What now for foreign law firms?

Legal professionals assess the impact of Bombay High Court's ruling on foreign law firm liaison offices

Ajay Shamdasani reports

A recent court ruling on the issue of foreign law firm liaison offices has set the global legal community abuzz. In the case of *Lawyers Collective v Bar Council of India et al*, Bombay High Court considered the legality of licences granted by the Reserve Bank of India (RBI) to three law firms – Ashurst, White & Case and Chadbourne & Parke – in the mid '90s. The licences, which were granted under section 29 of the Foreign Exchange Regulation Act, 1973, permitted the firms to establish liaison offices in the country.

The petitioner, Lawyers Collective, a group of advocates formed to promote social causes, opposed the licences, arguing that the practise of law – even for non-litigious work – was governed by the Advocates Act of 1961.

Since the three foreign law firms were not licensed to practise law in India, Lawyers Collective contended that the RBI licences contravened the Advocates Act. It also argued that under the terms of the act, "practise of law" was deemed to include both litigation and transactional work, and did not simply apply to those authorized to appear in court.

In its judgment of 16 December, a two-judge bench consisting of Chief Justice Swatanter Kumar and Justice JP Devadhar ruled in favour of Lawyers Collective and held that the RBI licences were unjustified. Their ruling upholds an interim decision by Bombay High Court in 1995, after which no new licences were issued.

White & Case and Chadbourne & Parke closed their India offices after the 1995 decision. But UK-based Ashurst stayed behind. For 15 years it has been the only foreign law firm to have a physical office in the country.

The new decision may yet be appealed before the Supreme Court, but for now the parties are playing their cards close to their chests. "We are continuing to review the decision and

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its implications," says Andrew Blum, the New York-based media relations manager at Chadbourne & Parke.

"We will continue to comply with the regulatory requirements in India," says Jo Sheppard, the London-based head of public relations at Ashurst. "We continue to believe that opening up the legal market would not only benefit the legal community in India but it would also help to facilitate the continued growth of international business in India," she adds.

Defining legal practise

The case hinged on the definition of the term "practise of law" and whether this applies to all lawyers in India or simply those practising before the country's courts.

In announcing its decision, Bombay High Court cited the Supreme Court's decision in *Harish Uppal v Union of India*, 2003: "The right of the advocate to practise envelops a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators … The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie."

Likewise, the Supreme Court held that practise rights include non-litigation in the case of *Pravin Shah v KA Md Ali*, 2001. Indeed, section 29 of the Advocates Act states that "there shall ... be only one class of persons entitled to practise the profession of law, namely, advocates."

The three foreign firms had contended that section 29 of the act should be read in conjunction with section 33. This section states that "no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this act". The law firms therefore argued the requirement to be enrolled as an advocate applied only to lawyers who would appear before the country's courts.

In rejecting this assertion, the high court turned to the statement of objects and reasons in the Advocates Act. The objective of the act, it said, was to form a unitary, nationwide bar council whose members can practise in any Indian court, including the Supreme Court. The court held that legislative intent sought to deal with "practise in any part of the country" and "practise in any court" which by definition includes non-litigation in its ambit.

Constitutional questions

Representing White & Case, senior counsel Navroz Seervai raised an interesting constitutional argument relating to the Supreme Court's decision in *ON Mohindroo v Bar Council*. This ruling held that the Advocates Act had been enacted by parliament under entries 77 and 78 of list I of the seventh schedule to the constitution, which deals solely with issues related to the organization of the Supreme Court and high courts, and those permitted to appear before them. On this basis, Seervai contended that the Advocates Act only extends to litigation before the country's high courts and Supreme Court. For other types of legal practice, he argued, it was necessary to turn to the definitions in entry 26 of list III of the schedule, which deals with the legal profession.

The high court, however, dismissed this argument. While acknowledging that the Supreme Court had indeed held that the advocates act had been enacted by parliament under entries 77 and 78 of list I of the seventh schedule of the constitution, it rejected the notion that the Advocates Act was only applicable to those practising before the high courts or the Supreme Court. "Practising the profession of law involves a larger concept, whereas practising before the courts is only a part of that concept," the high court said.

Silver lining

Despite the disappointment felt by many foreign firms, there may be a silver lining in the court's decision. Embedded in the ruling is a directive to the government to expedite its decision making with regards to the opening up of the country's legal profession.

"We are pleased that this substantive issue has been directed to the Indian government," says Sheppard.

However, as Anand Prasad, a partner at Trilegal, cautions, the court's directive "is not law but *orbiter dicta*".

Vivek Kathpalia, a Singapore-based partner at Nishith Desai Associates, believes that the Indian government actually supports the foreign law firms' position, as evidenced by its filing of an affidavit maintaining that "the 'practice of law' only encompasses litigation, not foreign legal advice".

Maintaining the status quo

As for the practical consequences of the ruling, the general consensus is that the status quo will continue and that the Indian legal profession will remain closed for the foreseeable future. Foreign firms, to the extent that they are already

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present in India, will continue operating out of hotel rooms and establishing "best friends" relationships with local practices.

