



# Asian Dispute Review

Since 1999

July 2018

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# Entry Restricted Casually: The Supreme Court of India's Judgment on the Entry of Foreign Lawyers in India

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This article discusses the impact of a recent judgment of the Supreme Court of India on the provision of legal services in India by foreign lawyers and law firms (including in relation to India-seated international commercial arbitration) and urges the passage of practice rules by the Bar Council of India and/or the central government aimed at neutralising its effects.

### Introduction

For more than a decade, the Indian judiciary has been seized of the question whether foreign lawyers should be permitted to practise law in India. On 13 March 2018, the Supreme Court of India (Supreme Court) laid this fervently debated issue to rest,<sup>1</sup> while largely leaving it up to the government to frame rules.

The Supreme Court ruled that the 'practice of law' in India includes both litigation and non-litigation. However, under

India's regulatory regime, only advocates enrolled with the Bar Council of India (BCI) are entitled to practise law. Foreign lawyers are therefore barred from practising law in India. Even without a liaison office, if foreign lawyers make frequent visits to India, albeit to advise on foreign law or international legal issues, this constitutes 'practising law in India' – thereby falling foul of the Indian regulatory regime. However, as a silver lining in what may be considered a bank of grey clouds shrouding the liberalisation of the Indian legal sector, the Supreme Court ruled that foreign lawyers could

make casual visits to India on a ‘fly in and fly out’ basis. This would not constitute ‘practice’ and so would not violate the national law. The advice they could give would be limited to foreign law or international legal issues.

The judgment has garnered mixed reactions from India’s legal community, while disappointing the international legal community.

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### The background

The genesis of the issue lies in the early case of *Lawyers Collective v Bar Council of India*.<sup>2</sup> In the 1990s, as liberalisation began to gain a foothold in the Indian economy, a number of overseas law firms obtained permission from the Reserve Bank of India (RBI) to set up liaison offices in India. This action was challenged in 1995 in the High Court of Bombay, which held that the RBI was not justified in granting permission to foreign law firms to open liaison offices to practise in India in relation to non-litigious matters. The High Court relied on s 29 of the Foreign Exchange Regulation Act 1973 (the 1973 Act), which provides that a person resident outside India or a company not incorporated in India shall not establish in India a branch office or other place of business for the carrying on of any activity of a trading, commercial or industrial nature without the permission of the RBI. The Supreme Court drew

a distinction between professional and commercial activities and held that the liaison activities of foreign law firms related to the profession of law under the Advocates Act 1961 (the 1961 Act). Thus, the RBI could not have granted permission to such law firms to carry on practice in non-litigious matters by opening liaison offices in India under s 29 of the 1973 Act.

A related issue subsequently arose before the High Court of Madras in *AK Balaji v Bar Council of India*.<sup>3</sup> The issue related to whether a foreign lawyer visiting India for a temporary period to advise on foreign law, without establishing any liaison office in India, could be barred from doing so under the 1961 Act. The High Court held that foreign lawyers cannot practise the profession of law in India, either in litigation or non-litigation matters, unless they fulfil the requirements of the 1961 Act and the Bar Council of India (BCI) Rules. However, it permitted foreign lawyers to provide legal advice to clients on foreign law, on their own system of law and on diverse international legal issues for a temporary period, on a ‘fly in and fly out’ basis. Since then, the legal profession in India has been fiercely debating the pros and cons of allowing foreign law firms and lawyers to practise in India.

The Supreme Court’s decision was the result of an appeal against a decision of the High Court of Madras. An appeal had also been filed by Global Indian Lawyers against the judgment handed down by the High Court of Bombay in *Lawyers Collective v Bar Council of India*.<sup>4</sup>

### Entry of foreign lawyers: a gamut of issues

The broad issue of entry of foreign lawyers in India encompasses a gamut of significant legal issues.

