Ministry wastes no time post Balaji-era to restart liberalisation talks • Plus the definitive analysis of a timepass judgment

Exclusive

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22

In this analogy, the foreign law firms are the red ball. The child has been pretty much everyone else

"I received a call from the government today," Kaviraj Singh, secretary general of the Indian National Bar Association (INBA), told us yesterday. Staunchly pro-liberalisation INBA and Singh have been one of the stakeholders involved in discussions with the Indian government.

"We will be meeting by the end of this week or next week," he added.

INBA had carried out two seminars in Delhi and Mumbai with the commerce ministry lat year, for them to meet local litigation lawyers and discuss the plans, with Singh adding that INBA would also organise two more seminars with the ministry of commerce to discuss the proposed rules.

As we had reported yesterday in the Law Society Gazette, reactions to the judgment have been mixed.

"The judgment of the Supreme Court is a setback for India," said senior counsel Dushyant Dave, who argued on behalf of the London Court of International Arbitration (LCIA). "They should have taken a more practical and pragmatic approach."

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"You are in a world of globalisation," added Dave. "The world may need India or not but India certainly needs world, with 1.2bn poor people. There is a crying need for new technology to come in to improve agriculture and irrigation to create hundreds of millions of jobs, we need sophisticated technology and capital investment."

He added: "Foreigners [investors] would be much more comfortable if they could use their own legal counsel. It is not something the Supreme Court should have stalled. To fly in and fly out is ridiculous."

Stall closed for business

Stalling was indeed the name of justices AK Goel and UU Lalit's game in the Supreme Court yesterday.

In the operative portions of the judgment, the Supreme Court did not fundamentally change any parts of the Madras high court AK Balaji judgment; arguably, it even restricted some of Madras' vague restrictions on foreign lawyers, though you could also argue that all it did was spell out the obvious (for the wordy details, see section below: **The fineprint: SC vs the Madras Balaji judgment**).

Instead, Goel and Lalit J said this twice in their closing paragraphs: "Bar Council of India or Union of India are at liberty to make appropriate rules in this regard" and "it is for the Bar Council of India or Central Government to make a specific provision in this regard, if considered appropriate".

But it's not as though such an outcome hadn't been widely expected.

The good

Senior counsel Sajan Poovayya, having represented US firms White & Case and Covington Burling, was more positive / pragmatic about the outcome. "My personal view is that we got exactly what we argued for in the Supreme Court," he said.

He had argued for his US firm clients - who he said were appearing on behalf of a "consortium" of US firms - that the US firms did not want to establish a presence in India "without complying with local regulatory regime".

"But you can't put conditions on fly-in and fly-out. When a lawyer flies into a country, he continues to be answerable to the parent regulatory body."

"It's not that I go beyond the regulatory control of the BCI when I go to London to advise," noted Poovayya, about multi-jurisdictional advisory practice. "The Supreme Court has done a fine job in holding that balance."

"This represents a pragmatic response to decisions in Madras allowing 'fly in fly out' and in Bombay against foreign law firms having 'liaison' offices in India," agreed Alasdair Steele, partner and co-head of the India practice at London-headquartered law firm CMS. "The Advocates Act restricts the practice of law to Indian qualified lawyers. The debate has centred round whether this means all and any law or just Indian law. The Supreme Court has taken a position allowing the continuation of a practice allowing Indian and international businesses to receive the foreign law advice they need."

On the arbitration front, Poovayya said that the Supreme Court went to the "maximum threshold limit" in what could be allowed under the existing laws, saying that it was happy for foreign lawyers to come to India to arbitrate but it was "not an open scenario". "So long as you come here, follow the rules of the arbitral institutions," he said. "If I go to [London], I follow the LCIA [London Court of International Arbitration] rules. I don't go to Inns of Court to get myself enrolled as a solicitor, I just comply with LCIA mandates."

The bad: Missing woods for trees?

Rasich Group consultancy founder Ramit Singh had drafted one of the most progressive and well-researched proposals submitted to the government in 2016 on behalf of the Indian Corporate Counsel's Association (ICCA).

He said that the judgment missed at least several big tricks. "As things stand – the practice of Armenian law by an Armenian lawyer for an Armenian Client within the territory India for a prolonged period of time is not permissible. In my opinion, the court could have easily set up a test by way of which the determining factor of permissibility would simply be whether the advice given by a foreign lawyer requires an interpretation of Indian law, directly or indirectly.

"If yes, such advice would constitute the practice of law under the Advocates Act, if not, then it would fall outside the purview of the Act. Furthermore, if it is outside the purview of the Act, then restrictions on opening an office would not apply (which in my humble opinion is already outside the ambit of the Act, but who am I to say so)."