Prasad at Trilegal describes the ruling as an "inconvenience rather than a deathblow". Meanwhile Hong Kong-based Neil Torpey, the vice-chairman of Paul Hastings' global corporate department, expresses concerns that "neither the Advocates Act, nor this judgment, address the issue of non-Indian-law transactional work," which accounts for most of the India-related work that foreign law firms undertake.

Prasad is sympathetic to the needs of foreign lawyers to service their Indian clients in India. "I don't think foreign lawyers should take the super-conservative approach and not visit India to tend to clients," he says, adding that the practice of foreign firms making temporary visits and operating from hotel rooms "will continue the way it is".

Remaining 'best friends'

Several observers have questioned the impact of the ruling on existing "best friends" relationships between Indian and foreign firms, but most lawyers are confident that such tie-ups will be unaffected. "The implications of the high court judgment on the existing work arrangements are next to negligible," says Rabindra Jhunjhunwala, a Mumbai-based partner at Khaitan & Co. "The foreign law firms [apart from Ashurst] had not been operating directly but only through 'best friends' relationships, which can continue."

"This judgment does not address tie-ups and 'best friends' relationships," concurs Kathpalia.

Torpey notes that most of the "best friends" arrangements are safe because they "have been structured within the boundaries of existing laws and regulations … The Indian best friend only provides Indian law advice," he says.

Likewise, Shearman & Sterling partner Sidharth Bhasin believes the recent decision has been sensationalized and that "best friends" referral relationships will proceed unimpaired. "There is a lot of hype involved, but perhaps it will force the government to open things up," he says.

Impact on corporate counsel

From a clients' perspective, Torpey believes the court judgment will have little impact. "Corporate counsel look to international law firms for specific and specialized non-Indian-law advice, and the ruling is unlikely to have an impact on this," he says. However, Torpey cautions that the judgment might affect the manner of delivery of legal services since foreign firms may be less comfortable rendering services while being physically present in the country.

Others believe that with foreign clients increasingly engaging Indian counsel directly, rather than through a Western firm, the importance of having foreign lawyers on the ground may be diminishing. "For 70-80% of our clients, there is never an issue. We provide Indian legal services; foreign firms provide foreign legal services – so there's no need for them to have their own lawyers [in India]," says Kathpalia.

Jhunjhunwala agrees that the impact on clients will be negligible, particularly since so many international firms already have a quasi-local presence through referral arrangements. However, he concedes that some of his clients have raised concerns. "Most of the corporate world is cautious in expressing their resentment on the subject," he says. "However the few thoughts privately shared by some of our clients are that this does not bode well for the liberalization of the Indian markets and it's high time that legislature took up the matter."

Spotlight on liberalization

While Bombay High Court's ruling has certainly refocused international attention on the prospects of opening India's legal market, in reality it has very little bearing on it.

As Torpey explains, the judgment is a "ruling on a specific set of facts which are historical," whereas the opening of India's legal market "is a separate issue that is being examined by the Indian government in consultation with appropriate stakeholders". He also notes that a ruling by an Indian court does not provide any insight into the current thought process of the Indian executive or legislature, as they operate independently of each other.

Matthew Bersani, a partner at Shearman & Sterling in Hong Kong, believes that India should take a more measured approach in order to address the dire need for on-the-ground legal services. "We're practising international law," he says. "We are only interested in an [Indian] office to advise clients on cross-border deals."

Bersani believes that Indian lawyers' fears of losing business to US and UK firms are overblown, largely because

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international firms would not be willing to lower their fees to a level that would make them competitive with local ones. "We just want to do what we do, but sit in India and do it," he says.

Bersani touts the benefits that Indian firms would enjoy if their foreign counterparts were allowed in. He cites the example of China, where local firms have gained valuable exposure to global best practices. "We can't practise Chinese law and need to retain local counsel for that, but the Chinese law firms have grown knowledgeable because they're absorbing know-how and technology from the experiences of dealing with Western firms," he says. "Indian firms would benefit too, and we would only give opinions on laws outside India."

Kathpalia is optimistic that the profession will eventually open up, though not until the latter half of the decade. "I've always been slightly upbeat, but my colleagues are less so," he says. Notwithstanding his optimism, Kathpalia predicts that the path to liberalization will be slow: "We have obligations under the WTO to open up our service sector, but the foreign presence here will always be limited in scope."

Bersani is also hopeful that liberalization will come, but he isn't holding his breath. "They've been talking about this for 15 years," he laments.

Appeal prospects

As for the prospect of an appeal against Bombay High Court's decision, neither Bhasin nor Torpey believe it to be likely because law firms do not like to draw attention to themselves. Moreover, the firms involved "are more likely to focus on the larger issue of the opening of the Indian market," says Torpey.

Kathpalia thinks it improbable that an appeal would succeed because the "Supreme Court isn't likely to overturn the high court". If an appeal were to be filed, Prasad thinks only Ashurst, if at all, might do so as it is the only firm with a liaison office to lose. "No one else has one so they're not directly affected," he says. ■