Kluwer Arbitration Blog

India at the Tipping Point to Welcoming Foreign Law Firms? How Do New Rules Affect Foreign Arbitration Lawyers?

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The Bar Council of India ("BCI") recently notified (i.e. entered into effect) the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers or Foreign Law Firms in India, 2022 ("Rules"). It is a pivotal moment for the Indian legal industry as it signals the transformative change allowing the entry of foreign law firms into India. However, the Rules have attracted criticism from the Delhi Bar Council and the Society of Indian Law Firms ("SILF") because of a lack of clarity and for being notified without any consultation process. In its 21-page representation to BCI, the SILF has urged the BCI to repeal the Rules pending consultation with the law firms in India. This post discusses a few issues that could be relevant for international arbitration lawyers while considering setting up an office in India.

"Fly in and fly out" could still be a better option for firms focusing solely on international arbitrations

India has been pushing the envelope slowly and steadily for almost a decade to gain recognition as a pro-arbitration jurisdiction (see here, here, here, and here.). The country has made a concerted effort to improve its standing as a pro-arbitration jurisdiction, starting from the amendment of the Arbitration and Conciliation Act 1996 in 2015. It has also achieved the feat mainly with the cooperation of the judiciary, government, and various domestic and international arbitral institutions.

While the liberalization of the Indian legal market by gradually allowing for the participation of foreign lawyers and law firms could be a game-changer, in its current state, the Rules do not change much so far as foreign law firms and lawyers representing Indian clients in international arbitrations are concerned. Foreign lawyers have historically represented Indian clients in international arbitrations. In that regard, there is not a stark difference in a foreign law firm's ability to represent an Indian party in international arbitration. A foreign law firm still does not need to register under these Rules if it satisfies the following (See Chapter II, Rule 3):

1. It conducts its practice on a "fly in and fly out basis".
2. The purpose is limited to giving legal advice to the client in India regarding foreign law. Such advice must be "procured" by the Indian client in a foreign country.
3. It does not maintain an office in India.

4. In aggregate, the stay in India for such practice does not exceed 60 days in 12 months.

It is unclear what the Rules mean when they state that the advice must be "procured" by the Indian client in a foreign country. It would be impractical for Indian clients to travel out of India to a foreign country each time they "procure" advice on foreign law. It is also unclear if advice sought over a video conference or a phone call would qualify as being "procured" by the client in a foreign country or whether the advice is procured in a foreign country simply by visiting the law firm's foreign office.

The unclear "reciprocity" requirement

Aside from the shortcomings of the Rules highlighted in SILF's representation, BCI's discretion to approve foreign law firms from various jurisdictions to practice in |India could appear convoluted. BCI may refuse to register any foreign law firm if, in BCI's opinion, the number of foreign law firms of any jurisdiction is likely to become disproportionate to the number of Indian law firms registered to practice law in the corresponding country. BCI may also limit the number of registrations to maintain a balance, ensure complete "reciprocity", or protect the interest of Indian law firms. Given that only a handful of Indian firms have offices outside of India, the number of applications BCI approves could remain low, perhaps on a first-come, first-serve basis. Consequently, foreign law firms who may want to adopt the wait-and-see approach could find themselves automatically locked out of Indian shores if, according to BCI, the number of foreign law firms/lawyers that have been allowed has equalled or maxed out in comparison to Indian firms/lawyers in that jurisdiction. Notably, there are several countries where no Indian firm has an office. Does that mean no foreign firm from those jurisdictions will be allowed to open offices in India? Only time will tell once (and if) BCI starts processing the applications based on the recently notified Rules.

Separately, it is unclear what Rules mean by "reciprocity". The Rules state that for reciprocity, BCI would consider the Indian law firms and lawyers operating in the corresponding jurisdiction. For example, several Indian lawyers work for foreign law firms in the U.K. and U.S. who are also qualified to practice law in those jurisdictions. As a result, they essentially practice the local law of that country rather than advising on Indian law. Will the BCI consider this while allowing lawyers from these jurisdictions? The answer is likely no, especially in light of the restriction that foreign lawyers will not have the right to audience in Indian courts and that they can only advise on foreign law to foreign clients.

Preference to "elevated/designated" lawyers

According to the Rules (Rule 6(C)), foreign law firms with lawyers who are awarded a superior level of seniority by their bars or the appropriate authority, such as the King's Counsel in the U.K. and Senior Counsel in Singapore, shall be given preference over others while considering their applications. The Rules do not explain the rationale behind this. Therefore, firms with "designated/elevated" lawyers may have an advantage in their applications to register as foreign law firms. This preference for elevated lawyers could place law firms from countries such as the U.S. at a disadvantage where there is no "elevation" of attorneys, as in India, the U.K., and Singapore.

The limited scope of practice if operating in India

Chapter IV of the Rules lays down the framework for law practice by foreign lawyers. The Rules (in Rule 8(2)(ii)) indicate that foreign law firms registered in India may only advise foreign clients. The BCI released a press release almost immediately after the notification of the Rules, which states that registered foreign lawyers and law firms can advise clients only on foreign law and international law. While the legal validity of such a press release is questionable, the cumulative effect of the Rules read with the Press Release puts Indian clients at a disadvantage as they cannot avail the expertise of registered foreign lawyers. In such a situation, an international firm might instead prefer advising its Indian client from its foreign offices on a fly-in and fly-out basis in India-seated arbitrations, as the Rules appear to restrict foreign firms that are registered in India from representing Indian clients. Both Indian and foreign stakeholders will benefit from clarity from BCI in this regard.

