

FOREIGN LAW FIRMS IN INDIA

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By The Way

A lawyer's dog runs around town unleashed, heads for a baker's shop and steals a loaf bread. The baker goes to the lawyer's office and asks, "If a dog running unleashed steals a loaf of bread from my store, do I have a right to demand payment for the bread from the dog's owner?" The lawyer answers, "Definitely."
"Then you owe me Rs. 50. Your dog was loose

Advocates Act Insufficient

The Bombay High Court passed a significant judgment in December 2009, which virtually denies foreign law firms entry into India on the basis of the existing laws.

The Division Bench of the High Court, comprising of Chief Justice Swatanter Kumar (As he then was. Currently, Supreme Court Judge) and Justice J.P. Devadhar, in the matter of Lawyers Collective v. Chadbourne and Park and Others, held against the right of foreign law firms Ashurst (UK), Chadbourne and Parke Associates (US) and White and Case (US) to set up offices in India. The Court, inter-alia held that the words 'practising the profession of law' under Section 29 of the Advocates Act, 1961 include giving legal advice in non-litigious matters. As per Section 29 of the Advocates Act, 'advocates' are the only recognized class of persons entitled to practice law in India. However, it was alleged that these firms, although comprising foreign nationals (not advocates), were providing consultancy legal services through their offices in India. The Division Bench also held that the permission granted by the RBI to the foreign law firms to establish their places of business (liaison offices) in India was illegal and invalid.

The above-mentioned firms had in the 1990s set up liaison offices in India, after obtaining permission from the RBI under Section 29(1)(a) of the Foreign Exchange Regulation Act, 1973. 'Lawyers Collective' had previously filed a petition in the High Court alleging that that instead of merely operating as liaison offices, these firms were indulging in active legal practice, in breach of the statutory requirements. In 1995, at the interim stage, the Bombay High Court had held that as the words 'to practise the profession of law' have very wide mandate, and include advisory services; hence the foreign law firms, by providing such services, were in fact practising law in India. The High Court noted that only an Indian citizen could be an advocate under the Advocates Act. The matter was subsequently appealed, and it came before the Supreme Court of India in March 1996. The Supreme Court did not, however, decide on the substantive issue but remanded back the matter to the Bombay High Court.

In effect the latest judgment of the High Court reaffirms the earlier decision of 1995 by declaring the RBI's original grant of licences to the foreign firms illegal and ruling that the foreign firms were practising law and should therefore be bound by and enrolled under the Advocates Act. The decision is broad and largely unambiguous, and appears to prohibit conduct that most foreign law firms

and stole a loaf of bread from me today." The lawyer, without a word, writes the baker a cheque for Rs. 50. The baker, having a feeling of satisfaction, leaves. Three days later, the baker finds a bill from the lawyer - Rs. 1000 due as consultation charges.

had assumed was legal, i.e., the temporary practice of giving advice in non litigious matters on behalf of Indian or foreign clients.

Despite the above notion, there are no provisions permitting foreign lawyers to practice in India under the existing laws. The Advocates Act in Section 24 provides that only an Indian Citizen has the right to practice and be enrolled as an advocate in India. However, a national of any other country may be admitted as an advocate, if citizens of India are permitted to practice law in that other country. As stated previously, Section 29 provides that an advocate is the only recognized class of persons entitled to practice law in India. Section 30 therefore grants every advocate whose name is entered in the state roll the right to practice throughout the territories to which the Act extends:

- in all courts including the Supreme Court;
- before any tribunal or person legally authorized to take evidence; and
- before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

Section 33 further makes it clear that advocates are alone entitled to practice in any Court or before any authority.

Notwithstanding the provisions of the Advocates Act, as per the Bar Council of India Rules, 1975 no foreigner is allowed to practice law in India unless:

- there is a reciprocal right of the same kind in the country of his origin (Rule 5 of Res. No. 6/1997); and
- he has obtained a degree from a University recognised by the Bar Council of India (Rule 3 of Res. No. 6/1997).

There has been talk of imminent amendments to the Advocates Act in order to permit the presence of foreign law firms. However, as per the view of the High Court in the recent judgment, it is apparent that the Advocates Act and the Bar Council of India Rules in their current forms are insufficient for that purpose.

The General Agreement on Trade in Services (GATS) is a treaty of the WTO that came into force in January 1995 as a result of the Uruguay Round negotiations. India is a member-state and signatory to GATS and is obliged to conform to its principles. The fundamental principles which are prescribed under GATS include:

- National Treatment under Article VII, whereby member states have to provide equal treatment to foreign firms as they do to domestic firms;
- Market Access under Article XVI, which states that there can be no restriction for entry of foreign firms into the services market by quotas, economic needs tests, maximum foreign shareholding limits, etc;
- Domestic Regulation under Article VI (4), which affords that statutory domestic regulations must be administered in a reasonable, objective and impartial manner and that qualifications, licensing requirements and technical standards must be fair and not unnecessary; and
- Transparency, i.e. the member-states must provide all relevant information that is required under the GATS.

In the Uruguay Round of the GATS, India had not made any commitments in relation to legal services. If the Indian legal profession is to be liberalised, India will need to provide some open-minded concessions to facilitate mutually beneficial bilateral schemes.

However, concessions under the GATS or amendments to the Advocates Act are unlikely until the inherent restraints faced by the Indian legal profession are removed. These regulatory barriers faced by the profession, including; prohibition

on advertising, partnership as the only form of collective legal practice (now, with the possible exception of L.L.P.), limitation on number of partners, nature of liability in partnership, bar on partnership with non-advocates, etc., may need to be minimised to ensure a level playing field for everyone concerned.

It is also unclear whether the present judgment affects the rights of other classes of professionally qualified persons in India (such as Company Secretaries and Chartered Accountants) to appear before fora in which they traditionally appear (such as the Income Tax Appellate Tribunal or Company Law Board).

By – Anirudh Hariani

[**CORRIGENDUM:** In the Newsletter sent on 17 December 2009, it was wrongly noted that the Division Bench comprised of the Hon'ble Chief Justice and Dharmadhikari, JJ. and should have correctly read the Hon'ble Chief Justice and Devdhar, JJ. The error is regretted]

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