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Bar Council of India's 'Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2023'

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India Practice

It is a historic achievement for the Bar Council of India ("BCI") and for the Indian government that the Indian legal market is now, at least in limited areas, open to foreign law firms and foreign lawyers.

This move follows over twenty years of deliberation. Excluding foreign expertise benefits only a few to the detriment of many others.[1] Companies and individuals who are involved in matters concerning foreign laws (*i.e.*, laws other than that of the Republic of India) could benefit from having access to professional advisors qualified to advise on substantive legal issues. Those clients should have access on the ground, in person, in India—whether their matters involve commercial arrangements, M&A, or international arbitration.

Likewise, Indian advocates could benefit from the significant career and growth opportunities that foreign law firms would bring to India. And opening the Indian legal market would provide Indian attorneys who work with foreign law firms better opportunities to collaborate with their colleagues and friends back at home.

As to the legal profession, competition between Indian qualified lawyers and foreign lawyers is expected to elevate the quality and ethical standards of services.

However, the "Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2023" ("Entry Rules") present significant challenges. The rules prescribe a boil-the-ocean registration process, impose self-defeating limitations, and implement a "fine-first, justify-later" approach without clearly articulating boundaries.

[1] *See, e.g.*, https://www.legallyindia.com/govt-scba-call-for-frequent-reform-consultations-at-inba-s-reminder-that-law-firm-liberalisation-is-pending-00011130-8891 (last visited March 24, 2023); https://www.legallyindia.com/home/ridiculous-salve-slams-fear-mongering-in-fraternity-to-preserve-own-turf-as-et-now-confirms-pm-s-pro-lib-stance-20170810-8711 (last visited March 24, 2023).

To move forward, it seems important that these rules be improved through the collaboration of all stakeholders, including those newer to law or now studying law.

Background

On March 13, 2023, the BCI notified the Entry Rules in the Gazette of India. The rules came into force immediately upon notification. *See* Entry Rule 1(b) ("These Rules shall come into force in whole of India as soon as notified in the official Gazette."). As a result, "a foreign lawyer or foreign law firm shall not be entitled to practice law in India unless he/it is registered with the Bar Council of India under these [Entry] Rules," subject to a more limited "fly-in-fly-out" exception. Entry Rule 3(1).

The stated purposes of the Entry Rules are: "help[ing] address the concerns . . . about flow of Foreign Direct Investment in [India] and making India a hub of International Commercial Arbitration." Objects and Reasons, ¶ 9. To achieve these goals, the Entry Rules attempt to create new opportunities for Foreign Lawyers, particularly in relation to transactional/corporate work and international arbitrations. Litigation before courts and tribunals remains off-limits, and the Entry Rules generally prohibit Foreign Lawyers from practicing in any forum where evidence is recorded under oath.

Attorneys who practice law outside India are "Foreign Lawyers" under the Entry Rules. *See* Entry Rule 2(iii) ("'Foreign [L]awyer' means a person, including a law firm, limited liability partnership, company or a corporation, by whatever name called or described, who/which is entitled to practice law in a foreign country.").

Any state and country where a Foreign Lawyer practices constitutes a "Foreign Country" under the Entry Rules. *See* Entry Rule 2(iv) ("'Foreign Country' means a country, which is recognized as such by the Government of India and it includes a constituent State thereof in case such as a foreign country has a federal structure of governance and such constituent State has its own justice-delivery system and a separate class of persons entitled to practice law.").

Subject to registration with the BCI, Foreign Lawyers are welcome to open an office in India. Registration involves numerous complicated steps, including establishment of "reciprocity." While "reciprocity" is a fundamental premise of the Entry Rules, the rules do not explicitly define this term, and they instead use various formulations such as "principle of reciprocity" (Entry Rule 12), "complete reciprocity" (Entry Rule 5(4)), "reciprocity" (Entry Rule 6(A)), and "reciprocal basis" (Entry Rule 8(2)). All of these hint at a requirement that the Foreign Lawyer's home jurisdiction should offer similar allowances to Indian advocates.

On March 19, 2023, the BCI published a press release entitled "True Facts about BCI's Rules regarding Entry, Rules and Regulations of Foreign Lawyers and Law firms in India" ("Press Release").

