Opening India’s Legal Market: the Madras High Court Cracks the Door for Foreign Lawyers

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Recommended Citation
Katie Feuer, Opening India’s Legal Market: the Madras High Court Cracks the Door for Foreign Lawyers, 37 B.C. Int’l & Comp. L. Rev. E. Supp. 16 (2014), http://lawdigitalcommons.bc.edu/iclr/vol37/iss3/3
OPENING INDIA’S LEGAL MARKET: THE MADRAS HIGH COURT CRACKS THE DOOR FOR FOREIGN LAWYERS

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Abstract: Until 2012 India, barred foreign lawyers from formally practicing law in the country. On February 21, 2012, however, the Madras High Court, in A.K. Balaji v. Gov’t of India, handed a victory to international law firms keen on entering the Indian market alongside their globalizing clients. The Balaji decision marked the Indian judiciary’s first concerted effort to carve back the blanket prohibition, by permitting foreign lawyers to enter India on a temporary basis to conduct arbitrations, or advise clients on matters of foreign and international law. Although many practitioners and scholars alike applaud the Madras Court’s decision, the case also exposes the numerous regulations governing India’s legal profession, thus raising concerns about domestic lawyers’ ability to compete in a now increasingly global market.

INTRODUCTION

On February 21, 2012, the Madras High Court (Madras Court), in A.K. Balaji v. Gov’t of India, handed a victory to international law firms keen on entering the Indian market alongside their globalizing clients.\(^1\) India pro-

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* Katie Feuer is a Note Editor for Volume 38 of the Boston College International & Comparative Law Review.

\(^1\) See Balaji v. Gov’t of India, W.P. No. 5614 of 2010 (Madras H.C. Feb. 21, 2012) (India), available at http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=35290. The decision was appealed to the Supreme Court of India, where it is currently pending, and which affirmed the Madras High Court’s ruling until a final decision is reached. See Petition for Special Leave to Appeal, Bar Council of India v. Balaji, (2013) No. 17150-17154/2012 (India July 7, 2013), available at http://court nic.nic.in/supremecourt/temp/sc%2017150-1715412p.txt. See generally David B. Wilkins & Mihaela Papa, The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance, 36 B.C. INT’L & COMP. L. REV. 1149 (2013) (examining the growth, and regulation of, legal services markets India, as well as other rapidly growing economies). The Indian judiciary consists of multiple levels of courts. See Indian Courts, INDIAN COURTS, http://indiancourts.nic.in/index.html (follow “Indian Judiciary” hyperlink) (last visited October 29, 2014). The Supreme Court of India is the country’s highest tribunal and its decisions are binding on all lower courts. See id. Below the Supreme Court are eighteen High Courts. See id. Each High Court is the supreme court of the state in which it sits. See id. The Madras High Court is the highest court in the southern Indian state of Tamil Nadu. See Madras High Court, HCMADRAS, http://www.hcmadras.tn.nic.in (last visited May 2, 2014). A High Court’s decision is binding within its state and of persuasive value to other High Courts. See INDIAN COURTS, supra. Below High Courts are district courts, which state governments establish. See id. High Courts primarily
tects its legal market to a far greater extent than other countries, and has largely shut out foreign lawyers. Until this ruling, India—at least formally—barred foreign lawyers from practicing law in the country at all. One decision in 2009, from one of India’s highest courts, affirmed the prohibition and held that international firms could not set up offices in India even if only for business development purposes.

The *A.K. Balaji* judgment, however, marks an effort to carve back the blanket prohibition, by permitting foreign lawyers to enter India on a temporary basis to conduct arbitrations, or advise clients on matters of foreign and international law. Part I of this Comment provides background into the regulations that serve to keep foreign lawyers out, as well as the efforts foreign lawyers have made to circumvent those restrictions. Part I also provides an overview of the current state of the Indian bar. Part II discusses the Madras Court’s decision. Part III argues that the reasoning employed by the Madras Court highlights the weaknesses of the restrictive regulations governing India’s legal profession. In particular, Part III argues that Madras Court’s decision exposes inherent difficulties in enforcing the prohibition on foreign lawyers and that the restrictions themselves are incompatible with the Indian government’s expressed economic goals.

I. BACKGROUND

A. Legal and Regulatory Hurdles

Before 1990, India had a closed economy. In the early 1990s, the government introduced a series of economic reforms which permitted foreign direct investment and multinational corporations to enter the country. In-
dia’s economy has developed rapidly since those reforms. Consequently, foreign law firms, particularly those from the United States, England, and Australia, began looking for ways to enter the market in order to better advise their globalizing clients, and to compete for a growing market of new Indian clients.

