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## Legally In India?

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Let's start with an old fight that's taken a new turn and has lawyers across the country in heated debate. In 2009, the Bombay high court had its say. Then, in February this year, the Chennai high ruled on the matter. And now the Supreme Court has passed an interim order! All to determine what foreign lawyers can or cannot do in India! Payaswini Upadhyay gets you the details.

In Lawyers Collective vs The Bar Council case, the Bombay HC had laid down that foreign law firms are not eligible to open liaison offices or practice law in India. That was in 2009.

### **Sitesh Mukherjee** **Partner, Trilegal**

(Trilegal is representing one of the 30 foreign law firms involved in the matter)

"The question that had arisen before the Bombay HC or which was framed before the Bombay HC was whether the practice of profession of law in India included both litigious as well as non-litigious practice. And the Bombay HC said that it did include non-litigious practice as well. As matters stood there, lot of international commercial arbitration started happening in India-foreign lawyers were flying in and flying out to advise clients."

It is against this practice that advocate AK Balaji filed a petition in the Madras High Court. The grounds of appeal were that under the guise of LPOs, seminars and arbitrations, foreign lawyers are visiting India and earning money from their clients. And by doing so, they are violating the provisions of Income Tax and Immigration Laws. AK Balaji also contended that 30 foreign law firms are actively practicing law in the field of mergers, takeovers and the like but his petition doesn't quite describe how.

The foreign law firms argued that their lawyers fly in and fly out of India on a temporary basis to advise clients on international transactions and foreign law- an aspect not covered by the Advocates Act.

In its order, the Madras HC laid down 3 things

First, foreign lawyers can 'fly-in-fly-out' of India to advise Indian clients on foreign law. Second; they can represent clients in India on International Commercial Arbitration. And third BPOs involved in integrated legal services do not come under the Advocates Act but if there is a violation, the Bar Council will have jurisdiction.

### **Sitesh Mukherjee** **Partner, Trilegal**

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"The moment you consider that practice of foreign law in India is part of the practice of profession of law in India, the Advocates Act will apply and the registration would be required. But there

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seems to be a distinction being made in the Chennai HC judgment, which is probably the right distinction that foreign law would not come within the definition of practice of profession of law in India."

**Hiroo Advani**  
**Senior Partner, Advani & Co.**

"This practice of advising on foreign law is prevalent in different jurisdictions and the Madras HC also extensively cited the Vodafone judgment saying that India is attracting FDI and must permit this kind of activity; otherwise the FDI will slow down."

**Manan Kumar Mishra**  
**Chairman, Bar Council of India**  
**Advocate**

"BCI was not in agreement with any of the conditions laid down by honorable Madras HC. And we have challenged the entire judgment of Madras HC â€" the first condition is fully in favor of BCI, the other conditions i.e. the BPOs and international arbitrations â€" we are opposed to it. The arbitrations- we are not opposed to opening the international centers of arbitration in India but they will have to be regulated through BCI and they will have to be under the government and Bar Council of India."

And so, on appeal by the BCI, last week, the Supreme Court passed an interim order clarifying that the RBI shall not grant any permission to foreign firms to open liaison offices in India but the

apex court allowed foreign lawyers to fly in and fly out of India for the purposes of advice on foreign law. But the order is silent on whether foreign lawyers can participate in international arbitration and whether the Advocates Act covers BPOs providing integrated legal services.

**Sitesh Mukherjee**  
**Partner, Trilegal**

(Trilegal is representing one of the 30 foreign law firms involved in the matter)

"The SCâ€™s interim order actually tries to reconcile the Bombay HC judgment and the Chennai HC judgment. There were apprehensions expressed that after the Chennai HC judgment, the Bombay HC judgment was probably no longer good law. So the SC really clarifies that position that the practice of the profession of law in India includes both litigious as well as non-litigious practice. However, what is exempted is foreign law advised by lawyers who fly into India and fly out after giving advice to their clients."

**Manan Kumar Mishra**  
**Chairman, Bar Council of India**  
**Advocate**

"The interim order is self-explanatory. There is no problem. If you go through the verdict of the honorable apex court, the only thing they have allowed is the fly in and fly out basis. Otherwise, the Bombay HC judgment has been affirmed in toto. The other liberties granted by the honorable Madras HC- they have not been approved by the Supreme Court. So only the fly in fly out condition has been approved temporarily so long the case is pending."

**Hiroo Advani**  
**Senior Partner, Advani & Co.**

"It doesnâ€™t change the life of foreign firms in any manner because the SC has not, in any way, restricted them from advising foreign law. It does not prevent them from coming to India when they are handling larger transactions to advise on foreign law. And it does not prevent them in any way in acting in International Arbitration involving foreign law. It does not change life for them in any way at all."

**Lalit Bhasin**  
**President, Society of Indian Law Firms**

"If my recollection is correct, then this submission was specifically made before the SC that at least, let the foreign law firms be permitted about two things- firstly, they can come in and advise the clients on fly-in & fly-out basis and also to participate in arbitration proceedings. But the SC, very clearly, affirmed the

Madras HC judgment to the limited extent that yes, they can do it so far as the fly-in & fly-out is concerned but with regards to arbitration, the SC did not accept the contention."

And so the confusion continues with one side saying that foreign lawyers cannot participate international arbitration till the final judgment is out while the other side believes that because the SC did not address the international arbitration part in its interim order, the Madras HC's order stands. As of now, the apex court has issued notices to all involved but hasn't given a date for the next hearing, leaving the foreign law firms in a fix.

In Mumbai, Payaswini Upadhyay

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