

ENTRY OF FOREIGN LAW FIRMS TO REMAIN FOREIGN OR WILL THE CLIFFORDS GET A CHANCE IN INDIA?

Sandipan De and Aneesh V.*

INTRODUCTION

"If I said 18 months I would probably be optimistic, if I said 2 1/2 years I would be unduly pessimistic,"¹

Says Stuart Popham, Senior Partner of Clifford Chance LLP, the UK's highest grossing law firm, in the context of foreign law firms entering the guarded precincts of the Indian legal market. In the post liberalisation era the Indian economy opened up to the forces of globalisation and became a constituent of the global village. The Indian legal market has always been a mammoth one, notwithstanding the fact that it has been largely one which has not seen much competition in the corporate law arena, except a few family-controlled law firms. With the large number of pending cases at various levels of the Indian judiciary it has always remained a huge epicentre of activity but only for the practising Indian advocate. As doors opened to various multinational corporations the corporate sector began to spread its wings like never before and this brought preying foreign law firms to the very doorsteps of the largely untapped transactional practice market.

VIEWS OF THE ANTI/PRO LIBERALIZATION LOBBIES:

It is expectedly easy for lawyers from common law backgrounds to be able to effortlessly adjust between different countries that have the same systems but the bar like the one in India on foreign nationals practising law hinders and inhibits such seamless integration. Hong Kong has recently put an impediment in the path of such foreign lawyers by putting a bar exam in place. South Korea on the other hand is slated to ratify an agreement later in the year which would facilitate liberalisation of their legal market due to the Free Trade Agreement which it has signed with the European Union.

*By Sandipan De and V. Aneesh. II year BA LL.B (Hons.) students at NALSAR University of Law, Hyderabad.

¹KianGanz, 'Clifford Chance's Popham heads UK govt India mission for lawyers and 'market access negotiations' <<http://www.legallyindia.com/201007251139/Law-firms/clifford-chances-popham-heads-uk-govt-india-mission-for-lawyers-and-market-access-negotiations.html>> accessed 20 October 2011

The arguments advanced by the pro-liberalisation lobby are that Indian clients need global lawyers who can advise them on multiple jurisdictions and that such prohibitions only hinder India's growth. They claim that due to the restriction in supply there is less competition and obviously this cycle leads to higher prices. We know of many such foreign firms which have their India-offices running out of Singapore soil or even UK soil where the climate is more liberal.

There is immense pressure from the said lobby who claim that they are here not to take away work of Indian advocates but to enthuse and invigorate the so called stagnating legal arena through their professionalism and dynamic approach. It is argued that these Oxbridge graduates of foreign law firms would not dabble into vernacular and fight it out in District courts but are here mainly for transactional and corporate work. Hence only the corporate firms in India have a cause to worry and the lakhs of advocates whose cause the anti-liberalisation lobby is advocating is in no way going to be affected.

Stuart Popham recently visited India with the British Prime Minister Mr. David Cameron. It was expected that a lot of pressure would be put on the Indian government to open up its legal market to these foreign firms. Mr.Popham who was part of this high level delegation faced stiff opposition from the Indian lobby who saw this as a measure to undermine the stance taken by the Indian law community. He claims that, "Liberalisation does not take away anyone's job...the evidence is that no country has ended up with a smaller domestic legal community after opening up."²

Since foreign law firms are recruiting from the top law schools of the country and hiring students as associates or giving training contracts by luring them with the attraction of foreign exposure and pecuniary benefits that are unmatched. Thereby, it is argued that the brightest brains of our legal industry are being drained out of the country and people requiring their services through foreign law firms are shelling out in pounds. Whereas, liberalisation would have helped our indigenous market to reach up to the same standard of expertise and render such services, retaining such graduates in the Indian arena along with boosting the domestic scenario to a world class level.³

Eminent Lawyer Ram Jethmalani concords with what the pro-liberalization lobby has to say about the entry of foreign law firms. He says, "I fully support the entry of foreign law firms in India. But it should be done on the basis of reciprocity. We should allow the lawyers of those countries who allow our lawyers to practice.

