

Dispute Resolution Hotline

February 27, 2012

PRACTICE OF FOREIGN LAW IN INDIA

Recently, on February 21, 2012, the Madras High Court ("**Madras HC**") in A.K.Balaji vs. Government of India and Ors.¹ held that there is no bar under the Advocates Act, 1961 ("**Act**") or the Bar Council of India Rules ("**Rules**") for foreign lawyers or law firms to visit India for temporary periods on a "fly in and fly out" basis to advise their clients on foreign law and diverse international legal issues. They are however not permitted to practice Indian law, either in relation to litigation or advisory matters, unless they qualify and enroll as advocates and fulfill the requirements of the Act and Rules. The judgment also clarifies that activities performed by BPOs and LPOs do not constitute practice of law and hence do not conflict with the Act. The Madras HC also noted that the Bar Council of India ("**BCI**") may take necessary steps in relation to the practice of law by chartered accountants and management firms, which is contrary to the Act.

QUALIFICATIONS FOR PRACTICE OF LAW IN INDIA

Section 29 of the Act² clearly specifies that only 'advocates' as defined under the Act are entitled to practice the profession of law in India. An advocate is defined as a person who enters into the rolls of a State Bar Council under the provisions of the Act.³ Persons may enroll with a State Bar Council if:

1. He/she is a citizen of India.
2. He/she has completed 21 years of age.
3. He/she has obtained a degree in law from any University in India recognized for the purposes of the Act by the BCI or has obtained such other foreign qualification in law as is recognized by the BCI for the purpose of admission as an advocate.

However, Section 24(1)(c)(iv) lays down that subject to other provisions of the Act, a national of any other country may be admitted as an advocate on the rolls of the State Bar Council, if Indian citizens who are duly qualified are permitted to practice law in that other country. Further, provisions pertaining to reciprocity as provided under Section 47 of the Act⁴ stipulate that where any country prevents Indian citizens from practicing the profession of law or subjects them to unfair discrimination in that country, then no subject of that country shall be entitled to practice law in India.

FOREIGN LAWYERS NOT ENTITLED TO PRACTICE LAW IN INDIA, RULES BOMBAY HIGH COURT

In 2010, the Bombay High Court ("**Bombay HC**") in the case of Lawyers' Collective v. Bar Council of India & Ors.⁵ held that the 'practice of law' would cover both litigious and non-litigious (advisory) practice. On this basis it was held that foreign lawyers not enrolled as advocates under the provisions of the Act would not be entitled to practice law in India. The Bombay HC laid down these principles while addressing questions as to whether practicing in chamber constituted practice of law and whether such practice is in the nature of a business liaison under Section 29 of the erstwhile Foreign Exchange Regulation Act. The Bombay HC, however, did not address the issue regarding whether foreign lawyers can practice foreign law in India.

MADRAS HIGH COURT DECIDES THAT FOREIGN LAWYERS CAN PRACTICE FOREIGN LAW IN INDIA ON "FLY-IN-FLY-OUT" BASIS

In relation to short visits by foreign lawyers, it was argued before the Madras HC that since foreign law firms do not have any office in India and do not advise on Indian laws, they do not require enrollment under the Act. Placing reliance on the principle of reciprocity, it was also pointed out that Indian lawyers are permitted to advise on Indian law in any country around the world. It was also highlighted that foreign lawyers qualify and are supervised by governing bodies in their respective countries and the absence of regulation by BCI may not be considered as a valid ground to prohibit foreign lawyers.

Accepting these contentions, the Madras HC held that foreign lawyers are permitted to visit India for a temporary period on a fly in and fly out basis for rendering legal advice on foreign legal issues as well as to participate and conduct arbitration proceedings in India.

The Madras HC observed that refusal to permit foreign law firms from participating in negotiations, settling documents and conducting arbitrations in India will be contrary to government policies and is against national interest. The goal of promoting India as a commercial hub for international commercial arbitration would be defeated if foreign lawyers are not permitted to enter India to advise their clients. Relying on the recent Vodafone judgment, it was held that with the increasing flow of foreign investment into India and transactions with foreign companies, advice on foreign legal issues becomes imperative.

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The Madras HC also held that BPOs and LPOs not practicing law can freely operate in India provided that their roles are confined to back-office support services. These services include administrative support, word-processing, secretarial support, transcription services, proof-reading, travel desk, etc. The Madras HC however pointed out that the BCI may take action against such BPOs or LPOs if any of their activities transgress the provisions of the Act.