Analysis

The Entry Rules attempt to take "an all-inclusive view" to enable Foreign Lawyers "to practice foreign law and diverse international law and international arbitration matters in India on the principle of reciprocity in a well defined, regulated and controlled manner" (Entry Rule 10). However, as currently framed, the rules will likely struggle to properly open these "arenas" (Entry Rule 8(2)) and may leave *Indian* parties dealing with foreign law at a disadvantage. For example, the Entry Rules limit Foreign Lawyers to representing only *foreign* parties in India-

seated arbitrations. This limitation may work against incentivizing parties to international commercial arrangements to adopt India as the seat of arbitration.

Further ambiguity surrounds procedures for registration as BCI has not yet published "Form A," *i.e.*, the form that a Foreign Lawyer must submit to apply for registration.

What Is Now Permitted?

This section discusses the impact of the Entry Rules on the scope of activities Foreign Lawyers may undertake in India. As to the law prior to the Entry Rules, *Bar Council of India Vs. A.K. Balaji*, (2018) 5 SCC 379 ("*Balaji*"), is instructive.

1. "Fly-In-Fly-Out"

Pre-Entry Rules	Post-Entry Rules
Permitted, but limits unspecified: The Supreme Court of India ruled that there is "no bar for the foreign law firms or foreign lawyers to visit India for a temporary period on a 'fly in and fly out' basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues. . . [T]he expression 'fly in and fly out' will only cover a casual visit not amounting to 'practice.'" (*Balaji*, ¶ 43.) Disputes are to be adjudicated on a case-by-case basis, and limits "can be determined by the Bar Council of India." (*Id*.) Additionally, "the Bar Council of India . . . [is] at liberty to make appropriate rules in this regard." (*Id*.) It is unclear whether, prior to the Entry Rules, the BCI (or any other authority) attempted to articulate when "fly-in-fly-out" becomes "practice."	**Permitted, and limits specified**: Under the Entry Rules, there are no restrictions and no registration requirements for "law practice by a foreign lawyer or foreign law firm in case such practice is done on a 'fly in and fly out basis' for the purpose of giving legal advice to the client in India regarding foreign law and on diverse international legal issues and provided further that such expertise/advise of such a foreign lawyer or foreign law firm had been procured by the client in a foreign country and foreign lawyer or foreign law firm does not maintain an office in India for the purpose of such practice and lastly such practice in India for one or more periods does not, in aggregate, exceed 60 days in any period of 12 months." Entry Rule 3(1).

As written, the BCI's new rule states that Foreign Lawyers may, absent registration, work in India subject to four conditions: *First*, they should work in India no more than 60 days in any 12-month period. *Second*, their work should involve advising Indian clients on foreign law or international legal issues. *Third*, the client should have "procured" the Foreign Lawyer's expertise or advice in a foreign country. *Fourth*, the Foreign Lawyer should not establish any office in India to support this work.

The restriction regarding "procurement" ostensibly requires that the Indian client leave India to obtain the services of a foreign lawyer. However, the new rule is ambiguous, and may prove impractical to implement, creating unnecessary burden and cost for Indian companies and individuals seeking advice on foreign law. This rule could benefit from additional clarity and may even require a rewrite.

2. Transactional And Corporate Work

Pre-Entry Rules	Post-Entry Rules
Permitted on a fly-in-fly-out basis: "We are persuaded to observe . . . [that] there may be several transactions in which an Indian company or a person of Indian origin may enter into transaction with a foreign company, and the laws applicable to such transaction are the laws of the said foreign country. There may be a necessity to seek legal advice on . . . the foreign law [to] be applied to the said transaction, for which purpose if a lawyer from a foreign law firm is permitted to fly into India and fly out advising their client on the foreign law, it cannot be stated to be prohibited." (*Balaji*, ¶ 60.)	**Permitted from local office, subject to registration**: "A foreign lawyer or foreign law firm [may] . . . practice law in India [provided] he/it is registered with the Bar Council of India under these Rules" (Entry Rule 3(1)); and registered foreign lawyers "shall be allowed to practice on transactional work /corporate work such as joint ventures, mergers and acquisitions, intellectual property matters, drafting of contracts and other related matters on reciprocal basis." (Entry Rule 8(2).)