Despite the country’s liberalization in other industries, the Indian legal market has remained firmly closed to outsiders. Paramount among the barriers to entry is the Advocates Act of 1961 (Advocates Act or the Act), a statute that governs the practice of law in India. The key provision of the Act is section 29, which states that only “advocates” are entitled to practice law in India. To be an advocate, one must also be an Indian citizen. This is subject to two narrow exceptions: (1) If another country permits Indian lawyers to practice in its jurisdiction, then lawyers from that country will be granted reciprocal privileges in India; or (2) otherwise by special permission of the Bar Council of India (BCI).

As a practical matter, foreign lawyers have been unable to take advantage of either exception. India, thus far, has maintained that reciprocity means admittance without bar passage or other licensing requirements, for

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8 Macroeconomics & Economic Growth in Southeast Asia: Growth in India, THE WORLD BANK, http://go.worldbank.org/PHG41GT9I0 (last visited May 2, 2014) (“Since 1991 [India] has been among the top 10 percent of the world’s countries in terms of economic growth.”).

9 See, e.g., Vena, supra note 6, at 195–96; see also Christine Garg, Note, Affiliations: Foreign Law Firms’ Path into India, 56 N.Y.L. SCH. L. REV. 1165, 1170–71 (noting Australia and U.K. lobbying the Indian government to open its legal market). See generally James Podgers & Rhonda McMillion, Two-Way Street: ABA Urges Obama Administration to Ask India to Ease Restrictions on Foreign Lawyers, 97 A.B.A. J. 60 (2011) (arguing that U.S. lawyers should be granted greater access to the legal markets of key trading partners in order to better facilitate cross-border transactions).

10 See Wilkins & Papa, supra note 1, at 1172; Harris, supra note 2.

11 See Krishnan, supra note 6, at 67–68; Garg, supra note 9, at 1175. Before the enactment of the Advocates Act, India’s legal system resembled that of the United Kingdom, which distinguished between legal practitioners who practice in court and legal practitioners who did not. See Garg, supra note 9, at 175. One of the goals of the Advocates Act was to establish greater uniformity in the legal profession. See id. The Act created a single class of lawyers, called advocates, and instituted uniform qualifications for admittance. See id. The Act also established the Bar Council of India (BCI) as the legal profession’s exclusive, and supreme, regulatory body. See id. The Act authorized the BCI to administer, enforce and implement new regulations, which includes determining the qualifications for bar enrollment, licensing practitioners and accrediting law schools. See Krishnan, supra note 6, at 67–68. See generally Advocates Act, No. 25 of 1961, INDIA CODE (1961).

12 See Advocates Act § 29; Krishnan, supra note 6, at 67.

13 See Advocates Act § 24(1)(a); Krishnan, supra note 6, at 67–68.

14 See Advocates Act § 47.

15 See Garg, supra note 9, at 1176.
which other countries do not provide. In addition, the Indian judiciary has not granted foreign firms special permission to practice in India.

Consequently, foreign firms sought entry into the Indian market through alternate means. Soon after India opened its borders to foreign corporations in the early 1990s, three law firms, Chadbourne & Parke, White & Case, and Ashurst Morris Crisp, obtained authorization from the Reserve Bank of India (RBI), which has statutory authority to license commercial enterprises, to open offices in India for business development purposes.

Shortly thereafter, in 1995, Lawyers Collective, an Indian public interest organization, filed a writ petition in the Bombay High Court seeking to enjoin the foreign firms from operating in India. The petitioners charged the law firms with using their liaison offices as fronts for full-fledged legal practices in violation of the Advocates Act. In response, the defendant firms argued that “practicing law,” as defined by the Act, only applied to litigious activities, and because they were not engaged in litigation, the Act did not apply to them.

The Bombay High Court rejected that argument. The court concluded that the Advocates Act applied to litigators as well as non-litigators, and that

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16 See Wilkins & Papa, supra note 1, at 1174; Garg, supra note 9, at 1177. The Act does not define reciprocity, and thus the provisions have generated a great deal of confusion. See Wilkins & Papa, supra note 1, at 1174. Opponents of liberalization claim foreign jurisdictions do not grant complete reciprocity. See id. The United States, for example, imposes hurdles, such as LL.M requirements, which India does not. See id. Proponents, on the other hand, argue that such licensing requirements do not constitute a complete prohibition because Indian lawyers may practice once the requirements are satisfied. See id. India, in response, has linked reciprocity not only to licensing requirements but to immigration issues as well. See id. The General Secretary for the Bar Association of India argued that reciprocity did not exist with the United States because the United States made it much more difficult for Indian lawyers to obtain work permits than India did. See id. The debate over reciprocal conditions may soon be changing, however, as India, in 2010, implemented the All India Bar Exam (2010). See Ganz, supra note 4. Prior to that, India did not require that its advocates pass an admission test. See id.

