant had spent time fighting off applications to enforce the award by the Respondents in other parts of the world which are still pending. The Appellant filed an application for extension of time to set aside the arbitral award as soon as it was made aware that it had to set aside the award in Malaysia and that there were timeframes for compliance in this jurisdiction.
  27. In **Gold Coast Ltd v. Naval Gijon SA [2006] 2 Lloyd's Rep 400**, there was an application by Gold Coast for an extension of

time under section 79 of the Arbitration Act 1996 to enable them to make an application to correct an arbitration award under the slip rule. In that case the application was granted.

The court ruled that on the facts, the buyers (the applicants) would suffer substantial injustice if an extension of time were not granted. Justice Gloster said:

*“In my judgment it would be a substantial injustice to the buyer if the yard were to receive a windfall benefit and the buyer were to lose the opportunity of putting forward what appear to be strong arguments for the correction of the award to include interest in this amount.”*

28. The Respondents argued that they would suffer prejudice if the application for extension of time was granted in favour of the Appellant. On the other hand, the court is of the view that the Appellant would obviously suffer more prejudice if the application were to be refused. The prejudice which may be suffered by the Respondents (if any) as a result of the delay was not of sufficient weight to persuade the court not to exercise its discretion in circumstances where a substantial

- injustice would be caused to the Appellant if no extension were granted.
29. An extension of time ought to be allowed where there is a good arguable case (see: **Bulk Transport Corporation v. Sissy Steamship Co. Ltd [1979] 2 Lloyd's Rep 289**). In that case an extension of time was allowed as the arbitrator failed to begin the arbitration with the *prima facie* presumption and went on to proceed with the question of whether the wording of a particular clause was such as to rebut the *prima facie* presumption. The English Court allowed the extension of time but dismissed the application to set aside the award on the ground that the decision of the arbitrator was right on the facts of the case.
30. The learned High Court judge in the present case relied so much on the UNCITRAL Model Law in coming to his decision that the prayer for extension of time in arbitration matter ought not to be condoned by the court. He expressed his view that "*it is trite that the Arbitration Act 2005 has prima facie accepted the UNCITRAL Model Law and the judicial sentiment here as*



*well other countries which have adopted the same is inclined towards the jurisprudence relating to “minimum intervention of the court” in matters governed by the Act”.*

31. With respect, we are not in agreement with the learned judge on this point. Our view is that, even though the Malaysian Arbitration Act 2005 had *prima facie* accepted the UNCITRAL Model Law, it does not in any way take away the powers of the court in dealing with any application for extension of time. There is no express provision to that effect. The Model Law, particularly Article 34(2) thereof, provides for the grounds under which an arbitral award may be set aside by the court. They relate to the substantive application to set aside the award. There is no mention about an extension of time to file the said application. Even section 37 of the Arbitration Act 2005 does not expressly prohibit the powers of the court to extend time in appropriate case.
  
32. Hong Kong has adopted the Model Law as part of her Arbitration Ordinance (Cap 341). In **Kwan Lee Construction Co. Ltd v Elevator Parts Engineering Co Ltd [1997] 1 HKC**

- 97**, the Court of Appeal of Hong Kong allowed the extension of time and acknowledged that the duty of the court is not to debase the entire arbitral process and to shake parties' confidence in arbitration.
33. In that case the court also acknowledged that despite the delay, it is vital for the court to consider the merits of the appeal. In that case, the arbitral award was bad *ex facie* because it focused purely on the payment per se and took no account of the fact that it was expressed as having made "without prejudice" and the arbitrator, in awarding interest, did not consider whether the sum paid was in fact due.
34. In that case the court held that the court's jurisdiction to grant an extension of time is as broad as can be. The proper approach to the question whether an extension of time should be granted is to consider what the question of law involved might ultimately be should leave be given, as well as the reasons for the delay. In allowing the appeal Patrick Chan J gave the following reasons:

*“Since we are disagreeing with the learned judge, I should also briefly make the following two points. First, it is unfortunate that the learned judge seemed to have relied only on the absence of explanation for the delay and did not express any views on the merits of the case. One is therefore left in doubt whether he had given proper consideration to them when he exercised his discretion in refusing leave. Second, it is of course important to maintain as much as possible finality in arbitral proceedings. It is, however, equally desirable to ensure that arbitration is trusted and respected as a means of resolving commercial disputes. The arbitrator here did not make any specific finding on all but one of the points raised by the parties and the only reason he gave for making his award is, in my view, clearly questionable. In the circumstances of this case, I think this is a matter which not only substantially affects the rights of the parties but would also have caused sufficient concern for the court to grant leave to appeal”.*