PRACTICE OF LAW BY CHARTERED ACCOUNTANTS AND MANAGEMENT CONSULTANTS

Both the Bombay HC and the Madras HC have made it clear that only legal professionals enrolled under the Act are entitled to practice Indian law. On this basis, it has been held that foreign law firms cannot practice Indian law. At the same time, the judgment also notes the submission by the Indian Government in relation to practice of law by non-advocates and observes "a□[the oversight of the BCI on non-litigation activities of such law firms was virtually nil till now, and exploiting this loophole, many accountancy and management firms are employing law graduates, rendering legal services, which is contrary to Advocates Act."⁶ The Madras High Court has suggested that the Bar Council may decide to take steps to curb such practices.

CONCLUSION

The Madras HC held that foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfill the requirements of the Act and the Rules. However, foreign law firms have been permitted to fly in and fly out for rendering advice on foreign law on a temporary basis.

The judgment mentions that the Government in consultation with the BCI proposes to commission a study on the nature of activities of LPOs and appropriate decisions would be taken in consultation with the BCI. It has to be ensured that BPOs and LPOs do not practice law or provide any legal advice in any manner. It will be interesting to see the outcome of the study proposed by the Government and the BCI in this regard.

As far as management firms and chartered accountants are concerned, it is common knowledge that such professionals routinely issue legal opinions, draft legal documents and provide advisory memoranda having legal consequences. The Madras HC in its observation noted that BCI may take necessary steps in relation to the practice of law by chartered accountants and management firms in contravention of the provisions of the Act.⁷

The presence of foreign lawyers in India may also give rise to potential Indian tax exposure which is important to consider in the overall scheme. A foreign legal service provider may be said to have a business connection or a permanent establishment ("**PE**") in India if its employees or associates frequently visit India or spend considerable time (individually or collectively) in India. For instance, under the India-US tax treaty, a service PE may arise if services are rendered by such employees who stay in India for an aggregate period of 90 days in a year. If the services are provided to related parties (for instance, to a foreign affiliate of the service provider such as a captive LPO), even a day's presence may give rise to a service PE. Under the Treaty, any income attributable to the PE would be taxable in India. Foreign law firms would also be subject to Indian taxes if they establish an Indian presence in the form of a fixed base or branch office. Further complications may arise if the foreign law firm is organized as a foreign limited partnership, limited liability partnership or a tax transparent entity since it may face difficulties in claiming tax treaty benefits. In such cases, the tax implications would be governed by the Indian domestic law provisions where the potential tax exposure is wider. It would also be important to consider potential indirect tax implications since, today, advisory and consultancy services provided by law firms may attract service tax. Visa and immigration issues in relation to entry of foreign lawyers in India have to be separately considered.

Another interesting issue that may arise is whether foreign lawyers can practice foreign law by "Flying-in and Flying-out" only in the State of Tamil Nadu where the Madras HC judgment is binding. The Madras HC judgment is not binding in the State of Maharashtra over which the Bombay HC, which decided the Lawyers' Collective case, has jurisdiction.

The Bar Council of India is likely to appeal to the Supreme Court against this ruling. Until the Supreme Court decides this issue, the debate will continue.

Cross Border Litigation and Dispute Resolution Team

You can direct your queries or comments to the authors

¹ A.K.Balaji vs. Government of India and Ors., W.P. No. 5614 of 2010, decision dated February 21, 2012.

² Section 29- Advocates to be only recognized class of persons entitled to practice law- Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates.

³ Section 2 (1) (a) of the Advocates Act, 1961

⁴ Section 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.

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⁶ Para 62 of the Madras HC's judgment.

⁷ In certain cases, chartered accountants are allowed to appear before certain authorities such as Income-Tax Appellate Tribunal. However, their appearance is restricted only as petitioner-in-person and not as an advocate entitled to practice law under the Act. Section 288 of the Income Tax Act, 1961 provides that a chartered accountant may appear before the tax department and Appellate Tribunal on behalf of the taxpayer when such taxpayer is required to "attend personally for examination on oath or affirmation." This is distinct from practice of law. As per Section 29 of the Advocates Act, only advocates registered under the Act may practice law, which includes both litigation as well as legal advisory services. Further, it is also important to note that unlike in the case of advocates, the communication between a chartered accountant and the client is not protected by privilege or confidentiality under Section 126 of the Indian Evidence Act, 1872.

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