²The Economist, 'Not Entirely Free, Your Honour' <http://www.economist.com/node/16693882?story_id=16693882.html>, accessed 12 November 2011

³Firoz Ali K, 'Foreign law Firms in India : Legally the world may not be flat...' <<http://www.thehindubusinessline.com/2007/12/21/stories/2007122150280900.htm>>, accessed 13 November 2011

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And if foreign lawyers would come, we shall see an increase in the standards of our lawyers also. And let me tell you, the foreign lawyers shall not go to court to argue the cases; they shall do more of transactional and drafting work. Now so much documentation is needed in transactional dealings so we need an expert to understand those documents. So I think there is a big room for foreign lawyers."⁴

The Society of Indian Law Firms (SILF), a consortium formed to protect the interests of the Indian firms is one lobby vehemently opposing the entry of foreign law firms into India. LalitBhasin, Managing Partner of Bhasin & Co and President of SILF has been most vocal in his opposition to the pro-liberalization and mainly the British lobby who want the Indian legal market to open up. It is argued that the average Indian lawyer is going to be washed away by the tide of cash hungry, multi-faceted corporate oriented foreign law firms who will have lesser commitment to the Indian legal system than to their balance sheets. Legal questions arise of reciprocity. Under Section 24 of the Indian Advocates Act, 1961 only such foreign nationals shall be allowed to practice law in India whose countries of origin reciprocally allow Indian nationals to do so. It is perfectly logical for the Indian lawyer to put forth such an argument since liberalization and giving in to global trends in the context of the Indian legal market cannot solely be seen as one-way traffic.

Union Minister of Law, Mr Veerappa Moily has said, "On the opening up of the legal market, the Government would not impose a decision on the legal community in India", adding "even Britain took long before opening up its legal sector to Americans. There were more than a million lawyers in the country and they had to carry them along."⁵ Are the British not being hypocrites in this context by pressurizing the Indian legal fraternity to do away with all barriers to foreign law firms' entry which will in turn propagate the interest of the domestic Indian lawyer? Liberalization and Globalization especially in regard to the economy have shown themselves to be hydra-headed monsters. For example, mammoth multi-national corporations have gobbled up home grown and domestic industries. What is the guarantee that upon the liberalization of the services in the legal dimension, it will not have the same fate -- fears inherent to the SILF members and innate in any domestic legal industry? There is a strong probability that the smaller and mid-level corporate practices and corporate law firms may face extinction. They would have the option of shutting shop or giving up their autonomy to the big fish foreign players who would then call the shots and rule the roost in the legal scenario. If an Indian law firm is not accorded

⁴Interview with Ram Jethmalani, Govt wants corrupt judges; Foreign firms good for profession <<http://www.legallyindia.com/20100607939/Interviews/ram-jethmalani-interview-govt-wants-corrupt-judges-foreign-firms-good-for-profession.html>>, accessed 10 November 2011

⁵Bar and Bench News Network, 'Entry of Law Firms, recent Tax judgments and reciprocity high on Clifford Chance Partner Stuart Popham's agenda: SILF President blasts "British lobby"' <<http://www.barandbench.com/brief/2/859/entry-of-law-firms-recent-tax-judgments-and-reciprocity-high-on-clifford-chance-partner-stuart-pophams-agenda-silf-president-blasts-british-lobby.html>>, accessed 13 November 2011

the same treatment that these mammoth firms are seeking of us then under what logical connotation can the latter claim that our indigenous legal market should not expect protectionist barriers but flow themselves into the tide of Liberalization and welcome Popham and his British partners to set shop in India.