- (1) What would be covered under the rubric of the phrase ‘practice of the profession of law in India’?
- (2) Could drafting and providing legal opinions qualify as ‘practice’, or was this confined to appearance in the courts?
- (3) Were the regulatory powers of the BCI exercisable only over persons practising in courts and before any other authorities or persons under the 1961 Act?



- (4) Would advice on foreign law in India amount to the 'practice of law' in India?
- (5) Could foreign lawyers be barred from conducting arbitration proceedings in an Indian-seated international commercial arbitration?

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Several of these issues are considered below.

### (1) *The practice of law and foreign practitioners*

The foundation of the issues lay in the interpretation of the term 'practice of law', ie, whether it included matters both of litigation and non-litigation. This is a pertinent issue, as foreign lawyers regularly seek to practise in non-litigious matters in foreign countries, eg, by providing legal opinions, drafting instruments and participating in conferences involving discussions that are legal in nature.

Foreign law firms contended that while the 1961 Act prohibited them from practising before courts and authorities in India, it did not bar them from practising law in non-litigation matters. This inference flowed from an interpretation of the 1961 Act<sup>5</sup> to the effect that it applied only to advocates who practised in any court or before any authority or person - ie, in litigious matters.

However, the Supreme Court stated that the 1961 Act covered the broad practice of law, including both litigious and non-litigious aspects. It relied on its judgment in *Pravin Shah v KA Mohd Ali*,<sup>6</sup> in which it declared that the right to practise,

including appearance in court, consultation with clients and drafting and providing legal opinions, was the 'genus', while the right to appear in courts was a 'specie'. In so ruling, the Supreme Court upheld the decisions handed down by the Madras High Court and the Bombay High Court.

Next, the Supreme Court considered whether it was possible for foreign law firms and lawyers to 'practise law' without meeting the prescribed requirements of the 1961 Act. It held that the regulatory mechanism under that Act and the BCI Rules also applied to advocates performing non-litigious work. As such, those provisions would also apply to foreigners if they wished to "practise the profession of law" in India. In any event, Chapter IV of the 1961 Act makes clear that only advocates enrolled with the BCI are entitled to practise law. The Act therefore restricts both Indian and foreign lawyers not enrolled with the BCI from practising law, both in litigious and non-litigious matters.

### (2) *Fly in and fly out*

With regard to foreign lawyers and law firms flying into and out of India to render legal advice, the Supreme Court modified the position stated by the Madras High Court. It suggested that even 'fly in and fly out' by foreign lawyers may amount to the practice of law if done on a regular basis. Thus, although foreign lawyers could fly into and out of India to provide legal advice, the frequency or otherwise of their visits would determine the legality of those visits under the 1961 Act. The Supreme Court ruled that the issue whether, judged by their frequency, visits amounted to the practice of



law in India or were casual visits was a question of fact. In this regard, it suggested that the BCI and the Union of India should prepare rules extending the applicability of any code of conduct to foreign lawyers.

### (3) *International commercial arbitration*

The Supreme Court then considered the question whether there was a limitation on foreign lawyers and law firms conducting and participating in arbitration proceedings relating to India-seated international commercial arbitration. Counsel representing foreign law firms cited the rules of a number of international arbitral institutions which suggested that parties could be represented by foreign lawyers in an international commercial arbitration.

The BCI, however, contended that an arbitral tribunal constituted an ‘authority’ under s 32 of the 1961 Act before which only advocates enrolled in India could appear. Further, it contended that institutional rules needed to be in conformity with Indian law in order to be valid and applicable. The BCI drew a comparison between the ethical standards applicable to the legal profession in India and in other jurisdictions to fortify its contention that institutional rules could not ignore the relevant national law. For this purpose, the BCI drew on examples such as (*inter alia*) advertising by the legal profession, contingency fees and success fees.

