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ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS IMPACT ON INTERNATIONAL ARBITRATION IN INDIA

by Sushant Mahajan

I. INTRODUCTION

On March 10, 2023 the Bar Council of India (“BCI”), which is the apex disciplinary and regulatory body for legal profession and legal education in India, came out with the Rules for Registration of Foreign Lawyers and Foreign Law Firms in India, 2022 (“Rules”).¹ Under the Rules, foreign lawyers/law firms² are permitted, after registration, to provide legal services in non-litigious matters as detailed in the Rules. One important area where foreign Lawyers would be allowed to provide legal services is any international arbitration case which is conducted in India. This is a drastic change from the protectionist stance previously adopted by the BCI pertaining to entry of foreign Lawyers into the Indian legal industry and could help India gain popularity as a hub for international arbitration proceedings.

II. BACKGROUND

The question of allowing foreign Lawyers to practice in India reached the Indian Supreme Court in 2015, after challenge to judgments of two High Courts. In its 2018 decision in *Bar Council of India v. A.K. Balaji*,³ the Indian Supreme Court ruled that foreign law firms could operate in India only on a limited ‘fly-in and fly-out’ basis, i.e., via temporary visitation. The Court further opined that as far as international commercial arbitration is concerned there is no absolute bar and the same would be subject to rules and regulations of the arbitral institution or of the provisions of the Advocate Act, 1961.

¹ Bar Council of India Notification, Bar Council of India Rules for Registration of Foreign Lawyers and Foreign Law Firms in India, 2022 (Mar. 10, 2023), https://www.livelaw.in/pdf_upload/bar-council-of-india-rules-for-registration-and-regulation-of-foreign-lawyers-and-foreign-law-firms-in-india-2022-463531.pdf [hereinafter “The Rules”].

² For purposes of clarity, “lawyers/law firms” or “lawyer/lawfirm” will be referred to as “Lawyers” or “Lawyer” respectively.

³ *Bar Council of India v. A.K. Balaji & Ors.*, AIR 2018 SC 1382 (2018) (India).



In the absence of clarity as to whether foreign Lawyers could provide legal services for international commercial arbitration, international arbitration practitioners were discouraged from representing clients in international commercial arbitration proceedings in India. This however was not the case for international arbitrations involving Indian parties that were seated outside of India, as in such proceedings the Indian parties typically chose to engage Lawyers based in London, the Middle East or Singapore to represent them.

III. THE (NEW) RULES

The ambiguity concerning representation in international arbitrations seated in India was clarified with the introduction of the Rules. Under the Rules, foreign Lawyers may register with the BCI to provide legal services in India in non-litigious matters as detailed in the Rules. Notably, the practice of foreign Lawyers may include:

providing legal expertise/advise and appearing as a lawyer for a person, firm, company, corporation, trust, society etc. who/which is having an address or principal office or head office in a foreign country in any international arbitration case which is conducted in India and in such arbitration case ‘ [sic] foreign law may or may not be involved.’⁴

Two interesting facets of this provision are, firstly, that it permits foreign Lawyers to appear for a person, firm, company, corporation, trust, society, etc., provided that the party’s address or principal office or head office is in a foreign country. This implies that any law firm, company, corporation, trust, or society which is Indian but has an address in a foreign country would be able to seek representation of a foreign Lawyer. Secondly, the foreign Lawyer can appear for a person or an entity in an international arbitration even if foreign law is not relevant to the underlying dispute. Thus, foreign Lawyers are essentially permitted to advise on issues relating to domestic law in international arbitration proceedings.

Noting the inconsistency, the BCI attempted to clarify the above noted facets by a March 19, 2023 Press Release titled “True Facts about the BCI’s Rules regarding Entry, Rules and Regulations of Foreign lawyers and Law firms in India.”⁵ There, the

⁴ The Rules, Rule 8(2)(ii).

⁵ Press Release, Bar Council of India, *True Facts about the BCI’s Rules regarding Entry, Rules and Regulations of Foreign lawyers and Law firms in India* (Mar. 19, 2023),



BCI stated that foreign Lawyers shall be allowed to advise their “foreign clients about foreign laws and international laws only.”⁶ The Press Release notes that foreign commercial entities and multi-national corporations generally do not prefer India as a venue of arbitration since they are not allowed to seek representation of foreign lawyers. The BCI further hopes that the change in rules would encourage India being preferred as a venue for international arbitration proceedings.