When the Pro-liberalization lobby talks of foreign investment in the Indian legal domain and how it would boost the Indian economy, they forget the fact that all the incomes will largely contribute to outflow of the accrued revenue to the economies of the countries of their origin. In this regard Link is already in trouble with the tax authorities in India for the backdoor services they were rendering and the ruling was in accordance with the earlier Clifford Chance judgment that held Clifford Chance liable to pay taxes in pursuance of Article 15 of ITAT rules 'under independent personal service', as held by the Income Tax Appellate Tribunal.⁶

The argument of the foreign firms that international corporations who are their clients and are in need of advice on Indian matters do not get so and are hindered from investing in India does not hold much water since there already is the existence of the 'best friends' concept. In this concept one foreign firm enters into an agreement with an Indian firm through which the latter renders expert advice to the former on Indian legal matters and performs the same work for their clients and is paid for such services by the foreign firm, e.g. Clifford Chance has a tie up with AZB and Partners.

HURDLES ARISING OUT OF THE ENTRY OF FOREIGN LAW FIRMS

THE AMBIT OF LEGAL PRACTICE UNDER THE ADVOCATES ACT, 1961:

The principal issue which arises for consideration when we talk about the foreign law firms' entry into India is whether the 'practice of law' under The Advocates Act, 1961 includes transactional work too predominantly taken up by corporate law firms. The year 1994 saw the Reserve Bank of India granting permission under the Foreign Exchange Regulation Act, 1973 to foreign law firms to open liaison offices however this permission was circumscribed to the extent that these firms could set up shops only for the purpose of getting acquainted with the business environment, collecting investment information, serve as official representatives of the foreign firms to the Indian government and to Indian businesses and promoting

⁶Bar and Bench News Network, 'After Clifford Chance, now Linklaters in the tax net: ITAT rules delivering services to clients in India is taxable; new angle to A.K. Balaji v. Ashurst et al?' (29 July 2010) <<http://www.barandbench.com/brief//845/after-clifford-chance-now-linklaters-in-the-tax-net-itat-rules-delivering-services-to-clients-in-india-is-taxable-new-angle-to-ak-balaji-v-ashurst-et-al.html>>

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relationships with others involved in such cooperative initiatives.

An Indian non-governmental organization named Lawyers' Collective filed a writ petition in the Bombay High Court⁷ in 1995 challenging the order of the RBI which granted permission to these foreign law firms to open liaison offices in India. This long-running case involved fifteen respondents, ten Senior Advocates and six law firms, amongst others.⁸ The Bombay High Court held that even the rendering of legal assistance and/or executing of documents, negotiations and settlements of documents would certainly amount to the practice of law".⁹ However, the court failed to determine what 'practice' is and also failed to articulate how liaison activities of administrative nature fall within the ambit of 'practice of law'.¹⁰

Accordingly, it can be argued that Advocates Act applies only to litigious practice and that non-litigious practice falls beyond the scope of the Act. Section 29 states that subject to the provisions of the Act, there shall be only one class of persons who shall be entitled to practice the profession of law, namely, advocates. Section 33 states that except as otherwise provided in this Act or any other law in force, no person shall be entitled to practice before any court or before any authority or person, unless he is enrolled as an advocate under this Act. Section 29 hence, makes it mandatory for an individual to enrol himself/herself in order to practice law before the courts. However, every enrolled person need not avail the right to practice before the court as envisaged by Section 33 which bars the practice before a court without enrolment, i.e. bars only the specie of litigious practice.

In *Harish Uppal v. Union of India*¹¹, the Supreme Court explained that "the right to practice, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie" but again it can be said that though an advocate has a right to practice in non-litigious matters, he needn't be enrolled with the Bar Council at all. Since practice in court in a sub-set of the legal profession and not the converse, a license required for the former, cannot by implication necessitate a license for the latter.¹²

⁷*Lawyers Collective v. Chadbourne, Ashurst and White & Case*. W.P. No. 1526 of 1995, decided on December 16, 2009; MANU/MH/1467/2009

⁸14-year epic battle draws to a close as Bombay High court rules against liaison offices for foreign firms' <<http://barandbench.com/index.php?page=brief&id=400&full=.html>>, accessed 12 November 2011

⁹See Para 55 of the Judgment of the aforementioned case.