The Entry Rules allow Foreign Lawyers to handle a variety of transactional and corporate work in India.

There is ambiguity, however, surrounding whether *an Indian* client could retain the local office of a Foreign Lawyer in transactions where foreign law is relevant (*e.g.*, a joint venture agreement the governing laws of which are the laws of a jurisdiction other than India). The Entry Rules do not explicitly prohibit such work, but the Press Release creates confusion by asserting that the Entry Rules permit work by Foreign Lawyers "for their foreign clients only." (Press Release, ¶ 2.) It seems counterproductive to place Indian parties to transactions involving foreign law at a disadvantage in this manner.

3. Arbitrations

Pre-Entry Rules	Post-Entry Rules
Permitted for certain international commercial arbitrations: "We hold that there is no absolute right of the foreign lawyer to conduct arbitration proceedings [in India] in respect of disputes arising out of a contract relating to international commercial arbitration. If the Rules of Institutional Arbitration apply or the matter is covered by the provisions of the [Indian] Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act. However, they will be governed by code of conduct applicable to the legal profession in India. Bar Council of India or the Union of India are at	**Permitted for arbitrations involving foreign clients**: A Foreign Lawyer may appear for parties "having an address or principal office or head office in a foreign country in any international arbitration case which is conducted in India [wherein] . . . foreign law may or may not be involved;" and for parties "having an address or principal office or head office in the foreign country of the primary qualification in proceedings before bodies other than Courts, Tribunals, Boards, statutory authorities who are not [sic] legally entitled to take evidence on oath, in which knowledge of foreign law of the country of the primary qualification is essential." (Entry Rules 8(2)(ii), 8(2)(iii).)

liberty to frame rules in this regard." (*Balaji*, ¶ 45.)	

The Entry Rules appear to limit Foreign Lawyers to representing only foreign clients in international arbitrations held in India. If the governing law of the matter in dispute is the law of a jurisdiction *other than* India, the Foreign Lawyer should not be disqualified from representing any party to the dispute. This restriction may create a disincentive for holding arbitration proceedings in India.

The Entry Rules could benefit from simplification. If the rules were rewritten to prohibit Foreign Lawyers from participating in arbitrations that involve only Indian parties and Indian law, they would meet the parties' requirements and be more in line with BCI's stated goal of "making India a hub of International Commercial Arbitration."

How Should A Foreign Lawyer Register?

The Entry Rules prescribe an uncertain process that could prove burdensome for Foreign Lawyers applying for BCI registration. As previously stated, the form that a Foreign Lawyer seeking registration is required to complete, namely, "Form A," is yet to be published.

Registration is valid for five years, following which another application for renewal must be submitted. Conditions for renewal are similar to those for registration. For renewal, Foreign Lawyers must complete "Form B," which is also undisclosed at this time. The BCI retains broad discretion on whether to register a Foreign Lawyer, or renew or cancel a registration. This includes the ability to consult with a seemingly unbounded list of political stakeholders,[2] and to conduct investigations.[3]

Entry Rule 4(1) enumerates twelve conditions for registration, of which the most significant ones are discussed below.

First, India must issue a no-objection certificate. Specifically, an applicant is required to submit "[a] certificate from the Government of India (Ministry of Law & Justice and Ministry of External Affairs and Trade) . . . [stating] that an effective legal system exists in concerned foreign country

[2] According to Entry Rule 7, the BCI may "hold consultation with the Government of India through the Ministries of Law and Justice . . . the Hon'ble Chief Justice of India or any sitting Judge of Supreme Court, the Union Minister of Law & Justice and /or the Union Minister for Foreign Affairs, any other Senior Advocate or Jurist or the . . . Advisory Board of Bar Council of India for the Development of Legal Education & Legal Profession on any issue relating to registration or cancellation of registration."

[3] Entry Rule 4(1)(ix) requires the applicant to submit "[a] declaration on affidavit that the applicant has no objection and consents to the making of enquiries and investigation by the Bar Council of India on its own or through such government or non-government investigating agency, as it may deem fit, to verify the veracity of the particulars disclosed by the applicant in the application and genuineness of the documents annexed therewith."

of the primary qualification and that it has no objection in case the applicant is registered." Entry Rule 4(1)(i).

