New York Law Journal

India Shuts Out Foreign Law Firms

Jaipat S. Jain
04-01-2010
A recent decision of India's Bombay High Court has shut out foreign law firms from setting up offices in India.

New York law firms White & Case and Chadbourne & Parke had set up representative offices in India in the early 1990s. Shortly thereafter in 1995, Lawyers Collective, a civil liberties advocacy group, filed a writ petition before the state's High Court seeking to bar their entry into India.

The suit, *Lawyers Collective v. Bar Council of India* and others,[1] named 15 defendants, including India's federal bank, the Reserve Bank of India (RBI), White & Case, Chadbourne and Ashurst Morris Crisp LLP,[2] a London, U.K.-based firm. Other defendants included the Union of India and the Bar Council of India.

Lawyers Collective alleged that RBI had exceeded its authority in permitting White & Case, Chadbourne and Ashurst (collectively, defendant firms) to open "liaison" offices in India. It further alleged that defendant firms were engaged in the practice of law without a license to do so.

Liaison Office

A "liaison office" in India is a foreign branch office except that it does not possess any authority to transact business in India. Its sole purpose is to serve in a representative capacity, as if an ambassador. RBI regulations describe it as a "listening post or a channel of communication."

Under the Foreign Exchange Regulation Act, 1973 (the 1973 Act), a federal statute repealed in 1999, prior permission of RBI was required to open a liaison office in India. Accordingly, defendant firms sought RBI's permission to open such an office. The application of one of the defendant firms noted that the proposed office in India will "act as a coordination and communication channel," and that it would "coordinate and liaise with the various Governmental agencies," "collect information and data in respect of clients and prospective clients," "establish business contacts and act as a listening post," among other things.[3] A condition to RBI's grant of approval was that the applicants shall not engage in any activity other than liaison activities proposed by them.[4]

Lawyers Collective alleged that RBI exceeded its authority in permitting defendant firms to open liaison offices in India because such permission was tantamount to permitting them to engage in the practice of law "without being enrolled as advocates." In India, an advocate is another name for a lawyer.

RBI defended the grant of approval. It submitted that the liaison offices were limited purpose offices and defendant firms had complied with the conditions imposed on them. RBI further submitted that it should not be faulted for permitting foreign law firms for opening offices in India because its grant of permission did not imply that defendant firms did not have to comply with provisions of other laws to which they may be subject, including any laws relating to the practice of law.

The defendant firms, in turn, affirmed that their activities complied with the requirements of the 1973 Act and they adhered to the restrictions imposed on them by RBI.

Court's Findings. In its writ jurisdiction, the High Court acts as a finder of facts. After reviewing rival submissions, the High Court noted: "Since the head office and branch offices of the foreign law firms are engaged in providing various legal services to their clients…, the liaison activity…would *obviously* be relating to providing legal services to the clients" (emphasis added).

The Court further noted that in its reply affidavit, White & Case stated that liaison activity included providing "office support services for lawyers of those [foreign] offices working in India on India related matters and also included drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients…"[5] The High Court then concluded that the activities performed by defendant firms "were nothing but practicing[6] the profession of law."[7]

The High Court further held that practice of law was not the type of activity which RBI could have permitted under the 1973 Act. Accordingly, it held that RBI acted outside its authority in granting permission.

In reaching that decision, the Court faulted RBI for not responding to plaintiff's allegation that prior to applying before RBI, defendant firms had approached India's Foreign Investment Promotion Board (FIPB), a high-powered, inter-ministerial body established by the federal government to regulate and facilitate foreign investment. According to the judgment, FIPB had "rejected the proposal submitted by the foreign firms."[8] The High Court noted that the position taken by RBI and FIPB was "mutually contradictory."[9]

The Court appeared to imply that defendant firms had used RBI as a back door for opening an office in India after being denied entry by the FIPB. In any event, the FIPB and RBI split indicated disarray in India law and policy with respect to entry of foreign law firms.

Practice of Law in India

The Court then turned to the issue of practice of law. The law regulating admission and conduct of lawyers in India is the Advocates Act, 1961, as amended.[10] The Advocates Act is a federal statute that "amends and consolidates the law relating to legal practitioners in India."[11] It provides, in pertinent part: "there shall…be only one class of persons entitled to practice the profession of law, namely, advocates."[12]

Defendant firms argued that the Advocates Act regulated only certain lawyers, namely, those engaged in litigation matters (litigious matters). Moreover, they argued, the act regulated only those lawyers who appeared before the country's Supreme Court and the High Courts of the various states (collectively, the higher courts). Put differently, the Advocates Act, they argued, applied only to litigators that appeared before the higher courts.