¹⁰Sanjay Bhatia, 'Legal opinion: Ashurst, Balaji and other writ petitions: Are LPOs safe?'

<<http://www.legallyindia.com/20100511807/Legal-opinions/ashurst-balaji-and-other-writ-petitions-are-lpos-safe.html>> accessed 13 November 2011

¹¹[2003] 2 SCC 45

¹²Gitanjali Shankar and Amba UttaraKak, 'Litigation versus Non Litigation: : 'Practise of law' under the Advocates Act' [2010], 3 NUJS L. REV.299 308-309

IMMIGRATION & RECIPROCITY:

In another petition in the Madras High Court¹³ challenging the entry of foreign law firms, it has been argued that the advocates from various foreign law firms visit India and conduct seminars in various parts of India. It has been alleged by the petitioner that these firms are entering in to India through a visitor's visa but the actual intention of their visit is to indirectly market and earn money out of clients from India by way of seminars. The petitioner also alleges that they are also conducting arbitration in Indian Hotels and for which the Payments are made to their head office located outside India and hence are in violation of Immigration laws.¹⁴All these allegations have however, been denied.¹⁵

It has also been argued by stakeholders that the entry of foreign law firms can be expedited provided Indian lawyers are given reciprocal treatment on basis of mutual agreement with their British counterparts or to those legal markets to which the Indian legal market is open. It seems that that the accusation that India is failing to reciprocate on many advantages it receives from the West and is devoid of merit.¹⁶ In the United Kingdom for example, Indians must pass the Qualified Lawyers Transfer Test (QLTT) if they want to work as licensed solicitors. While these requirements exist, it is slightly inconceivable to allow a red carpet entry to the foreign law firms. Hence, reciprocity by way of abandoning licensing tests or reducing immigration restrictions before the legal market in India opens will make a lot of sense.¹⁷

INDIA'S COMMITMENT TO GATS:

The General Agreement on Trade in Services (GATS) which is a multilateral, comprehensive framework of rules governing trade in services covers 160 sub-sectors under 11 categories of services sector. Legal Service has been classified as a professional service under the category of Business services as per the World Trade

¹³A.K. Balaji v. Govt of India & Ors. W.P. No. 5614 of 2010. Case pending as on 15 November, 2011

¹⁴See Para 11 of A.K. Balaji's petition. <http://barandbench.com/userfiles/files/File/madras_hc_writ_petition.pdf> accessed 14 November 2011.

¹⁵31 Foreign Law Firms deny all the allegations made by A.K. Balaji' <<http://barandbench.com/brief/2/1637/31-foreign-law-firms-deny-all-the-allegations-made-by-ak-balaji.html>> accessed 14 November 2011

¹⁶See, Jayanth K. Krishnan, 'Globetrotting Law Firms, Forthcoming: 23 Georgetown Journal Of Legal Ethics' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371098.html> accessed 13 November 2011

The author mentions the example of an Ivy-League post-graduate who worked for a large American law firm, but returned to India. Even though she was already a licensed lawyer in India, before she could practice in the U.S, she had to take a state bar exam, which itself first required her to receive an LL.M from an accredited American law school. While in the U.S. she received no financial aid and paid tens of thousands of dollars in tuition. At the law firm she billed over two thousand hours a year and helped to settle a case that brought her partners a large sum in legal fees. Further, she had to comply with strict immigration laws

¹⁷ibid

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Organization's Classification list of Services Sector. India has not undertaken any commitment in the legal services sector during the Uruguay Round of negotiations which resulted in GATS. Moreover, Indian advocates are not permitted to enter into profit sharing arrangements with the persons other than Indian advocates. Many member countries like US, Australia, Singapore, Japan, China, Switzerland, New Zealand and Brazil have requested India for taking commitment in Legal Services. There is no such request to practice domestic law in Indian courts. These requests are only for their engagement in a consultative capacity.¹⁸

The term 'Services' circumscribes a large and variety of sectors, and depending on each country's economic strengths and internal structuring the required service sectors are liberalised, countries have to be really careful on taking any such step because the general obligations like MFN etc., under the GATS make liberalisation for one nation by another as a bench mark for it to be opened to rest of the world. But, at the same time countries cannot really abstain from opening up their services with the fear of local market being destroyed in this era of globalisation thus, the local players have to be made strong enough to withstand the competition and challenge posed by international players.¹⁹ Hence, the BCI has a proactive responsibility to ensure that the rights of lawyers are properly safeguarded.

