LIBERAZITAION OF LEGAL PROFESSION IN INDIA- OPENING DOORS FOR FOREIGN LAW FIRMS

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INTRODUCTION

Indian firms have grown tremendously in both financial and manpower numbers. The various ups and downs of the market, international expansion of Indian corporations, introduction of new practice areas such as competition law, cyber laws etc., a mix of fragmentation as well as consolidation of law firms have all helped the Indian Legal Profession to grow in strength and learn from its experiences. However, the legal industry in India has traditionally remained a closed industry. The Indian law firms have catered to all the legal needs of the country and have maintained their hold on the legal industry. Time and again, they have opposed the proposal of allowing the foreign law firms to practice litigation in Indian Courts or solicit services in India.

However, the foreign firms have entered the Indian market over the years, if not directly then indirectly through legal process outsourcing (LPO) or legal services outsourcing (LSO). Many foreign firms have tied up with India-based LPOs to outsource their work in India and marked their presence in the country. To take an example, International law firm- Clifford Chance has collaborated with LPO cum offshoring center named OSC Services Private Ltd in India which provides a wide-range of services at low costs through labor arbitrage.

The kind of work delegated to Indian outsourcing companies is mostly relating to transactional and paralegal work. This scenario is now gradually changing with the Central Government along with Bar Council of India (BCI) and Society of Indian Firms (SILF) soothing to the idea of opening up India’s non- litigious services and international arbitration legal services to foreign law firm.
But even after this move, the legal services are not fully liberalized and there still remain certain reservations. The foreign firms still cannot engage in representational or litigious practice of any law, including Indian law. Further, there are also reservations in the eligibility criteria of an advocate in the Advocates Act and no recognition is given to LLP law firms under the Act, even though the limited liability partnership act has long been passed by the Parliament.

PREVIOUS POSITION

Initially in the early 1990s, foreign firms were permitted to set up their liaison offices in India. RBI had granted permission to three law firms namely White & Case LLP, Chadbourne & Parke LLP and Ashurst under the Foreign Exchange Regulation Act, 1973 to conduct the activities of “coordination, communication between its head office, clients, various governments; establish business contacts, explore foreign investment opportunities in India and other administrative functions”. The RBI granted permission under FERA, with certain restrictions, such as, the liaison office shall not enter into contracts on its own name; its expenses shall be met by its head office etc.3

In 1995, the general agreement on trade in services (GATS) treaty under WTO was entered into force. All members of WTO are signatories to GATS and the basic rules under this treaty apply to all services and all members. As per GATS, every member country has an obligation to open up their service sectors to other member countries. The main purpose for the creation of the General Agreement on Trade in Services (GATS) was to create a credible and reliable system of international trade rules, which ensured fair and equitable treatment of all countries on the principles of non-discrimination.4 Under the legal service sector, the legal advisory and representation services in the different fields of law, legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards and legal documentation and certification

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4 FAQs on GATS. http://commerce.nic.in/trade/faqs_gats.pdf (Last accessed on 25/02/2017)
services and other legal advisory and information services are included. However, India has not made commitment to open this service sector to foreign lawyers and the negotiations are still going on till date.

In the same year of 1995, a writ petition was filed by Lawyers collective, a public trust, in the Bombay High Court challenging the legality of licenses granted by RBI to the three foreign firms i.e. White & Case LLP, Chadbourne & Parke LLP and Ashurst. The core argument made was that these liaison offices were a backdoor entry for foreign firms and a convenient way to circumvent the strict rules governing the ‘practice of law’ enumerated the Advocates Act, 1961. And by giving such permissions, the RBI has also acted ultra vires its powers under FERA and Advocates Act. The court passed an interim order in favour of Lawyers’ collective, upholding their contentions.

Following this order, White & Case and Chadbourne & Parke closed their Indian offices while the UK based firm Ashurst stayed behind to be the only foreign firm with a physical office in the country for 15 years.

In 2009, a two-judge Bench of the High Court upheld the 1995 interim order and held that since Foreign Law Firms’ parent provide legal advice to clients all over the world, their liaison office in India, even though functioning as coordination and communication channels, would also be conducting activities in relation to providing legal advice. In other words, the activity of liaison office are “inextricably linked” to the head office of Foreign Law Firms. On the second issue, the court held that the ‘practice of law’ is a profession and not a business, trade or commerce, as covered under the scope of S. 29 of FERA. Therefore, the RBI has no authority to grant permission to foreign law firms to establish liaison office in India.

Recently, in April, 2015, two American law firms have filed an appeal against the 2009 decision in the Supreme Court. Their main contention is that this is era of liberalization and globalization where the MNCs are allowed to practice in the domestic market and therefore, they should be

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allowed to practice in India. The bench has agreed to examine the issue and sought responses from the Centre and the Bar Council of India (BCI), which is dead set against entry of foreign law firms.\(^7\)

Meanwhile in 2007, SILF and British’s Law Society came together and signed a MOU regarding cooperation in the legal profession. In the same year, the BCI and the State Bar Councils jointly put forward a request to the Centre to take a final decision on the matter only with their consultation and approval.