Constitutional and Statutory Construction. The source for this creative argument can actually be found in India's Constitution. India is a union of several states.[13] The Constitution distributes the

power to make laws between the federal government (the Union) and the various states. Among the lists of subjects on which the Union legislature, the Parliament, alone could make laws was organization of the higher courts and regulation of lawyers entitled to practice before those courts.[14] The Advocates Act, defendant firms correctly argued, was enacted by Parliament in exercise of that power.

In further support of their position, defendant firms cited *O.N. Mohindroo v. Bar Council*.[15] *Mohindroo*, a decision of India's Supreme Court, called into question the power of the Union and the states with respect to regulation of lawyers. In *Mohindroo*, the Supreme Court held that Parliament was exclusively empowered to legislate with respect to persons entitled to practice before the higher courts. It further held that the legislatures of the various states possessed the power to legislate with respect to all other legal practitioners. The decision is consistent with the Constitutional devolution of powers between the Union and the states.[16]

Relying in part on *Mohindroo*, defendant firms argued that the Advocates Act regulated only those lawyers that appeared before the higher courts. They further argued that even if their offices were deemed to be engaged in the practice of law, such practice did not involve litigations or appearance before the higher courts. Accordingly, they argued, the Advocates Act did not regulate them.

This was a novel argument and one that also finds some support in the plain reading of the Advocates Act. Thus, for instance, the Advocates Act provides that only "advocates" may appear before a court or similar body.[17] An "advocate," defendant firms argued, meant an individual who appeared before a court of law. In support of that proposition they cited obiter from several cases decided by the Supreme Court and a case decided by the High Court.

Admission to Bar Necessary. The High Court then framed the issue before it as follows: whether defendant firms, by opening liaison offices in India, were at liberty to engage in the practice of law "in non-litigious matters" without being enrolled as advocates under the Advocates Act?

Quoting from a decision of the Supreme Court, it held that "the right to practice is genus, of which, the right to appear and conduct cases in court may be a specie."[18] It rejected the argument that the Advocates Act applied only to litigators that appeared before the higher courts. Such a construction, it said, was "unwarranted because, once Parliament invokes its power to legislate…, then the entire field…would be open to the Parliament to legislate."[19] In other words, it held that by enacting the Advocates Act, Parliament had completely preempted the states with respect to regulation of lawyers.

The High Court went on to note:

It is not the case of the respondents [defendant firms] that in India individuals…are practicing the profession of law in non-litigious matters without being enrolled as advocates under the 1961 Act. It is not even the case of the respondents that in the countries in which their head office as well as their branch offices are situated, persons are allowed to practice the profession of law in non-litigious matters without being subject to the control of any authority… There is no reason to hold that in India, the practice in non litigious matters is unregulated.[20]

It further noted:

If the argument of the respondents that the 1961 Act is restricted to persons practicing the profession of law in litigious matters is accepted, then an advocate found guilty of misconduct in performing his duties in non-litigious matters cannot be punished under the [penal provisions] of the 1961 Act. Similarly, where an advocate…is debarred for professional misconduct, [he] can merrily carry on the

practice in non-litigious matters on the ground that the 1961 Act is not applicable to persons practicing the profession of law in non-litigious matters. Such an argument, which defeats the objects of the 1961 Act, cannot be accepted.

The Court therefore concluded that the Advocates Act applied to all lawyers and that admission to the bar under the Advocates Act was a prerequisite to the practice of law in India.

Unresolved Issues

During the 15 years it took the Court to decide *Lawyers Collective*, potentially affected parties devised creative ways of dealing with an adverse decision.

As a result, there now exists in India an established network of "best friend" alliances under which domestic law firms serve as dutiful outposts of their foreign masters. Similarly, in the burgeoning outsourcing of legal services to India, non-lawyers run legal factories that, among other tasks, manufacture briefs and other legal documents. Each of these areas is unaffected by the decision.

That said, the decision is significant for a variety of reasons. On one hand, it bars foreign law firms from opening offices in India. On the other, it tarnishes their image, first, for having argued that they were somehow not subject to the law that regulates all lawyers in India; second, for giving the "practice of law" a more restrictive meaning than what they would in their home country. After all, "practice of law" in New York or in London is not limited to litigations. It is of no avail that India's current statute arguably lends itself to such splitting of hairs.