However, the Supreme Court held that it could not be said that there was no absolute bar on the conduct of arbitral proceedings by foreign lawyers in India. If a matter pertained to an international commercial arbitration governed by the rules of an arbitral institution or the Arbitration and Conciliation Act 1996, then foreign lawyers would not be prohibited from conducting arbitration proceedings in India under ss 32 and 33 of the 1961 Act.<sup>7</sup> This was not, however, to be construed as an absolute right. Foreign lawyers would be subject to the code of conduct applicable to Indian lawyers. The Supreme Court reiterated that the BCI and the Union of India should implement appropriate rules on the applicability of any code of conduct to foreign lawyers.

“... [A]lthough foreign lawyers could fly into and out of India to provide legal advice, the frequency or otherwise of their visits would determine the legality of those visits under the 1961 Act. The Supreme Court ruled that the issue whether, judged by their frequency, visits amounted to the practice of law in India or were casual visits was a question of fact.”

### (4) *Outsourcing business processes*

The final issue addressed by the Supreme Court was whether business process outsourcing companies (BPOs) providing integrated services were covered by the 1961 Act or the BCI Rules. In this regard, the Madras High Court had held that:

“BPO Companies providing [a] wide range of customized and integrated services and functions to its [*sic*] customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules.”<sup>8</sup>

The Supreme Court modified this ruling by asserting the applicability of the ‘pith and substance’ test. If the pith and substance of the practice of BPOs amounts to the practice of law, then, despite the branding of their activities, the provisions of the 1961 Act would come into play, thereby disallowing foreign lawyers and law firms from engaging in such practice.

## Does the ruling benefit stakeholders?

The Indian regulatory regime as it stands today does not permit foreign lawyers to practise law routinely in India. The Supreme Court has delineated two narrow categories of foreign practitioner in India:

- (1) those who fly in and fly out of India to render legal advice; and
- (2) foreign lawyers who represent parties in international commercial arbitration proceedings in India.

The judgment is, however, silent as to the relevant parameters for determining the precise boundaries of these categories.

For example, the question whether a particular visit by a foreign lawyer in India is casual or not is to be determined as a question of fact, on a case by case basis, albeit with no guidance on the factors informing such a determination. The BCI or the Union of India have been given liberty to frame rules in this regard, and no more. Only time can test the merit of any rules that may be framed in the future. Further, there is no guidance on what number and nature of visits would constitute the 'practice of law' in India. Under Hong Kong law, by contrast, it is clearly provided that a visit by a foreign lawyer is considered a 'fly in and fly out' visit if he or she stays in Hong Kong for a maximum of 90 days or three continuous months in one year.<sup>9</sup>

Further, in the case of international arbitration proceedings, the Supreme Court has categorically stated that foreign lawyers conducting arbitration proceedings in India would be subject to any code of conduct that may apply to the legal profession in India.

The Supreme Court's judgment is therefore subject to possibly perilous interpretation, as it leaves several questions open and unanswered. Lack of sufficient guidance may lead to potential challenges for foreign lawyers. Proceedings may lie against them on the ground of professional or other misconduct under s 45 of the 1961 Act, subjecting them to the risk of imprisonment.<sup>10</sup> Such regulations and penal

provisions could create a chilling effect on foreign lawyers visiting India.

“...[T]he Supreme Court held that it could not be said that there was no absolute bar on the conduct of arbitral proceedings by foreign lawyers in India. If a matter pertained to an international commercial arbitration governed by the rules of an arbitral institution or the Arbitration and Conciliation Act 1996, then foreign lawyers would not be prohibited from conducting arbitration proceedings in India under ss 32 and 33 of the 1961 Act. This was not, however, to be construed as an absolute right.”

## The position in other Asian jurisdictions

In other key Asian jurisdictions, such as Singapore and Hong Kong, the law regarding permission for foreign lawyers to practise in their jurisdictions has evolved over the years.