In 2008, the Limited Liability Partnership Act was passed by the Parliament which allowed the traditional partnership firms to convert into LLPs and gain the flexibility and tax concessions provided under the Act. This raised the hopes for foreign firms to establish themselves in India as the Indian parliament was hinting at liberalizing their service sectors by allowing such models of companies. However, the BCI has till date not provided any clarification on the inclusion of LLP under the Advocates Act.

In 2010, the Indian ministry of Law and Justice released a press release in support of BCI’s stand of not allowing the foreign firms into Indian market. The press release stated that the decision was made after a detailed and rational scrutiny in the light of opinions and points of view of different stakeholders.\(^8\)

Again, in February 2010, A.K. Balaji, an Indian lawyer acting on behalf of the Tamil Nadu-based Association of Indian Lawyers, filed a writ in the Madras High Court demanding a complete ban on foreign lawyers operating in India.\(^9\) However, this time the Court was more sympathetic and permitted foreign lawyers to enter India on a temporary basis (Fly in fly out) to conduct arbitrations, or advise clients on matters of foreign and international law.\(^10\) In February 2012, the court upon its final decision, opined that the Indian Advocates Act did not bar foreign


\(^{9}\) Affidavit of Petitioner, Balaji v. Govt of India at ¶ 18, W.P. No. 5614 of 2010 (Madras H.C. Mar. 18, 2010) (India).

\(^{10}\) Balaji v. Govt of India, W.P. No. 5614 of 2010 (Madras H.C. Feb. 21, 2012), ¶ 63
law firms and lawyers, from visiting on a temporary basis to advise clients on matters of foreign and international law. Moving a step forward, relying upon the Arbitration and Conciliation act, rather than the Advocates Act, the court further held that foreign lawyers can enter India, for the purposes of International arbitration. The reasoning given by the court for the conclusion was that any other stance of the Indian Judiciary would run in conflict with the goal of the Indian Government to make India a hub for international Arbitration.

While considering the said issue the Court also took into consideration the Vodafone Judgment, and was of the view that, with the increasing flow of FDI and foreign transactions in the Indian markets and increasing contribution of the foreign companies, it has become imperative to have within its jurisdiction, lawyers with expertise on foreign legal issues.

Another important facet of the decision was with respect of the LPOs. The court here held that since the LPOs were not performing any legal services, therefore they fell outside of the scope of the Advocates Act, though BCI would have jurisdiction to act against any LPO, in case the organization is found in violation of Advocates Act.

This judgment has been appealed against by BCI in the Supreme Court in April 2012. An Interim order has been passed by the Court where it has reiterated the decision of the Bombay High Court in Lawyers’ Collective case and has restricted the foreign law firms from pursuing any non-litigious work in India, holding that no foreign law firm is to be allowed to practice in the country unless it is in conformity with the Advocates Act and the BCI rules, which includes the reciprocity basis for recognition. Further, the court has also put restrictions on the RBI to permit any foreign Law firm to open its liaison offices in India. The matter is sub judice and the Court is yet to give its judgment on it.

However, the Madras High Court has made a positive effort into liberalizing the legal field and opened the doors to foreign lawyers. Notwithstanding the interim order, the situation in 2015 looks brighter, as even the BCI and SILF are changing their stand to partially allowing the foreign firms to set up their services in India in limited arenas.
CURRENT POSITION

Despite the Lawyers’ collective judgment and the BCIs strong stand, there is still silver lining for foreign firms to establish themselves in India. There are some grey areas which the judgment has not addressed and through which the foreign firm can operate in India.

There is also no impact of the ruling on existing “best friends” relationships between Indian and foreign firms, and most lawyers are confident that such tie-ups will remain unaffected. Also, the activities performed by the BPOs and LPOs do not constitute ‘practice of law’ and hence, they can continue to practice in India. Embedded in the ruling is a directive to the government to expedite its decision making with regards to the opening up of the country’s legal profession.

Acting on its obligation under GATS to open up legal sector, the Ministry of Commerce has finally declared its move to open up India’s non-litigious services and international arbitration legal services to foreign law firm. This will be completed in a phased manner after the proposal for the reform is put up for approval of the committee of Secretaries and then will be sent for cabinet approval.

The government has set up a high profile inter-ministerial group (IMG) under the chairmanship of Rajeev Kher, the commerce secretary, to prepare a road map for reforming and opening the legal services sector in India.

The road map will comprise two broad phases. Phase I will introduce domestic regulatory reforms and the simultaneous partial liberalization of the sector, including the opening up of international arbitration and mediation services and advisory services in foreign law and international law. The opening up is likely to be spread over a period of five to seven years.

