

SILF tries to figure out response to foreign firms: Lalit Bhasin doesn't want 'evasive answers' from members

But the biggest question in this debate is whether the government is underplaying its rather powerful hand?

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MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

NOTIFICATION

New Delhi, the 3rd January, 2017

G.S.R. 12(E).—In exercise of the powers conferred by section 55 of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government hereby makes the following rules further to amend the Special Economic Zones Rules, 2006, namely:—

- (1) These rules may be called the Special Economic Zones (Amendment) Rules, 2017.
 - (2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Special Economic Zones Rules, 2006, in Rule 76, for the words "professional services (excluding legal services and accounting) rental/leasing services without operators", the words "professional services, rental/leasing services without operators" shall be substituted.

This tiny rule change appears to have Silf in a bit of a tizzy about liberalisation

The Society of Indian Law Firms (Silf) is not yet sure how to deal with the government's [surprise rule change](#) that might see foreign law firms open up in special economic zones (SEZs) such as the Gujarat International Financial Tec-City (GIFT).

While the actual rule change is minor (it merely removed the restriction on any law or accountancy firm to operate in SEZs) and its effect is still unclear, an Economic Times frontpage on Saturday reported that "foreign law and accountancy firms now have a chance to operate in India on their own".

SILF rapidly reacted to the story, with its president **Lalit Bhasin** reaching out to SILF members via email with the following message:

“ Dear Colleagues,

There has been a sudden and significant development with regard to foreign law firms. Please read front page of Economic Times of today.

It appears that the Department of Commerce, Government of India has allowed foreign law firms and accountancy firms to be established in SEZs. Certain issues would require consideration such as

a) Whether such a notification can be issued by the Department of Commerce?

b) Whether this has the approval of the Bar Council of India which is the

regulatory body of the legal profession?

c) Whether this could be done without amendment of the Advocates Act which only permits Indian citizens to practice any law in the territory of India?

d) Who will monitor the activities of such foreign law firms?

e) What prevents these foreign law firms from practising throughout India from SEZ?

The news item is attached for ready reference. I am circulating the same for immediate response from the law firms about their views and comments. This should preferably be done before 25th January, 2017 and this will be followed by a proper meeting of SILF members to consider this important development.

I await your views.

Warm regards,

LALIT BHASIN

Only five minutes later, **Nishith Desai**, a senior SILF executive member and the managing partner of Nishith Desai Associates (NDA), responded to all with:

“ Btw we are also trying to understand that. Looks like Advocates Act will have to be amended. Also Arbitration Act may have to be amended for treating awards from Gift as foreign awards. Gift City is treated as foreign territory for certain legislations but not for all.

Bhasin, however, wanted a more unequivocal answer, and responded:

“ Dear Nishith

At the moment I want a simple answer from SILF members whether they support or oppose this notification. I do not want evasive answers.

Based on the response I will convene a physical meeting where the entire issue will be discussed.

Best regards

LALIT BHASIN

We have reached out to Bhasin and Desai for their comments and whether SILF had taken a view yet.

Bhasin responded to us via email with: “No comments at this stage – the issue will be considered in SILF meeting to be held towards end of January. “Till then this issue remains closed.”

Potential next steps by the government

If the government wants to continue along its path of liberalisation, several options are open to it, bearing in mind that it would want to presumably avoid any reform being tied up in court for years (as foreign law firms have been twice already, in the [Lawyers Collective](#) and the [AK Balaji](#) cases).

SEZ's FTW?

It could push ahead with an SEZ-led approach and immediately invite foreign law firms to set up in the GIFT with very limited operations.

The solution would have a certain pragmatic elegance, but the dually important questions here would be whether:

- sitting in a business park on the outskirts of a town like Gandhinagar or even Mumbai are attractive enough propositions for top foreign lawyers and their business case they need to make to partnership and clients,
- as limited as a pure SEZ entry would be, a quick legal challenge (possibly in the Gujarat high court?) is very possible.

Legislation?

The safest option from challenge, which would achieve the government's purposes of allowing foreign law firms to operate here, remains a full amendment to the Advocates Act or a completely new law.

It would give the government a lot of scope to come up with a robust model of regulating foreign lawyers (and maybe improve [regulation](#) of the domestic profession in the bargain).

But this obviously also has a parliamentary dimension with all accompanying pitfalls (even if liberalisation is unlikely to be a hugely divisive issue, politically).

And the BCI may end up going on strike anyway, as its [chairman](#) Manan Kumar Mishra had threatened in a letter to Narendra Modi], claiming that its pending Balaji appeal against foreign firms in the Supreme Court is making the entire debate sub-judice and illegal for the government to get involved in right now.

A third way? The governmental BCI veto

Feebleness of the BCI's legal arguments on sub-judice aside, if the government is able and willing to control or face off against the BCI, the executive has huge rule-making powers under the Advocates Act that unequivocally override the BCI's, in case of conflict, possibly avoiding any statutory change.

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Section 49A of the Advocates Act (and several others), states:

“ 49A. Power of Central Government to make rules- (1) The **Central Government may**, by notification in the Official Gazette, **make rules for carrying out the purpose of this Act including rules with respect to any matter for which the Bar Council of India or a State Bar Council has power to make rules.**

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) qualifications for membership of a Bar Council and disqualifications for such membership;

(b) the manner in which the Bar Council of India may exercise supervision and control over State Bar Council and the manner in which the directions issued or orders made by the Bar Council of India may be enforced;

(c) the class or category of persons entitled to be enrolled as advocates under this Act;

(d) the category of persons who may be exempted from undergoing a course of training and passing an examination prescribed under clause (d) of sub-section (1) of section 24;

(e) the manner in which seniority among advocates may be determined;

(f) the procedure to be followed by a disciplinary committee of a Bar Council in hearing cases and the procedure to be followed by a disciplinary committee of the Bar Council of India in hearing appeals;

(g) any other matter which may be prescribed.

...

(4) If any provision of a rule made by a Bar Council is repugnant to any provision of a rule made by the Central Government under this section, then, **the rule under this section, whether made before or after the rule made by the Bar Council, shall prevail and the rule made by the Bar Council shall, to the extent of the repugnancy, be void.**

[(5) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Theoretically, the government could therefore notify reciprocity of practice of lawyers from several countries under [section 47](#)'s reciprocity provisions:

“ 47. Reciprocity- (1) Where any country, specified by the Central Government in this behalf by notification in the official Gazette, prevents citizens of India from practicing the profession of law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practice the profession of law in India.

(2) Subject to the provisions of sub section (1) the Bar Council of India may prescribe the conditions, if any, subject to which foreign qualification in law obtained by persons other than citizens of India shall be recognized for the purpose of admission as an advocate under this Act.

If it wanted to make it easy, the government could simply issue a notification that lawyers from a specified list of countries could practice non-litigation law in India, if they have hold a local law qualification that is at least equivalent in standards to an LLB accredited by the BCI and the standards set by the BCI's All India Bar Exam (AIBE).

And with the wide powers under the Act, the government could theoretically even exempt foreign advocates from the BCI's regulation or registration.

Laying the rule change before parliament for 30 days is a low hurdle that would be unlikely to face much resistance.

Even so, that might not make liberalisation immune to a legal challenge. But when coupled with

an SEZ-led approach it might give just a sliver of enough comfort for some foreign law firms to take the leap into India.

And by now, all foreign firms would have realised that it's not possible to operate here without taking on at least some risk...