

## **UPDATE ON INTERNATIONAL COMMERCIAL ARBITRATION**

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### **FOREIGN LAWYERS PERMITTED TO ADVISE ON FOREIGN LAW IN INDIA**

In a landmark judgment passed on 21 February 2012 by the Division Bench of Hon'ble Chief Justice M.Y. Eqbal and Hon'ble Justice T.S. Sivagnanam of the Madras High Court, it was held that foreign lawyers can visit India for a temporary period on a "fly in and fly out" basis, for the purpose of giving legal advice to their clients in India regarding foreign law and on diverse international legal issues. It was further held that foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of dispute arising out of a contract relating to international commercial arbitration.

#### **Brief Background:**

A Writ Petition bearing no. 5614 of 2010 was filed by A.K Baliaji ("**Petitioner**") against the Government of India (Law Department) and 40 others ("**Respondents**") in the Hon'ble High Court of Madras under Article 226 of the Constitution of India to take appropriate action against foreign law firms and/ or lawyers who are illegally practicing the profession of law in India and to forebear them from having any legal practice either on the litigation side or in the field of non-litigation and commercial transactions, in any manner whatsoever within the territory of India.

#### **Arguments of the Petitioner:**

The Petitioner extensively relied on different provisions of the Advocates Act, 1961, (referred to as the "**said Advocates Act**") and contended as follows:

- According to Section 24 of the said Advocates Act, only Advocates whose names are entered in the State Roll shall be entitled a right to practice in all judicial forums throughout the country.
- The proviso to Section 24 of the said Advocates Act states that a national of any other country may also be admitted as an Advocate on a State Roll, if only duly qualified citizens of India are permitted to practice law in that country i.e. both countries have a reciprocity agreement.
- Law Graduates from India are allowed to practice the profession of law in countries like UK and USA and various other foreign nations subject to conditions and restrictions such as passing of

examinations conducted in those countries, work permit and experience. Hence, such permission granted to Indian lawyers to practice in foreign countries cannot be called "reciprocity" in the real sense.

- If foreign law firms and/ or lawyers are permitted to enter into India and provide legal services such as giving legal opinion/ advice to their clients in litigious or non-litigious matters and conduct arbitration proceedings without admitting themselves to the provisions of the said Advocates Act, it would cause great prejudice to the Indian lawyers who have to admit themselves to the State Roll in accordance with the said Advocates Act.
- The legal profession in India is governed by the various provisions of the said Advocates Act and the disciplinary rules and regulations, code of conduct and professional ethics framed from time to time. There is a hierarchy of disciplinary authorities such as State Bar Council, Bar Council of India, Supreme Court etc,. Persons who have not admitted themselves to the State Roll would not be subject to the disciplinary control and jurisdiction of the aforesaid authorities. Hence, foreign lawyers should not be permitted to practice the profession of law in India.

#### **Arguments of the Respondents:**

- The Government of India contended that if foreign law firms and/ or lawyers were not allowed to take part in negotiations, settling up documents and arbitration in India, it would have a counter productive effect on the aim of the Government of India to make India a hub of International Arbitration. It was also contended that India may lose many arbitrations to Singapore, Paris and London. This would adversely affect the economy and would be against the financial interest of the country.
- It was contended that lawyers from foreign law firms fly in and fly out of India on a need basis to advice clients on international transactions, which have an international component to it. Similarly, transactions which have an Indian component to it and the matters that involve Indian law are entrusted to Indian advocates.
- Foreign laws are not taught in Indian law colleges and correspondingly Indian Lawyers do not have the knowledge to practice foreign law. Hence, foreign lawyers must not be restrained from advising clients in India on foreign law.
- India is a signatory to the UNCITRAL [\(1\)](#) and also Section 2(1)(f) of the Arbitration Conciliation Act, 1996 provides for International Commercial Arbitration ("**ICA**"); foreign law firms and/ or lawyers should be allowed to accompany and advice their clients on matters relating to ICA and foreign laws prevailing in their country.
- Respondent No. 7 (i.e. Bar Council of India) contended that the issue involved in the present Writ Petition was no longer *res intigra* [\(2\)](#) as it had been settled by the Hon'ble Bombay High Court in the case of Lawyers Collective V/s. Bar Council of India ("**said Lawyers Collective case**") [\(3\)](#). In the said Lawyers Collective case, the Hon'ble Bombay High Court had ruled that the practice of law would include even non litigious practice, and therefore, foreign lawyers not enrolled under the provisions of the said Advocates Act would not be entitled to practice law in India. Hence, the aforementioned Writ Petition ought to be dismissed.

#### **Issue before the Court:**

In view of the aforementioned arguments put forth by the Petitioner and the Respondents, the issue framed by the Hon'ble High Court was whether a foreign law firm without establishing any liaison office in India is prohibited under the said Advocates Act to visit India for the purpose of offering legal advice to their clients in India on foreign law. It was observed by the Division Bench of the Hon'ble Madras High Court that the

aforsaid issue was never raised nor answered by the Hon'ble Bombay High Court in the said Lawyer's Collective case.

### **Judgment**

- The Division Bench held that the proposition that foreign law firms and/ or lawyers could not come into India to advice their clients on foreign law prevailing in their respective countries, would be very far fetched and dangerous and would take India a step backward.
- It was further held that the said Advocates Act does not bar foreign firms and/ or lawyers to visit India to advice on matters relating to law which is prevailing in their respective countries.
- The Division Bench observed that if foreign law firms and/ or lawyers are prohibited from practicing any form of law in India, it would result in an absurd situation wherein only Indian citizens with Indian law degrees who are enrolled as Advocates could practice foreign law. However, the fact remains that foreign laws are not taught at a Graduate level in Indian law schools, except comparative law degree courses at Masters level.
- It was held that foreign law firms and/ or lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfill the requirement of the said Advocates Act and the Bar Council of India Rules. However, it was held that there is no bar either in the said Advocates Act or the Bar Council of India Rules prohibiting foreign law firms and/ or lawyers to visit India for a temporary period on a fly in and fly out basis, for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.
- It was also held that having regard to the aim and object of ICA, which was introduced in the Arbitration and Conciliation Act, 1996; foreign law firms and/ or lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to ICA.

***By - Mohit Advani***

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**Editor: Mirat Patel**

[\(1\)](#) "The United Nations Commission on International Trade Law" is a Commission that formulates and regulates international trade in cooperation with World Trade Organization.

[\(2\)](#) "*Res integra*" is a term applied to those points of law, which have not been decided.

[\(3\)](#) Lawyers Collective vs. Bar Council of India 2010 (112) Bom.L.R.32

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