### (1) Singapore

In Singapore, foreign lawyers can apply for full registration or restricted registration under the Legal Profession Act.<sup>11</sup> Different qualification requirements apply to each form of registration.<sup>12</sup> To acquire full registration, a foreign lawyer must satisfy certain requirements, such as having a minimum of five years' experience before any court or tribunal.<sup>13</sup> A foreign lawyer applying for restricted registration must (*inter alia*) be duly authorised in the jurisdiction in which he or she practises law and must not have been struck off or disbarred in any jurisdiction.<sup>14</sup>

The ambit of activities that a foreign lawyer recognised under either form of registration may undertake also varies. For example, while a foreign lawyer with full registration can appear, represent, advise or provide advice in any relevant proceedings,<sup>15</sup> a foreign lawyer with restricted registration can only appear or advise on matters of foreign law, as permitted by the Singapore International Commercial Court or the Court of Appeal.<sup>16</sup>

Prior to 2004, the Legal Profession Act permitted foreign lawyers to appear in arbitrations only if they were accompanied by a Singapore lawyer where cases involved Singaporean substantive law.<sup>17</sup> An amendment to that Act in 2004 removed this requirement. Currently, there is no restriction on arbitrators conducting or lawyers representing parties in an arbitration proceeding in Singapore. The latter are also permitted to prepare documents and provide advice in relation to arbitration proceedings, but they do not enjoy the right of audience in court proceedings.<sup>18</sup>

## (2) Hong Kong

Hong Kong, on the other hand, has not entirely liberalised its legal services market. It is regulated through the Legal Practitioners Ordinance (Cap 159) (the Ordinance)<sup>19</sup> and self-regulated by the Hong Kong Bar Association<sup>20</sup> and the Law Society of Hong Kong (Law Society).<sup>21</sup>

Foreign lawyers can practise in Hong Kong as barristers, solicitors or through law firms. Under the Ordinance, the court can grant temporary admission to a foreign lawyer to act as a barrister in Hong Kong on an *ad hoc* basis, if the case so requires.<sup>22</sup> To practise as an enrolled barrister, a foreign lawyer can apply to the Hong Kong Bar Association if (*inter alia*) he or she holds a valid certificate as a legal practitioner in his or her jurisdiction of admission, has been in practice for at least three years in that jurisdiction, is a person of good standing and has passed the Barristers Qualification Examination.<sup>23</sup>

Foreign lawyers who intend to practise as solicitors, as well as foreign law firms who intend to operate in Hong Kong,

must register with the Law Society. Foreign lawyers are subject to certain requirements, such as a minimum number of years' post-qualification experience in the law of his or her jurisdiction.<sup>24</sup> Applicants intending to act as solicitors are also required to pass the Overseas Lawyers Qualification Examination.<sup>25</sup> Foreign lawyers and law firms, unless specifically permitted, cannot practise Hong Kong law. They can practise in any area of law apart from Hong Kong law or advise on matters of international law and conflict of laws.<sup>26</sup>

However, in matters of arbitration, the law does not pose any restrictions on foreign lawyers and law firms engaged in arbitration in Hong Kong on the basis of their nationality or qualification.<sup>27</sup>

“ In other key Asian jurisdictions, such as Singapore and Hong Kong, the law regarding permission for foreign lawyers to practise in their jurisdictions has evolved over the years. ... All hope in the international legal community rests on the BCI and the central government taking appropriate action to strengthen the legal framework governing the entry of foreign lawyers in India and their access to the legal arena. ”

## Conclusion

The competitiveness and quality of expertise that foreign law firms can bring to India is undeniable. Indian lawyers have been recognised as scaling great heights in terms not only of variety of work and clientele but also technical know-how,

niche area expertise and quality of services. Contrary to what some segments of the legal community fear, the entry of foreign law firms would not adversely affect the legal services market in a jurisdiction that has a sound and robust legal framework and legal capabilities in place.

While the Supreme Court's judgment has (i) restricted the entry of foreign lawyers in India to casual visits on a 'fly in and fly out' basis and (ii) made, or sought to make, foreign lawyers amenable to prohibitions under the Indian regulatory regime, the fact that it has offered liberty to the BCI or the central government to frame relevant practice rules offers hope for inroads being made into an otherwise restricted-access territory.