Unclear applicability of the code of ethics

As for the code of ethics, the Rules (Rule 10) state that India's professional and ethical standards in the Advocates Act, 1961, will "normally" apply to any foreign lawyers or law firms to which it grants registration. It is unclear as to what "normally" means as the Rules (Rule 8 (1)) state that in case of misconduct, Chapter V of the Advocates Act, 1961, that relates to the conduct of advocates, including punishment for misconduct, will not apply. Instead, the BCI will refer the matter to the disciplinary authority of the concerned foreign country. It is uncertain what the BCI would do if an action violates the Indian professional standard but not that of the lawyer's/ law firm's home country. The applicability of codes of ethics of multiple jurisdictions is a pervasive issue faced in most international arbitrations. Therefore, BCI would do well if it could elaborate on how the code of ethics would apply to foreign lawyers registered in India.

Separately, when the ethics rules are not conflicting, how will BCI ensure that the concerned authority takes appropriate action when reporting a violation? Further, when an action is taken, what is the guarantee that the action is commensurate with the misconduct? The basis on which the BCI can delegate its responsibility to a regulatory body of another country is unclear. While such foreign regulatory bodies may act on their own volition in violation of their rules, no framework binds the foreign regulatory body to take action on individuals/entities they regulate without a bilateral agreement on the issue. The Rules (Rule 8(1)) state that in case of substantive misconduct, the BCI may cancel the registration of such foreign advocate or foreign law firm. Misconducts can be of various degrees, and revoking the license in case of minor misconduct may be considered harsh and not commensurate with the misconduct. In Bar Council of India v A.K Balaji (2018) 5 SCC 379, the Supreme Court remarked that the BCI or the government could consider making appropriate rules in this regard, including extending the code of ethics to foreign law firms and lawyers. In that regard, BCI could consider a mechanism to regulate foreign lawyers and law firms appropriately.

Conclusion

The most significant benefit of the Rules is that it has conclusively brought the spotlight back on liberalizing the Indian legal market. While the Rules are imperfect, their introduction has ensured the issue can no longer remain on the back burner. SILF has stated multiple times in its representation to BCI that the Rules are *ultra vires* and can be challenged in court. Therefore, it would be reasonable to consider inputs from all stakeholders, including Indian corporate houses, Indian law firms, foreign law firms, and regulatory bodies of countries that allow foreign law firms and lawyers to operate in their jurisdictions. If properly and clearly executed, it will be a shot in the arm to strengthen India's reputation as a pro-arbitration jurisdiction. India, like Singapore and Dubai, could become a preferred choice for foreign law firms to operate arbitration teams to service Asia. As a result, India could become attractive to foreign law firms' arbitration practices offering a large talented pool of lawyers, rapidly improving infrastructure and economical supporting services.

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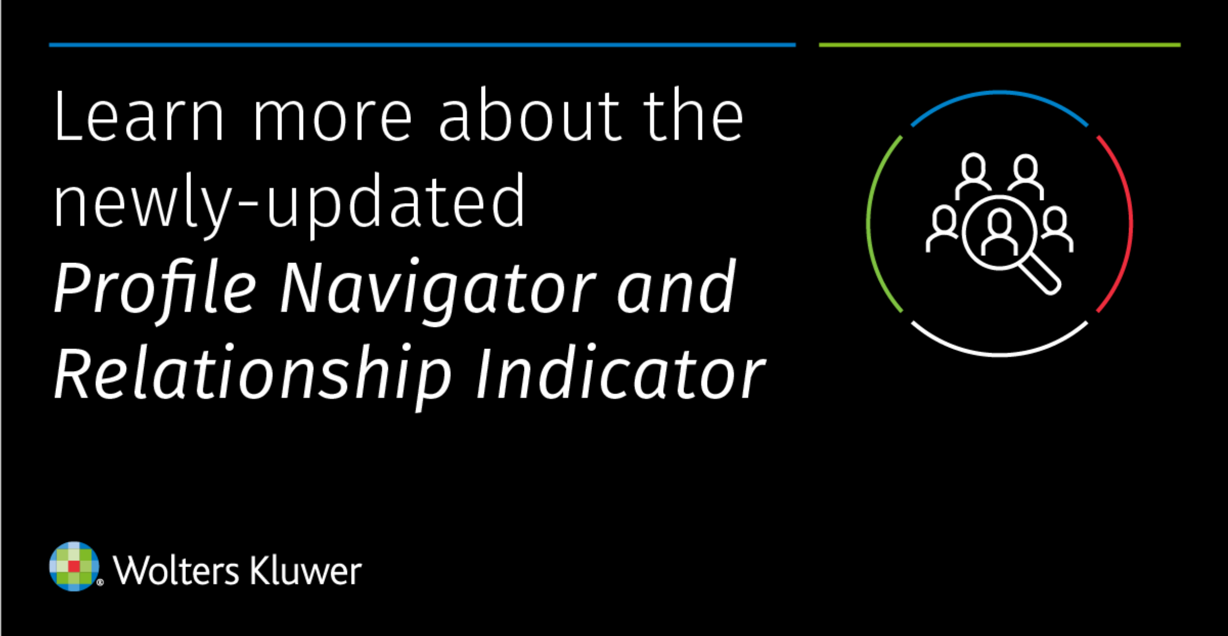

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