Second, the Foreign Country must certify "reciprocity." Specifically, the applicant is required to submit "[a] certificate from the Government of the foreign country of primary qualification or from a competent Authority thereof certifying that [Indian] advocates . . . are permitted to practice law in that country in the manner and to the extent which is comparable to the law practice permitted under these [Entry] Rules." Entry Rule 4(1)(iii). Relatedly, the applicant must submit "details of the fee structure and other amounts chargeable from an [Indian] advocate . . . to practice law in that country." Entry Rule 4(1)(vi).

Third, the applicant must pay registration fee plus a "guarantee." For law firm applicants, for example, a registration fee of USD 50,000 is payable, plus a "guarantee amount" of USD 40,000. As to the latter, the applicant must submit "[a] declaration on oath that he/it shall not be entitled to and shall not claim any interest on the guarantee amount . . . and that the Bar Council shall be entitled to adjust and apply this guarantee amount to the penalty and cost amounts that may be awarded by the Bar Council of India under the provisions of these Rules." Entry Rule 4(1)(xi).

Finally, the applicant must make additional promises. For example, the applicant must submit an undertaking on oath that "he/it shall not practice Indian law in any form or before any court of Law, Tribunal, Board or any other Authority legally entitled to record evidence on oath" (Entry Rule 4(1)(x)), and that the applicant agrees to be subject to ethics and other rules of the BCI, including that "he/it is subject to the jurisdiction of Courts of Law in India and to the jurisdiction of Bar Council of India in relation to such practice." Entry Rule 4(1)(xii).

The registration process raises numerous questions, and will likely require clarification and simplification before Foreign Lawyers can confidently act under the Entry Rules. Clarification seems particularly important for foreign law firms that operate globally. Assume, for example, a global law firm's California-based attorneys apply to open an Indian office and, in addition to satisfying the other requirements, demonstrate that California is accessible to Indian attorneys. Once opened, could the new India office provide *any* support to attorneys from the firm's other offices? Could the firm's London-based colleagues, for instance, avail themselves of the registration-free "fly-in-fly-out" ability to advise on the law of England without converting the office into one improperly "maintain[ed] . . . for the purpose of" a "fly-in-fly-out" practice? Alternatively, if the firm's California-qualified attorneys are advising on a transaction and the governing law shifts to that of England and Wales, are the attorneys required to put down their pens because the India office was originally registered based on California's reciprocity? These are some significant questions that the Entry Rules do not appear to answer.

Opposition To The Entry Rules

There is widespread support for the government's efforts to liberalize the Indian legal market, but some groups continue to oppose this movement. This section briefly addresses some arguments advanced by opponents to liberalization.

First, opponents argue that the Entry Rules have been brought in a hurry and that they contradict *Balaji*. However, as summarized in the Objects and Reasons section of the Entry Rules, the Supreme Court of India in *Balaji* explicitly recognized each of the topics addressed in the Entry Rules as proper subject matter for the BCI to regulate. Indeed, *Balaji* (a 2018 decision)

ordered the BCI to formulate rules and to do so expeditiously. *See, e.g.*, Balaji, ¶ 59 ("Counsel for the Union of India had argued that the Central Government is actively considering the issue relating to the foreign law firms practicing the profession of law in India. Since the said issue is pending before the Central Government for more than 15 years, we direct the Central Government to take appropriate decision in the matter as expeditiously as possible.").

Second, opponents argue that it is unfair that Indian law firms cannot be registered under the Advocates Act, 1961, while foreign firms may do so pursuant to the Entry Rules. However, it appears as though Indian firms are *exempt* from the onerous registration requirements and, therefore, have easier access to the Indian legal market.

Third, opponents argue that the BCI cannot take disciplinary action against Foreign Lawyers. However, the Entry Rules require those seeking registration to be adherent to BCI rules and the jurisdiction of Indian courts.

Finally, opponents argue that the Entry Rules are vague as to "reciprocity" requirements and also fail to properly define what Foreign Lawyers may or may not do. As discussed, these are fair criticisms and all would benefit from greater clarity.

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