International consciousness that India is an arbitration unfriendly jurisdiction has existed for some time now. This feeling owes in part to seemingly interventionist judicial views, in part to the delays that are oft complained of about the Indian judicial system and in part to the lack of infrastructure necessary for an arbitration friendly destination. Consequently, foreign parties to contracts with Indian parties have often been reluctant to seat their arbitrations in India. This has, in recent times, become a non-issue given the availability of jurisdictions such as Singapore which lend themselves well to parties seeking to arbitrate their disputes in a neutral and yet familiar and reputed international arbitration destination.

One of the areas of concern in relation to arbitrations seated outside India has remained the approach that Indian courts have adopted in actions seeking the exercise of their jurisdiction. Most common amongst these requests have been actions seeking interim measures from Indian courts in foreign seated arbitrations, and in some instances, challenges to awards resulting from such foreign seated arbitrations.

In the beginning was Bhatia

Interference by Indian courts in arbitral proceedings has especially been striking in the grant of interim measures of protection and interim relief. This is normally in exercise of the power under Section 9 of the [Indian] Arbitration and Conciliation Act, 1996 (the “1996 Act”). Section 9 forms part of Part I of the 1996 Act that largely incorporates the provisions of the Model Law on the conduct of arbitrations. Part II of the 1996 Act codifies the New York and Geneva Conventions and provides for the recognition and enforcement of foreign awards in India.

In the specific area of grant of interim measures of protection, of foremost importance, is the Bhatia (2002) decision of the Supreme Court which took the view that Part I of the 1996 Act applies equally to international commercial arbitrations that are seated outside India. The decision came about in the context of a request for interim relief made by a party to an ICC arbitration seated in Paris. The request was made to, and rejected by, a District Judge. The appeal to the High Court was also rejected. The Supreme Court, however, took the view that unless expressly or impliedly excluded, the provisions of Part I would also apply to arbitrations seated outside India. The argument that succeeded, amongst others, was that Section 2 (2) of the 1996 Act which provided that Part I would apply where the place of arbitration was in India, did not use the word ‘only’, implying that the legislature had not provided that Part I is not to apply to arbitrations which take place outside India.
The post Bhatia conundrum

Given that an Indian court could pass interim orders before the commencement of arbitral proceedings, the Bhatia decision led to scores of ‘Section 9 applications’ for interim relief being filed in courts across the country in relation to arbitrations, whether seated in India or outside.

The only carve out that the Court provided for was the parties’ express or implied exclusion of Part I. There was no guidance on what constituted an implied exclusion of Part I. This only served to complicate matters further since Part I also included important provisions for appointment of arbitrators and setting aside of awards, amongst others. Unclear with whether Part I had been impliedly excluded or not in specific instances, Indian courts began to appoint arbitrators in arbitrations seated outside India, for instance in National Agricultural (2007) and Indtel (2008) and permit setting aside of foreign awards, for instance in Venture Global (2008).

BALCO and White Industries

On 6 September 2012, a 5-judge Constitution Bench of the Indian Supreme Court handed down its decision in BALCO v. Kaiser Aluminum Technical Services Inc. The BALCO decision came about in the context of several related cases that were referred to a larger bench of the Supreme Court by a 2-judge Bench which was unable to agree on the correctness of the Bhatia decision. A connected case which also came to be heard by the Court along with BALCO and raised the same legal issues is the (in)famous White Industries case, which as many will know resulted in the first ever BIT award against India.

In BALCO, the Court took the view that it disagreed with the decisions in Bhatia and Venture Global, and that the power to grant interim measures in respect of foreign seated arbitrations or to deal with challenges to foreign awards did not flow from the provisions of the 1996 Act. In doing so, the Court took the view that the ‘broad’ interpretation of Bhatia that all of Part I applied to arbitrations seated outside India did not find proper basis in the provisions of the 1996 Act.

An important take-away from the decision is that the Court firmly endorsed the seat of arbitration as the ‘centre of gravity’ of an arbitration particularly to determine jurisdiction of courts in relation to that arbitration. Another is that it clarifies the hitherto murky distinction in India between the substantive governing law of a contract and the law governing the arbitration agreement. Perhaps, most important, is its elucidation of the interpretation of the phrase ‘...of the country in which, or under the law of which, that award was made’ in Article V (1) (e) of the New York Convention. While the phrase has been the subject of discussion worldwide, the Court took the view that there cannot be concurrent jurisdiction of two separate courts in the seat and the jurisdiction, the law of which governs the arbitration – it can only be the court at the seat of arbitration who can exercise such jurisdiction to deal with a challenge.

Prior to the hearings in BALCO, the Court also invited interested parties to place their views on the issues that arose before the Court. The SIAC was one such intervener and shared the Singapore position on these issues by sharing Singapore decisions on these issues such as Swift Fortune (2007), Sui Southern Gas (2010) and PT Asuransi
Jasa (2007) apart from the legislative amendments made to the [Singapore] International Arbitration Act ("IAA") in 2009 particularly in relation to the power of courts to grant interim measures of protection in respect of foreign seated arbitrations.

India has remained a particularly important jurisdiction for the SIAC. Indian parties have remained the single largest contingent of nationalities arbitrating at the SIAC for the past 3 years with a near 200% growth in the number of cases involving Indian parties in the past three years with cases in varying sectors such as trade, construction, joint ventures, energy and natural resources, international trade, shipping and maritime and general commercial disputes, amongst others. Not to be buoyed by the number of cases alone, it is of some importance that the monetary quantum of disputes involving at least one Indian party has similarly gone up by more than 140% for the same period.

Looking into the crystal ball

In BALCO, importantly though, the Supreme Court defines the applicability of its views by specifying that its view of the law only applies to arbitration agreements executed after its decision i.e. post 6 September 2012. In doing so, the Court appears to have been guided by practical considerations and inevitable issues that may have resulted from applying its views retrospectively. This raises interesting issues on the position that Indian courts may take on pending arbitrations and related litigations as well as future litigations on agreements currently in force, but dated prior to the Court’s decision.

It is also of some interest to see if parties re-execute arbitration agreements alone in respect of their commercial contracts in order to fall within the BALCO net.

A question that arises as a consequence of the bar on Indian courts from granting interim measures of protection in respect of foreign seated arbitrations is the availability of options for parties looking to seek such protective measures against an Indian party or assets located in India.

In this context, the emergency arbitrator provisions under the SIAC Rules present a viable option in as much they have found frequent use in respect of arbitrations involving Indian parties. Of the ten applications that SIAC has received and accepted thus far, 5 involved Indian parties. Interim injunctive and other forms of reliefs granted in these proceedings were either complied with or led to settlements between those parties. Also apt in this context is an observation by the Madras High Court noting the availability of the emergency arbitrator provisions under the SIAC Rules in Unknown (2011) for securing interim reliefs. However, legal debate on the enforceability of the orders of an emergency arbitrator continues. Singapore amended the IAA in 2012 to specifically recognize that an emergency arbitrator would also fall within the definition of an ‘arbitral tribunal’, thereby ensuring the enforceability of such orders, directions or awards in Singapore under Section 12 (6) of the IAA.

Be that as it may, the decision is a hugely positive development for India. It brings in line the Indian position with international arbitration jurisprudence and understanding. The decision is bound to create greater confidence in
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the Indian legal system and courts. Equally, it is bound to create greater investor confidence in India; uniformity and consistency in the judicial approach will only serve well to create a more efficient dispute resolution process for Indian and non-Indian parties equally.