Ramit Singh also pointed out that the foreign firms proceeded very conservatively in the Supreme Court (as we had reported on the final day of hearings on 1 February, when foreign law firms' arguments suddenly backtracked to a safe space, probably more fearful of losing the little they had and instead hoping this would encourage the government to move on quickly).

Singh said:

> What I am most perturbed about is the line of argument taken by the counsel for foreign law firms, where they began with making the averment that "with regard to non-litigation/advisory work, even those not enrolled as advocates under the Advocates Act are not debarred" and that "the Advocates Act applies only to individuals and not to law firms".
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> You've also pretty much dropped the ball when you do not correct the co-relation between the words 'liaison' and 'practice of law' and allow for the issue before the high court to not be rectified where it questions "whether the foreign law firms (…) by opening liaison offices in India could carry on the practice in non-litigious matters without being enrolled as Advocates under the 1961 Act?".
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> **Have we not ended up missing the wood for the trees here?**
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> The answers to all of these issues is a resounding NO, and this sets the trend for all that follows. Have we not ended up missing the wood for the trees here? The true questions get lost in a sea of words, which also includes a 4-5 page dedication to submissions on behalf of a client who is no longer active in India and against whom the case has (supposedly) become infructuous.

And what of the dual-qualified Indians?

London-practising barrister Nakul Dewan appeared for the Global Indian Lawyers Association (GILA), which intervened in the case to defend the rights of dual-qualified Indian lawyers.

Dewan said he was disappointed that the Supreme Court did not deal with GILA's submissions whether lawyers who are dual qualified in India and abroad, could practice under the umbrella of a international law firm from India, if they followed local BCI and other norms.

"The issue continues to be open, because there is actually no decision which rules otherwise, though a clarification on the point would have been welcome," said Dewan.

The practicalities, for now

When asked whether even the Supreme Court's current wording on establishing "practice" vs "casual" visits were vague, Poovayya disagreed: "You establish practice in India when you have some sort of permanence in India. Hypothetically, let's say Kian Ganz is a French layer and is coming to India and working here and earning money - under the Income Tax act, the minute you are here for more than 180 days you become assessable here, and your visa should change into work visa."

"You fly in and fly out on a mandate – should it be every day. Should it be once a year?" asked Poovayya. "They've not said that, which I think gives fantastic leeway to advise clients on international matters and come back. Therefore I think the balance is perfect."

Of course, not having spelled things out also leaves the door wide open to the next activist such as AK Balaji to file a petition to force the BCI to regulate foreign lawyers harder.

The involvement of the BCI is also a major of foreign lawyers. CMS' Steele said: "While the Supreme Court has also allowed foreign lawyers to appear at international commercial arbitrations in India, international lawyers will be concerned over the ability for the Bar Council of India to draft the rules relating to it - given previous delays in producing rules."

Hands tied

"The Supreme Court couldn't have done more, without having impinged on the present legal matrix of the country," noted Poovayya.

Society of Indian Law Firms (Silf) president Lalit Bhasin agreed: "If an appeal filed by the Bar Council was even challenging fly in and fly out and arbitration in Balaji's case, the Supreme Court had to decide those issues. I don't think anything more could have been expected."

"Given the scenario, everyone wants foreign law firms to come to India," added Bhasin, in contrast to the SILF's historically long-held opposition to liberalisation (the "SILF position remains the same – we are in favour of entry of foreign law firms in a phased regulated manner, and we had even made our detialed submissions with the SC which are on record", he told us yesterday).

The real problem in all this problem remains the venerable 1961 Advocates Act, which has not really managed to keep up with the modern-day realities of India's

and the global legal profession (and we had argued was unfit for purpose way back in 2009 already, after the Lawyers Collective judgment in the Bombay high court).

Ball games

All in all, probably the most positive outcome in all this is that the Supreme Court is finally done.

"I think now the ball is in the court of the government - as it has been always," said Bhasin.

"Everybody used to say that the judgment is pending,"

"Everybody used to say that the judgment is pending," agreed Kaviraj Singh, noting that the disposal of the case made such an argument against discussing liberalisation futile.

When asked who could take the next steps, Poovayya added: "The answer is the regulator and the government here can do more: they can bring in amendment to the Advocates Act."

While the commerce ministry's overtures to get the process started again are promising, not everyone is optimistic.