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Phase II will go a step further with the proposed opening of certain advisory and non-litigious services in Indian law.\textsuperscript{14}

After opposing for nearly two decades, the BCI and SILF have now agreed ‘in principle’ to allow foreign firms to practice in India. The Ministry of Law and Justice and Department of Legal Affairs have declared to act on the opinion of the BCI.

The reason behind such change as stated by Mr. Lalit Bhasin, the President of SILF, is that Indian law firms are now second to none in the world in terms of their knowledge, efficiency, and research, and competence, use of technology and speed of disposal. One can now say with daring certainty that given a level playing field, Indian law firms can successfully stand up to the competition from foreign law firms, as long as their entry is managed in a phased sequential manner.\textsuperscript{15}

Following this welcoming initiative, various foreign firms have signed ‘best friend’ referral agreements with premier law firms of India and are regularly supporting each other.

A. Restrictions under the proposed reform

Despite these positive developments for liberalization, there are still difficulties and limitations which the foreign firms have to face before they can practice full-fledged in this country. One of the lacunas is the incompatibility of the Advocates Act with the Ministries strategy. The key provision of the Advocates Act is section 29, which states that only “advocates” are entitled to practice law in India. To be an advocate, one must also be an Indian citizen. This is subject to two narrow exceptions:

(1) If another country permits Indian lawyers to practice in its jurisdiction, then lawyers from that country will be granted reciprocal privileges in India; or


\textsuperscript{15} Supra at 12
Another limitation is that the foreign are still not allowed opening representational or litigious practice of any law, including both foreign and Indian Law.

Further, Foreign Direct Investment (FDI) is still not allowed in the legal sector. The foreign firms cannot enter into any profit sharing agreements, including sharing of dividends, with any Indian lawyer. The SILF is also opposed to entry of multi-disciplinary practice (MDP) in India, which is done in collaboration of other professionals such as accountants etc. This would include reservations against the Big Four accountancy firms (E&Y, PWC, Deloitte and KPMG) from entering into legal field.

SILF is also against the idea of third party ownership of Indian law firms. Another long-standing demand which is not yet fulfilled is to allow a firm to operate as a limited liability firm (LLP), and facilitate access to working capital from banks. There is also a restriction against the law firms disseminating information, advertising, or creating a brand around their practice.\(^{17}\)

\(^{16}\) See Advocates Act § 47.

ADVANTAGES AND DISADVANTAGES OF ENTRY OF FOREIGN FIRMS

The Political debate on the entry of Foreign Law firms in India has been intense till date, also, post the Lawyer’s Collective v. Indian Bar Council18, and has created a trade barrier on the entry of foreign law firms in India. Even then looking at the critical importance of India and the Indian financial system for companies’ world over, law firms for years have been forging informal paths for entry into the Indian Legal system, by establishing strategic affiliations with the Indian Law firms, via their branch offices in other Asian countries.19

Australia in its submissions to the International Legal Services Advisory Council20 in the year 2008 has stated that the Indian Government though receptive of considering the idea of easing the restrictions on entry of foreign law firms in India, but the regulating body for the legal sector in India i.e. the Bar Council of India, has time and again reiterated its opposition to the entry of foreign lawyers and law firms in India.

The tide towards the liberalization of the Indian Legal services market began with the judgment of the Madras high court in the case of A.K.Balaji v. Government of India, in the year 2012. The court here took a pro-liberalization stance in consonance with the express goals of the Indian Government to make India a hub for International Arbitration. The said judgment is a little troubling for the Indian Lawyers, since according to the interpretation of the Madras High Court as to the term “Practice of Law”, it does not include the practice of foreign and international law, which effectively means that as and when the foreign lawyers enter the Indian markets, the Advocates Act, will not be applicable on them.

Another Judgment having wide ramifications on the issue of practice of Foreign Law firms in India, is the ruling of the Income Tax Tribunal, in the year 2012, where it was held by the

tribunal that the UK Based Law firm Linklaters LLP, will have to pay income tax on the fees its oversees employees earned in respect of Indian Projects, if they worked for more than 90 days in India.\textsuperscript{21} As a result of the said ruling, the Law firms will have to pay taxes for up to 40\% of their income, which till date, they had been avoiding by virtue of the Indo-UK treaty, to avoid double taxation.

The arguments both for, and against the liberalization of the Indian Legal Sector have been discussed below:

A. The proponents of Liberalization

\textit{I. Increase in competition and growth of the Indian Legal System and Legal Profession}

It has been argued time and again that, “competition that is created at an international level speeds up the economic development of the domestic market.”\textsuperscript{22} Furthermore, such competition will also enhance the quality of legal practice in India, by introducing better practices and enhancing of technical knowledge, resources and expertise.\textsuperscript{23} Therefore helping India become globally competitive in legal services market, in its own right.\textsuperscript{24}

The proponents of liberalization further argue that by opening the market for foreign law firms, even the Indian Lawyers will gain an opportunity to branch out internationally, catering their services to major companies both at home and worldwide.

