

## India—the scope of foreign lawyers and firms to practice in India (Bar Council of India v AK Balaji)

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**Arbitration analysis: Moazzam Khan, head of the Global Litigation Practice at Nishith Desai Associates in New Delhi, and Alipak Banerjee, senior member of the firm’s international litigation & dispute resolution practice, reflect on the practical implications of the Supreme Court of India’s decision from March 2018 concerning the provision of legal services in India by foreign lawyers and law firms.**

*Bar Council of India v AK Balaji and others* Civil Appeal Nos 7875-7879 of 2015

### What was the background to the judgment?

In March 2018, the Supreme Court of India in *Bar Council of India* settled:

- the law on the interpretation of the words ‘practice the profession of law’
- the scope of foreign lawyers to practice foreign law in India
- the scope of foreign lawyers to participate in arbitration proceedings in India

Both the Madras High Court and the Bombay High Court had ruled on this subject. The Bar Council of India (Bar Council) filed an appeal against the Madras High Court decision, while Global Indian lawyers challenged the Bombay High Court decision before the Supreme Court.

On 21 February 2012, the Madras High Court had held that:

- foreign law firms and foreign lawyers cannot practice the profession of law in India (either litigation or non-litigation), unless they fulfil the requirement of India’s Advocates Act 1961 and the Bar Council of India Rules
- foreign law firms or foreign lawyers can visit India for a temporary period on a ‘fly in and fly out’ basis, for the purpose of giving legal advice to their clients regarding foreign law or their own system of law and on diverse international legal issues
- foreign lawyers cannot be debarred from coming to India and conducting arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration
- the business process outsourcing (BPO) 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 India’s Advocates Act 1961 or the Bar Council of India Rules

However, in the event of any complaint made against these BPO companies violating the provisions of India’s Advocates Act 1961, the Bar Council may take appropriate action against such erring companies.

On 16 December 2009, the Bombay High Court had held that the expression ‘to practice the profession of law’ under India’s Advocates Act 1961 is wide enough to cover the persons practicing in litigious matters as well as persons practicing in non-litigious matters and hence, a practice in non-litigious matters in India would have to be governed by the provisions of India’s Advocates Act 1961. This decision did not address whether foreign lawyers can practice foreign law in India.

## What did the Supreme Court decide?

The Supreme Court held that 'practice of law' includes not only appearance in courts, but also:

- giving of opinion
- drafting of instruments
- participation in conferences involving legal discussion

The Supreme Court clarified that unless otherwise provided in any other law, advocates enrolled under the Bar Council only are entitled to practice law. All others can appear with specific permission of the court, authority, or persons before whom the proceedings are pending, as specified under India's Advocates Act 1961, s 32.

The Supreme Court has allowed foreign lawyers to provide legal advice on foreign law involving diverse international legal issues on 'casual' visits to India. The Supreme Court also opined that 'fly in, fly out' may amount to practice if it is on a frequent basis. Interestingly, the Supreme Court has not clarified on what amounts to 'casual' visits. It has been held that casual visits may not be 'practice of law' and whether a visit is casual or frequent would depend on facts of each case. The Supreme Court rejected the contention that India's Advocates Act 1961 applies only if a person is practicing Indian law, and that a foreign lawyer is entitled to practice foreign law in India without being subject to the Bar Council's rules and regulations.

The Supreme Court additionally held that foreign lawyers may not be debarred from conducting arbitration proceedings in India—however, they will be subject to the code of conduct applicable to the legal profession in India.

The Supreme Court observed that legal processing and outsourcing companies providing a wide range of customised and integrated services does not come under the purview of India's Advocates Act 1961, but the mere labelling of such services cannot be treated as conclusive. If in pith and substance the services amount to practice of law, the provisions of the India's Advocates Act 1961 will apply and foreign lawyers or law firms will not be allowed to do so.

## What are the practical implications of this judgment?

Under India's Advocates Act 1961, s 24, only an Indian citizen can be enrolled to practice law. Consequently, foreign lawyers cannot be enrolled and cannot practice law in India. However, foreign lawyers have been permitted to provide legal advice on foreign law involving diverse international legal issues on 'casual' visits to India. Whether a visit is a casual or a frequent visit so as to amount to practice is a question of fact. Ordinarily, a casual visit would mean a non-recurring visit, however it remains to be seen how casual visits are interpreted in the near future.

Foreign lawyers are not debarred from conducting international arbitration. However, the ruling that such foreign lawyers would be bound by the code of conduct applicable to the legal profession in India appears to be contrary to the internationally accepted practice of foreign lawyers freely practising before international commercial arbitral tribunals. Importantly, the Supreme Court has not placed any express restrictions, and has only acknowledged the Indian Bar Council's right to regulate.

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## LexisNexis

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