CONCLUSION

'Forceful' cases shall always be made by English representatives and India has been at the receiving end of much intense lobbying.²⁰ It is interesting to note that the Indian law makers are mulling over proposed entry of such foreign law firms at least in the transactional practice.²¹ The move to have primers in the like of academic exchanges is a good move out of which the Indian legal profession has much to gain especially the academia.²² The BCI might be dominated by pro-SILF lobby and thus guided by narrowed concerns and therefore a holistic approach is the need of the

¹⁸Trade in Legal Services, 'A Consultation Paper on Legal Services under GATS (Government of India Ministry of Commerce and Industry)' <<http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf.html>>

¹⁹Vinay Kothari, 'Gats & Legal Services: Entry Of Foreign Law Firms.In India' <<http://airwebworld.com/articles/index.php?article=1220.html>>, accessed 13 November 2011

²⁰"Senior UK cabinet minister Ken Clarke vows making 'forceful' case to liberalise Indian legal sector in upcoming visit" <<http://www.legallyindia.com/201109142331/Law-firms/senior-uk-cabinet-minister-ken-clarke-vows-making-forceful-case-to-liberalise-indian-legal-sector-in-upcoming-visit.html>>, accessed 15 November 2011

²¹"Govt. Indicates it will Fast Track Decision of Foreign Law Firms" <http://articles.economictimes.indiatimes.com/2011-09-26/news/30204552_1_foreign-law-firms-legal-firms-indian-legal-fraternity.html> accessed 15th November 2011

²²"UK, Khursheed, BCI sign no ag't on foreign law firms as Khursheed promises 'fast-track', BCI wants 6 months of exchanges but recognises case for non-litigation entry" <<http://www.legallyindia.com/201109272357/Law-firms/uk-khursheed-bci-sign-no-agt-on-foreign-law-firms-as-khursheed-promises-fast-track-bci-wants-6-months-of-exchanges-but-recognises-case-for-non-litigation-entry.html>> accessed 15 November 2011

day wherein the needs of commerce and strategic political interests are balanced with the need to protect domestic industries.²³

The Indian legal market is all set to go places. Whether there shall be a paradigm shift ushering in a plethora of foreign law firms causing a sea change is subject to the outcome of the Madras High Court writ petition which is presently being heard in the said court but this entire issue is of immense importance for the bread and butter and as such the very existence of a large number of stakeholders of the Indian legal industry. Should the government be pliant enough to kowtow to the Pophams? It should at least in the better interest of the Indian legal fraternity amend the 1961 Act as suggested by various Indian legal practitioners for better regulation of this noble profession and such impacts would have a socio-economic effect as well. In the best interest of the common man and the lakhs of practising Indian lawyers even if the Indian legal market is liberalized, enough checks and balances should be ensured. The issue of phased and regulated entry as well as the working of foreign law firms should be subservient to domestic concerns is rightly raised by the SILF lobby. Employment of a thousand National Law University graduates cannot be the sole concern. It is about the future of the legal profession and the Indian legal market which is at stake. Let not the general interest be sacrificed at the altar of any lobbying or unwarranted pressure.

²³“The BCI has sworn in an affidavit that they have the right to regulate restrictions on the entry of foreign law firms but are not going to use that prerogative.”

See also, <<http://www.legallyindia.com/201108102274/Analysis/exclusive-bci-chennai-writ-affidavit-swears-it-has-power-to-but-wont-relax-foreign-firm-restrictions-next-hearing-pushed.html>>accessed 15th November 2011