Ashurst Singapore
June 2014

Back to the future: *Reliance -v- Union of India*

Ben Giaretta and **Akshay Kishore** report on the latest in a line of judgments from the Supreme Court of India concerning the powers of the Indian courts to intervene in foreign-seated arbitrations: *Reliance Industries Limited & Another -v- Union of India* (2014)[1]

The *BALCO* effect

In 2012, the judgment of the Supreme Court of India in *Bharat Aluminium* (*BALCO*)[2] marked a sea-change in the relationship between the Indian courts and international arbitration.

A number of earlier Indian court judgments, while well-meaning and seeking to do justice between the parties, had muddied the waters between arbitrations taking place in India and foreign arbitrations taking place in other countries. The Indian courts had powers over both, it seemed, particularly when the governing law of the contract was Indian.

BALCO put a stop to that. It drew a clear line between the two. No more would the Indian courts intervene in foreign arbitrations. On the other hand, of course, the Supreme Court highlighted that the Indian courts had no powers to use in support of foreign arbitrations.

But there was a sting in the tail.

At the very end of the judgment, the Supreme Court confined the impact of *BALCO* to arbitration agreements entered into after 6 September 2012. That meant there would still be a number of arbitrations where the old law would prevail.

Reliance and BG stumble

In 1994, Reliance Industries Limited (*Reliance*) entered into two Production Sharing Contracts (*PSCs*) with the Government of India concerning two offshore oilfields located to the north-west of Mumbai. Another party was Enron Oil and Gas India Limited; that was absorbed into the BG Group in 2002, and renamed BG Exploration and Production India Limited (*BG*).

A dispute arose concerning the payment of royalties under the PSCs. Reliance and BG argued that they were entitled to US$ 11.4 million in compensation following changes to the Indian law on royalties, because in the PSCs the Government had promised to indemnify them against such changes. They started an arbitration. The seat of the arbitration was in London; the governing law of the PSCs was Indian law; and the parties had expressly agreed in the PSCs that English law would govern the arbitration clauses.

A preliminary issue arose as to whether the claims were "arbitrable"; that is, whether they could be referred to arbitration at all, or whether they had to be heard by the various statutory tribunals in India established to deal with petroleum matters. This was on the basis that payment of royalties concerned the national interests of India and was therefore an issue of public policy. The Tribunal decided in a Partial Award that the claims **were** arbitrable, because they concerned contract terms to offset the effect of changes to the law and not a dispute under the relevant Indian statute itself.

The Government challenged that decision in the High Court of Delhi. It argued that the High Court had jurisdiction to overturn the Partial Award because *BALCO* did not apply to the PSCs, which were signed before September 2012: the powers of the Indian courts over this foreign-seated arbitration remained, therefore. It also argued that since the claim was for the refund of public monies, it must be heard by the statutory bodies and not by a private arbitral tribunal.

The High Court agreed with the Government, and set aside the Partial Award.

The Supreme Court lifts them up

The Indian courts had no powers

On appeal to the Supreme Court, a number of earlier authorities concerning arbitration had to be considered. For new contracts, *BALCO* has confined those

authorities to the history books; for pre-September 2012 contracts, however, they remain very much alive.

The key question was whether, in accordance with those earlier authorities, the parties had agreed (expressly or impliedly) to exclude the application of Part 1 of the Arbitration Act, 1996. Part 1 includes section 34, which was the basis on which the Government had challenged the Partial Award. If section 34 was excluded, therefore, there could be no challenge. *Bhatia International* had said Part 1 could apply to foreign-seated arbitrations,[3] and *Venture Global* had said that parties could agree to exclude Part 1.[4] After *Venture Global*, it had become the practice to exclude Part 1 expressly in arbitration agreements. The PSCs pre-dated that, however.

The Supreme Court ruled that the parties had impliedly excluded Part 1 by agreeing that the seat of the arbitration was London, and that English law applied to the arbitration clause. This meant the English courts, not the Indian courts, supervised the arbitration. The Supreme Court here followed another earlier judgment, *Videocon Industries*.[5]

Public policy did not stand in the way

The Supreme Court also dismissed the Government's argument that public policy dictated that the questions in this matter should go to a statutory tribunal.

This was a claim arising from commercial contracts. Also, the arbitration agreements were separate contracts within the PSCs and governed by English law; meaning that the public policy argument did not impact on the question of whether the Indian courts could review the Tribunal's jurisdiction.[6]

Practical tips

- This case is a reminder that the pre-*BALCO* law remains in place for older India-related contracts. Parties wanting to avoid this and benefit from *BALCO* can amend their contracts to include a new arbitration clause.
- If parties do not amend their contracts, they can at least refer to this case as an attempt by the Supreme Court to reconcile the case law before and after *BALCO*.
- Foreign parties should be aware that public policy plays an important role in Indian commercial law – reflecting the significant involvement of the Government in business, particularly in the natural resources sector. However, the Indian courts have demonstrated in this case (and in others)[7] that public policy arguments do not always succeed.

Notes

1 Civil Appeal No. 5765 of 2014

2 *Bharat Aluminium Company -v- Kaiser Aluminium* (2012) 9 SCC 552. We commented on that judgment in our briefing which can be found here.

3 *Bhatia International -v- Bulk Trading S.A. & another* (2002) 4 SCC 105.

4 *Venture Global Engineering -v- Satyam Computer Services Ltd* (2008) 4 SCC 190.

5 *Videocon Industries -v- Union of India & another* (2011) 6 SCC 161.

6 Notably, the Supreme Court left open the question of whether the Government, if it lost the arbitration, could resist enforcement of the award in India on the grounds of public policy.

7 See our earlier briefing on another judgment concerning public policy arguments in Indian arbitration, which can be found here.

Further information

If you would like any further information about any of the issues raised in this briefing, please contact:

Ben Giaretta
Partner, Singapore
Asia Head of International Arbitration

+65 6416 3353
ben.giaretta@ashurst.com

Akshay Kishore
Associate, Singapore

+65 6416 3343
akshay.kishore@ashurst.com

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Key contacts

Singapore

Ben Giaretta
Partner, Singapore
Asia Head of International Arbitration

+65 6416 3353
ben.giaretta@ashurst.com

Rob Palmer
Partner, Singapore

+65 6416 9504
rob.palmer@ashurst.com

Baldev Bhinder
Senior Associate, Singapore

+65 6416 9507
baldev.bhinder@ashurst.com

Akshay Kishore
Associate, Singapore

+65 6416 3343
akshay.kishore@ashurst.com

Katherine McMenamin
Associate, Singapore

+65 6416 9517
katherine.mcmenamin@ashurst.com

Michael Weatherley
Legal Manager, Singapore

+65 6416 9509
michael.weatherley@ashurst.com

Hong Kong

Gareth Hughes
Partner, Hong Kong
Asia Head of Dispute Resolution

+852 2846 8963
gareth.hughes@ashurst.com

Angus Ross
Partner, Hong Kong

+852 2846 8909
angus.ross@ashurst.com

Port Moresby

Ian Shepherd
Partner, Port Moresby

+61 2 9258 5967
ian.shepherd@ashurst.com

Derek Wood
Partner, Port Moresby

+67 5309 2006
derek.wood@ashurst.com

Jakarta

Noor Meurling
Senior Foreign Legal Consultant, Oentoeng Suria & Partners, Jakarta

+62 21 2996 9200
noor.meurling@oentoengsuria.com

Tokyo

Chris Bailey
Partner, Tokyo
Tokyo Head of Dispute Resolution

+81 3 5405 6081
chris.bailey@ashurst.com