"It is widely understood that the Indian government under Prime Minister Modi is in favour of allowing foreign law firms into India and has made moves before to find ways of allowing this," said CMS' Steele, but added: "With the next Indian elections due in 12 months' time the question is how much of a priority is this question in Modi's reform agenda."

And even more worryingly to reformists, the regulator is a pole apart. "The BCI took the position [in the Supreme Court] that foreign lawyers can't even step into this country. Which shows that it's a little medieval in terms of its attitude, too protectionist," said Poovayya.

"On the one hand you have PM Modi doing international conferences and saying I want to make India a hub of international arbitration, but at the very same time, the regulator is saying, no they can't even come and arbitrate. Therefore the regulator should be a little more open."

"My issue with this saga is that unfortunately I have not come across anyone who is looking at it holistically and without an agenda. We need to do what is right for the country and its citizens," added Ramit Singh. "All I can say (in jest) is that with the BCI taking a stand that third-party funding by non-lawyers for litigations is not barred, I hope that there will be someone who will add pennies to our war chest and help take this issue to its logical and correct conclusion.

"On current evidence, that would probably be pushing through an amendment to the Advocates Act, or having this judgement pronounced as being *per incuriam*."

So, how long will it take for India's legal market to liberalise?

Two years remains as safe and non-committal an answer as it has always been...

The fineprint: SC vs the Madras Balaji judgment

In the 2012**Balaji** judgment, the **Madras** high court said about **practice of law**:

> 63. After giving our anxious consideration to the matter, both on facts and on law, we come to the following conclusion :-(i) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act, 1961 and the Bar Council of India Rules.

The **Supreme Court** agreed yesterday, and elaborated:

> practicing of law includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion. These are parts of non-litigation practice which is part of practice of law. Scheme in Chapter-IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work 18 (2003) 2 SCC 45 also. The prohibition applicable to any person in India, other than advocate enrolled under the Advocates Act, certainly applies to any foreigner also.

Madras in Balaji on fly-in-fly-out:

> (ii) However, there is no bar either in the Act or the Rules for the foreign law firms or foreign lawyers to visit India for a temporary period on a 'fly in and fly out' basis, for the purpose of giving legal advise to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

The **Supreme Court** arguably restricted this a tiny bit, by stating the fairly obvious that whether a foreign lawyer doing fly-in-fly-out was 'temporary' or "casual" in the words of the Supreme Court, was a question of fact:

> 41. Visit of any foreign lawyer on fly in and fly out basis may amount to practice of law if it is on regular basis. A casual visit for giving advice may not be covered by the expression 'practice'. Whether a particular visit is casual or frequent so as to amount to practice is a question of fact to be determined from situation to situation. Bar Council of India or Union of India are at liberty to make appropriate rules in this regard. We may, however, make it clear that the contention that the Advocates Act applies only if a person is practicing Indian law cannot be accepted. Conversely, plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. We do not find any merit in the

> contention that the Advocates Act does not deal with companies or firms and only individuals. If prohibition applies to an individual, it equally applies to group of individuals or juridical persons.

Madras in Balaji on arbitration:

> (iii) Moreover, having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

Again, the **Supreme Court** arguably restricted this slightly, though with a fairly common sense reading that filled in some gaps left by the Madras HC:

> It is not possible to hold that there is absolutely no bar to a foreign lawyer for conducting arbitrations in India. If the matter is governed by particular rules of an institution or if the matter otherwise falls under Section 32 or 33, there is no bar to conduct such proceedings in prescribed manner. If the matter is governed by an international commercial arbitration agreement, conduct of proceedings may fall under Section 32 or 33 read with the provisions of the Arbitration Act. Even in such cases, Code of Conduct, if any, applicable to the legal profession in India has to be followed. It is for the Bar Council of India or Central Government to make a specific provision in this regard, if considered appropriate.

Madras on LPOs, which it kept erroneously referring to as BPOs, perhaps signalling it had no idea of what an LPO actually was, had said:

> (iv) The B.P.O. Companies providing wide range of customised and integrated services and functions to its 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. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies.

Vague as ever, the **Supreme Court** did not improve on this much, including also mainly adopting the **BPO** moniker rather than **LPO** (completely ignoring to address the actual captive legal outsourcing operations such as that operated by magic circle firm Clifford Chance, instead just listening to red-herring arguments that foreign law firms were practising law in India under the of LPOs):

> 43. The BPO companies providing range of customized and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the activities in pith and substance do not amount to practice of law. The manner in which they are styled may not

be conclusive. As already explained, if their services do not directly or indirectly amount to practice of law, the Advocates Act may not apply. This is a matter which may have to be dealt with on case to case basis having regard to a fact situation.

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