India, though a signatory to the General Agreement on Trade in Services (GATS), has not undertaken the specific commitment of liberalising its legal services. Jurisdictions such as Singapore and Hong Kong are striving to achieve the liberalisation ideal by permitting foreign lawyers access to the practice of law through various devices, albeit subject to certain restrictions.

It is apparent that the liberalisation of trade in legal services is a policy issue – a decision to be taken by the legislature. It would be prudent to deliberate on reform of the legal services sector, considering that there is constant growth in cross-border transactions, leading to a need for the expertise of foreign lawyers. The Supreme Court's judgment does not merely uphold the *status quo* in India: rather, it modifies it in a manner that potentially reduces the grant of access to foreign lawyers to practise law. A decisive and deliberate policy intervention is required to frame legislation and rules in this regard. Given the ever-growing number of transactions and the liberalisation and globalisation efforts being undertaken worldwide, this is the need of the hour. All hope in the international legal community rests on the BCI and the central government taking appropriate action to strengthen the legal framework governing the entry of foreign lawyers in India and their access to the legal arena. <sup>181</sup>

- 1 *Bar Council of India v AK Balaji and Ors*, Civil Appeal Nos 7875–7879 of 2015.
- 2 WP No 1526/1995.
- 3 AIR 2012 Mad 124.
- 4 Civil Appeal No 8028 of 2015.
- 5 Sections 29 and 33 of the 1961 Act.
- 6 *Pravin Shah v KA Mohd Ali* (2001) 8 SCC 650; reiterated in *Ex Capt Harish Uppal v Union of India* (2003) 2 SCC 45.
- 7 Section 32 of the 1961 Act provides:  
 "Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case."
- Section 33 provides:  
 "Except as otherwise provided in this Act or in any other law for the time being in force, no person shall ... be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act."
- 8 *AK Balaji v Government of India*, AIR 2012 Mad 124, at [63(iv)].
- 9 Legal Practitioners Ordinance (Cap 159) (Hong Kong), s 50B(2).
- 10 Section 47 of the 1961 Act.
- 11 Legal Profession Act (Cap 161) (Singapore).
- 12 *Ibid*, s 36P(4); Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (Singapore), rules 5 and 6.
- 13 Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (Singapore), rule 5.
- 14 *Ibid*, rule 6.
- 15 Legal Profession Act (Cap 161) (Singapore), s 36P(1).
- 16 *Ibid*, s 36P(2).
- 17 Baker and McKenzie, *Restrictions on Foreign Lawyers in Singapore Arbitrations Removed*, International Law Office (22 July 2004), available at <https://www.internationalawoffice.com/Newsletters/Arbitration-ADR/Singapore/Baker-McKenzieWong-Leow/Restrictions-on-Foreign-Lawyers-in-Singapore-Arbitrations-Removed#>.
- 18 Legal Profession Act (Cap 161) (Singapore), s 35.
- 19 Legal Practitioners Ordinance (Cap 159) (Hong Kong).
- 20 Hong Kong Bar Association, available at <http://www.hkba.org/search-contents?text=foreign>.
- 21 The Law Society of Hong Kong, available at [http://www.hklawsoc.org.hk/pub\\_e/resource/cepa.asp](http://www.hklawsoc.org.hk/pub_e/resource/cepa.asp).
- 22 Legal Practitioners Ordinance (Cap 159) (Hong Kong), s 27(4).
- 23 Barristers (Qualification for Admission and Pupillage) Rules (Cap 159AC) (Hong Kong), s 4(2).
- 24 Foreign Lawyers Registration Rules (Cap 159S) (Hong Kong), s 5.
- 25 Overseas Lawyers (Qualification for Admission) Rules (Cap 159Q) (Hong Kong), ss 4-7.
- 26 Foreign Lawyers Registration Rules (Cap 159S) (Hong Kong), s 12.
- 27 Department of Justice of the Hong Kong Special Administrative Region, *Arbitration – The International Arbitration Centre for the Asia Pacific*, available at <https://www.doj.gov.hk/mobile/eng/public/arbitration.html>.