IV. ANALYSIS

The Rules and the Press Release, though confounding in certain aspects, make it abundantly clear that foreign Lawyers can represent foreign clients in international arbitration proceedings conducted in India. This is surely going to boost India’s image as a center for international arbitration. Institutional arbitration centers such as the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC) remain popular destinations for Indian parties. In 2021, Indian parties were the top users of the facilities of SIAC with 164 parties and an additional 23 parent companies of parties hailing from India.⁷ However, domestic institutions such as the Mumbai Centre for International Arbitration (MCIA), the Delhi International Arbitration Centre (DIAC) and the Indian Council of Arbitration International Arbitration and Mediation Centre (IAMC), Hyderabad, which was established in 2021, are gaining increasing traction and popularity for parties to international arbitration proceedings.⁸ This growth in popularity has coincided with inflow of huge amounts of foreign direct investment to India.⁹ The immense inflow of capital and increase in popularity of arbitration

https://images.assettype.com/barandbench/2023-03/57a2a39d-a1a9-4d43-ae22-aa1a5fbf3e8d/Press_Release_Dated_19_03_2023.pdf.

⁶ *Id.* at ¶ 1.

⁷ SINGAPORE INTERNATIONAL ARBITRATION CENTRE, ANNUAL REPORT 2021, at 21 (2022), <https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf>.

⁸ Chambers & Partners, International Arbitration 2022 – Law and Practice in India, <https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/india>.

⁹ See Arijit Barman & Bodhisatva Ganguli, *India over the next 10 years will see a dramatic increase in FDI*: Bruce Flatt, CEO, Brookfield, THE ECONOMIC TIMES, Mar. 20, 2023, <https://economictimes.indiatimes.com/news/company/corporate-trends/india-over-the-next-10->



institutions in India when coupled with the changes brought about by the Rules present a great opportunity for foreign Lawyers seeking to establish a presence in the burgeoning international arbitration community in India. However, whether this on its own is sufficient to make foreign parties choose India as a venue may be aspirational at best given the substantial economic burdens that the Rules impose on any foreign Lawyer aiming to practice in India. An individual foreign lawyer must pay a registration fee of US\$25,000, whereas a foreign law firm has to pay double that amount. These are considerable amounts which are likely to discourage foreign lawyers, especially solo practitioners, from practicing in India. In addition to the above, registration has to be renewed every five years, entailing a renewal fee of US\$10,000 for an individual or US\$20,000 for a law firm. Such registration and renewal fees are significantly higher than those charged in other jurisdictions. This higher fee may hinder a number of foreign lawyers looking to set up a base in India.

Another significant aspect of the Rules is that registration of foreign Lawyers is allowed only on a reciprocal basis, i.e., Lawyers of only those nations would be permitted in India where Indian lawyers are permitted to practice. The UK, Canada, Australia, Singapore, UAE, and a few other African and South Asian nations allow Indian lawyers to practice. As far as the US is concerned, 34 States allow foreign trained attorneys to practice. How the BCI would interpret this qualification provision with respect to Lawyers from the US remains to be seen. While uncertainties remain, these changes are sure to be lauded by international arbitration practitioners the world over and bode well for India as a venue for arbitration in the years to come.

V. CONCLUSION

The new Rules reflect a sea change in the policy that had been place in India since time immemorial. These Rules are likely to encourage foreign Lawyers to tap into a

years-will-see-a-dramatic-increase-in-fdi-bruce-flatt-ceo-brookfield/articleshow/98788903.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cp)pst; see also *FDI flowing out of China, into India: Noted economist Nouriel Roubini*, MINT, Feb. 20, 2023, <https://www.livemint.com/news/india/see-fdi-flowing-out-of-china-into-india-noted-economist-nouriel-roubini-11676875454197.html>.



hitherto unavailable market. The Rules specifically providing for international arbitration is especially noteworthy as it recognizes the global nature of the practice of international arbitration. These Rules also bode well for arbitral institutions in India which are likely to benefit if India is chosen as a seat for an international arbitration proceedings. All things considered, the Rules are likely to propel forward the practice of international arbitration in India.



SUSHANT MAHAJAN is the founder of M Arbitrium Consultants. He specializes in resolving a diverse range of business disputes and providing strategic counsel for both domestic and international conflicts. He has represented multinational corporations and governments in a wide spectrum of matters before numerous international and domestic courts as well as tribunals. He is also a Visiting Scholar at the George Washington University Law School focusing his research on the role of third-party funding in developing countries. He completed his Masters (LLM) in International Arbitration, Mediation and, other forms of Dispute Resolution at the George Washington University Law School where he was the President of the GW-International Arbitration Students Association.

**INSTITUTE FOR TRANSNATIONAL ARBITRATION
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a



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C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

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