Another argument proffered is that the opening of the domestic market would further facilitate international transactions for India, international law firms would provide expertise as to their home country laws, creating growth chances by expanding the practice.

It is believed by many that with the advent of foreign Law firms in India, there will also be an increase in the employment opportunities for the Indian Lawyers with better pay packages and working conditions, and at the same time to meet the standards set forth by the entry of law firms, there will also be an positive impact upon the Legal education system in India, which at the moment is focused more on the theoretical aspects of law rather than its practical implications.

II. For Clients and Students

It is believed by many, that the clients in the Indian Legal market are forced to shelve out huge amount of money by the Law firms servicing them due to closed nature of the market. Liberalization proponents are of the view that foreign Law being new entrants in the market would substantially charge less money to the clients to attract business, thus directly beneficial to the clients.

Even for the law students coming from prestigious universities with five-year law program would find better opportunities for themselves with the entry of the Law. As a result, the fresh graduates could find themselves with better salaries and vertical opportunities, without leaving their home country.

III. For ensuring equality and Fairness

The pro liberalization supporters claim that, number of jurisdictions have opened their doors for Indian citizens wanting to study or practice law in their jurisdiction. Furthermore, number of Indian Law firms have in the recent times have established their offices in various other jurisdictions to provide cross-border services to their clients. Therefore for ensuring equal treatment to the lawyers of foreign jurisdiction, it is the argument of pro-liberalization supporters that the Indian markets should also be opened for Foreign Lawyers and Law firms.

B. The Opposing View

It is the belief of many, including that of the Society of Indian Law Firms through their president and spokespersons, that the argument, made by most pro liberalization proponents, that the entry of foreign law firms would improve the quality of transactional legal practices in the country, is
rather superficial.\textsuperscript{25} According to them, the said argument makes a presumption that the Indian Law firms till date have been working in isolation with the law firms of other countries. Contradicting the presumption so made, it is their argument that number of Indian Law firms in the past have worked at par with other foreign firms in number of international transactions. Also, numbers of Indian and Foreign law firms have been for a very long time worked closely together, referring clients to one another, sharing information via conferences. Pointing towards the mala fide intentions of the foreign entities, SILF is of the view that India for them is yet another “fertile market” with possible employment opportunities and they have no intentions towards improving the quality of lawyering in India.\textsuperscript{26}

On the argument of equal treatment to foreign nationals and foreign law firms in India, as per the treatment given to them in various other foreign jurisdictions, it is argued that even for Indian Lawyers, working in foreign law firms in no cake walk, they have to abide by strict immigration laws, and even after being a licensed lawyer in India, they have to shelve out huge amount of tuition fee for LLM Programs in foreign jurisdiction with no financial aid, to even qualify for giving bar exams in the foreign country.


CONCLUSION AND SUGGESTIONS

The paper has sought to provide a viewpoint on the issue of whether foreign law firms should be allowed to practice in India. As analyzed the there are number of high power players involved, including Bar Council of India, the Indian Government, equity partners at various Indian Law firms, various other practitioners of law in India, Foreign Law firms and government etc. The controversy is no longer playing in the courtrooms or the High Powered committee meetings of GATS, but the strong Lobby of the Legal Practitioners in India will play a very important role in deciding the extent of liberties given to the foreign law firms to conduct their business in India, even though the present Indian Government is pro-liberalization in this sector, it is yet to be seen as to how the Indian market reacts to such entry.

It is the view of the authors that it would not be fair to prohibit skilled transactional foreign professionals from working in India, but at the same time, the authors believe that India is at the moment not ready for foreign professional in the litigious practice, as that would lead to a massive amount of foreign overtaking all at the same time. Therefore, what is required is a gradual integrating process, which ensures that the concerns of each relevant party to the issue at hand are taken care of. Some of the possible approaches that can be undertaken are:

A. Restrictions on the practice areas of the foreign law firms
The government can demand the foreign law firms interested in practicing in India to specific areas of law, including International Law, Arbitration Law or transactional aspects of corporate law and so on, further the government can also demand them to limit their practice only to the law of their countries, which is also beneficial for their Indian clients doing business in foreign jurisdiction.

B. Joint venture arrangements with Indian Law Firms
Another possible way could be to allow the foreign law firms to practice Indian Laws, subjected to a condition that they have to enter into Joint Venture agreements with Indian Law firms, this in turn will ensure that the international clients, wanting to business in India, are properly advised on the Indian Laws. This in turn will also ensure and facilitate sharing of best practices, benefiting the lawyers from both jurisdictions.