35. In the present case the Appellant challenged the arbitral award based on the following grounds:
- a) that the arbitrators had exceeded their jurisdiction by exercising jurisdiction over the Appellant’s disputes with the Respondents under the mining contracts which are

governed by law of Laos and in respect of which the arbitrators have no jurisdiction;

- b) that the arbitrators wrongly exercised jurisdiction over nonparties in respect of a dispute that was, and remained a dispute between the Appellant and the 1<sup>st</sup> Respondent pursuant to Article 14 of the PDA. The arbitrators erroneously decided that the 2<sup>nd</sup> Respondent was a party to the arbitration proceeding; and
  - c) that the arbitrators awarded investment costs against the Appellant to be paid to non-parties of the PDA by taking into consideration the evidence of investment costs incurred by the 2<sup>nd</sup> Respondent, Thai-Lao Power Co. Ltd and South East Asian Power Co. under the mining contract; thus the award was bad *ex facie* as it contained costs and damages beyond the scope of the submission of the parties under the PDA.
36. These are good reasons to extend time as applied for bearing in mind the cogent reasons for the challenge; the great prejudice to the Appellant if the application is dismissed without

considering the substantive application on its merits; the fact that the Respondents would be compensated by the payment of interest if the application is incorrectly entertained and the further fact that the Respondents are well aware, from the opposition to the enforcement applications taking place in other jurisdictions, that the Appellant is challenging the award.

### **Conclusion**

37. This court is of the view that this is an appropriate case for the court to exercise its discretion in favour of the Appellant to extend the time to enable the Appellant to file an application to set aside the arbitration award dated 4 November 2009; and to hold that the filing and commencement of the proceedings to set aside the said arbitration award be considered good and in order. In order to facilitate the above order, this court makes a further order that the Appellant's application for service of the Originating Summons out of jurisdiction as per the originating summons (Ex-parte) dated 19 October 2010 be heard by a High Court judge. The matter is to be remitted to the High Court and to be heard before a different judge. There is no

order as to costs and the deposit is ordered to be refunded to the Appellant.

Dated: **26 July 2011**

***sgd.***

**RAMLY HJ. ALI**

**Judge  
Court of Appeal  
Malaysia**

**Solicitors:**

1. Shanti Mogan  
Tetuan Shearn Delamore & Co .. for the Appellant
  
2. Sunil Abraham (with Idza Hajar Ahmad)  
Tetuan Zul Rafique & Partners .. for the Respondents

**Cases Referred to:**

1. **The Government of India v. Cairn Energy India Pty Ltd & Ors [2003] 1 MLJ 348**
2. **Thiruchelvasegaram a/l Manickavasegar v. Mahadevi a/p Nadchatiram [1998] 4 MLJ 297**
3. **Finnegan v. Parkside Health Authority [1998] 1 All ER 595**

4. **Percon Corp Sdn Bhd v. Yap Choon Loy [1998] 3 MLJ 867**
5. **Prodexport State Company for Foreign Trade v. ED & F Man Ltd [1972] 2 Lloyd's Rep 375**
6. **State of Haryana v. Chandra Mani & Others [1996] AIR SC 1623**
7. **Genuine Paints & Chemicals Co. v. Union of India 73 [1998] DLT 296, [1998] 2 (Raj) 206 (Del)**
8. **Thomas v. Booty, Edwards & Partners [1964] MLJ 359**
9. **ASM Shipping Ltd of India v. TTMI Ltd of England (The Amer Energy) [2009] 1 Lloyd's Rep 293**
10. **Gold Coast Ltd v. Naval Gijon SA [2006] 2 Lloyd's Rep 400**
11. **Bulk Transport Corporation v. Sissy Steamship Co. Ltd [1979] 2 Lloyd's Rep 289**
12. **Kwan Lee Construction Co. Ltd v Elevator Parts Engineering Co Ltd [1997] 1 HKC 97**

**Legislation Referred to:**

1. **Arbitration Act 2005: sections 37(1)(a)(iv), 37(4)**
2. **Rules of the High Court 1980; Order 3 rule 5(1) & (2)**