

Prolonging the Battle for Open Legal Markets in India

Sumeet H. Chugani

Xingjian Zhao¹

For years, lawyers at foreign firms have sought for opportunities to tap into the multibillion-dollar Indian market. They understand the impact that open markets will have for this growing democracy. Set to be the world's third largest economy by 2035, India's artificial barriers to the influx of legal professionals, and consequently international business, continues to be criticized by both foreign and domestic corporate interests as a major hindrance to India's economic development. A new High Court decision further constrains the influx of international capital.

On December 17, 2009, the Mumbai High Court of Judicature held that India's central bank cannot license foreign law firms to practice, even in a non-litigious advisory capacity, unless members fulfill the requirements of India's Advocates Act of 1961 ("Advocates Act"). In addition to the negative implications for international law firms seeking to tap into India's unsaturated legal market, the decision impacts India's economic growth by imposing a further barrier to the influx of international investment.

The Mumbai High Court's decision rendered existing licenses for foreign law firms invalid if their members failed to follow certain regulatory prerequisites. As a result of this decision, the affected law firms may neither litigate nor advise clients in India without conforming to onerous local certification. For example, the Advocates Act effectively blocks bar membership to graduates of foreign law schools. Moreover, Indian bar membership requires

¹ Sumeet Chugani is an associate attorney at the Miami office of Diaz, Reus & Targ LLP. He is a member of the firm's international litigation practice group. Xingjian Zhao is a law clerk at Diaz, Reus & Targ LLP. He focuses his research on international litigation and cross-border transactions.

passage of India's articulated clerks examination. Previously, international lawyers were permitted to draft contracts, advise business clients, and perform transactional tasks without fear of breaching Indian laws. This is no longer the case. The Court found that the legislators' intent in enacting the Advocates Act was to create one class of lawyers for both "litigious and non-litigious matters." The Court thus determined that India's previous deregulation of the non-litigious legal sector was misguided. Consequently, the High Court's decision extended the reach of the Advocates Act to transactional practitioners – imposing upon them the same requirements as litigators.

By opening its legal market, India will undoubtedly benefit from market liberalization, pull more investment into the South Asian region, and foster better trade relations with international partners. The presence of internationally recognized legal service providers would help mitigate the risks associated with investment in India. Such was the case in China when it opened its legal sector on July 1, 1992. The Indian High Court's rationale disallows the replication of this seemingly win-win situation in India.

Law firms still eagerly await the liberalization of India's legal sector – this decision will undoubtedly prolong the battle.