No less significantly, the decision succeeds in perpetuating a combative stance between domestic lawyers' lobbies and foreign firms, thereby strengthening the lobbies and alienating foreign law firms. These lobbies have focused little on the much-needed reform in the law relating to regulation of individual lawyers. Thanks in part to this case, it has been possible for them to frame the "big issue" before the bar as one concerning entry of "foreign law firms" as distinguished from "admission of foreign lawyers" or, for that matter, standards governing admission to the bar.

Thus, for instance, during the intervening 15 years, India did not institute any system of qualifying examinations for admission to the bar, thereby depriving a foreign lawyer of a simple, non-discriminatory and transparent road to admission.

Defendant firms did not do themselves any good by suggesting that they were entitled to operate offices in India without the need for compliance with the law applicable to all other lawyers. The Advocates Act may have deficiencies; indeed, it is a subject of frequent litigations, including before the Supreme Court. It does not contain any provision concerning entry of foreign law firms. However, to argue before a judge that the law applicable to all lawyers in his country was somehow not applicable to foreign law firms does not appear to have been a strategy designed to win friends in foreign lands.

No Winners. There is an old saying in India: the business of hustling coal tarnishes all. Akin to that, there were only losers in this case. One of the crucial defendants, the Union of India, argued that because bureaucrats did all legal work in government without oversight by the Advocates Act, that act did not, by implication, regulate non-litigators.

The argument revealed the Union's lack of interest in the subject, was roundly dismissed by the Court, and earned it widespread ridicule among lawyers. The Lawyers Collective may have temporarily succeeded in halting the formal entry of certain law firms but the victory was hollow: many foreign

law firms have entered into "best-friend" agreements with domestic firms or found other surreptitious ways in which to operate out of India. Finally, the Court earned itself no praise for taking 15 years to make a decision.

No appeal has been filed in this case. None is expected. Appeals typically lie with the Supreme Court of India. In a quirk of sorts, one of the two authors of the decision, Chief Justice Swatanter Kumar, has since been elevated to the Supreme Court.

Jaipat S. Jain *is a partner at Lazare Potter & Giacovas, in New York, and a member of New York City Bar's Task Force on International Legal Services. He can be reached at jjain@lpgllp.com.*

Endnotes:

1. Suit 1526 of 1995.

2. Now Ashurst LLP.

3. Application of White & Case, See Judgment WP 1526/1995, at 6 (Bombay High Court, 2009), Manu/MH/1467/ 2009 (the "Judgment"). See http://bombayhighcourt.nic.in/data/judgements/2009/OSWP8152695.pdf (last visited Feb. 16, 2010) for the full text of the Judgment.

4. Id., at 7.

5. Judgment, at 27 (internal quotations ignored).

6. The word, "practice" is often spelled "practise" in India. For ease of reading, the word is spelled "practice" here even where the actual spelling used in Indian materials is "practise."

7. Id.

8. Id., at 29.

9. Id., at 29.

10. Act 25 of 1961 (the Advocates Act or the 1961 Act).

11. *Re. Gurubasappa*, Advocate, AIR 1964 AP 261, (1964) 1 Andh WR 133, (1964) Andh LT 172 (FB).

12. Advocates Act, §29.

13. Unlike the U.S., however, all powers not specifically conferred on the states by the Constitution are held by the federal government.

14. See Entries 77 and 78 of Union List, Seventh Schedule, Constitution of India.

15. AIR 1968 SC 888, 1968 2 SCR 709.

16. The Constitution provides that the states may legislate with respect to "legal" and other professions. See Entry 26, Concurrent List, Seventh Schedule. Under the general rule of interpretation, if a subject is such that both the Union and the states could make laws, then any enactment by a state that is "repugnant" to a law made by the Parliament on that same subject is

potentially invalid. See Article 254, Constitution of India, as amended. See also *Amalgamated Electricity Co. v. Municipal Committee*, Ajmer, AIR 1969 S.C. 227 (234); 1969(1) SCR 430. Courts seek to avoid direct conflict by following a long-standing policy of "harmonious construction."

17. See Sections 30 and 33, the 1961 Act.

18. Judgment, at 33.

19. Id., at 35.

20. Id., at 36.