17 See Garg, supra note 9, at 1176.

18 See id.

19 See Vena, supra note 6, at 196–98. In keeping with the Advocates Act, the foreign firms could not practice law, but they could engage in “liaison” activities, which included setting up offices for the purposes of learning about the Indian business environment, collecting investment information, and serving as official representatives of the foreign firms to the Indian government. See id.


21 See Lawyers Collective, W.P. No. 1526 of 1995, ¶ 9; Vena, supra note 6, at 197.

22 See Jaipat S. Jain, India Shuts Out Foreign Law Firms: Outside Counsel, LAW.COM (Apr. 1, 2010), http://www.law.com/jsp/article.jsp?id=1202447244677 (last visited Oct. 16 2014). White & Case, in its reply affidavit, stated that its non-litigious activity included “drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards and customary practice relating to clients’ transactions.” See id. The source for this argument can be found in India’s constitution. See id.

23 See Lawyers Collective, W.P. No. 1526 of 1995, ¶¶ 55–60; Vena, supra note 6, at 198.
admission as an advocate was a prerequisite to the practice of law in India. Accordingly, the defendant firms were practicing law in violation of the Advocates Act.

B. The State of India’s Legal Profession

According to the Indian Ministry of Finance 2012–2013 Economic Survey, there are approximately 1.2 million registered advocates in India. The overwhelming majority are courtroom litigators operating as solo practitioners. Commentators estimate that less than 10 percent of advocates are engaged in transactional practice. Transactional work is typically performed by law firms, of which there are relatively few, given the size of India’s bar. This is primarily the result of regulations on the legal industry. According to such regulations, firms may have no more than twenty partners, and until recently, could not take advantage of limited liability

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24 See Lawyers Collective, W.P. No. 1526 of 1995, ¶ 54. The court reasoned as follows:

It is not the case of the respondents [defendant firms] that in India individuals/law firms/companies are practising the profession of law in non-litigious matters without being enrolled as advocates under the 1961 Act. It is not even the case of the respondents that in the countries in which their head office as well as their branch offices are situated, persons are allowed to practice the profession of law in non-litigious matters without being subjected to the control of any authority. In these circumstances, when the Parliament has enacted the 1961 Act to regulate persons practising the profession of law, it would not be correct to hold that the 1961 Act is restricted to persons practising in litigious matters and that the said Act does not apply to persons practising in non-litigious matters. There is no reason to hold that in India the practice in non-litigious matters is unregulated.


27 See Krishnan, supra note 6, at 61 (“Marc Galanter’s observation from years back still generally remains true: ‘Among the prominent features of Indian lawyers are their orientation to courts to the exclusion of other legal settings . . . .’”).

28 See Vena, supra note 6, at 205.

29 See Krishnan, supra note 7, at 62; ECONOMIC SURVEY, supra note 26, at 226. The number of transactional lawyers is growing, however, as industrialization and the inflow of foreign direct investment has increased the amount of available corporate work. See ECONOMIC SURVEY, supra note 26, at 226.

30 See Vena, supra note 6, at 206.
Consequently, partners faced the potential of unlimited personal liability—liability that increased with the size of the partnership—for their partners’ actions. Further regulations on law firms include a prohibition on marketing services, restrictions on the ability to borrow money, and a ban on contingent fee structures.

Despite these restrictions, the number of transactional lawyers, and thus the size of law firms, has grown throughout India’s economic liberalization. India has roughly fifty elite law firms, which collectively perform the bulk of the lucrative corporate work. In 2000, these elite firms founded the political interest group, Society of Indian Law Firms (SILF). Traditionally, this group has been one of the staunchest opponents of liberalization, in part, because they would be directly competing with foreign firms.

C. Foreign Firms in India Today

It took fifteen years for the Bombay High Court to decide Lawyers Collective. In the interim, foreign firms found new ways to circumvent the Advocates Act and tap into the Indian market. Some law firms established India-focused practices in branch offices in Singapore or London. Other firms established formal affiliations with Indian law firms known as “best friend agreements.” Under these preferential arrangements, foreign and Indian firms engaged in reciprocal referral agreements, incentivizing foreign firms to invest time and resources into developing their Indian partners.

31 See id. Technically some Indian law firms have managed to circumvent the twenty-partner limit by joining partnerships. See id.
32 See id.
33 See id. These restrictions are imposed by the BCI and adopted pursuant to its authority under the Advocates Act. See id. at 206, n.69.
34 See id.; ECONOMIC SURVEY, supra note 26, at 226.
35 See Krishnan, supra note 6, at 66, n.39 (estimating the number of lawyers these elite firms employ varies from 2,500 to 15,000).
36 See id. at 63.
37 See id. at 64–65. As the article points out SILF’s arguments against liberalization are more complex than simple fear of competition. See id. In fact SILF, unlike the BCI, approved of the Madras High Court’s decision in A.K. Balaji. See Kian Ganz, SILF View Clashes with BCI SC Appeal over Foreign Lawyers but Says CA Firms Practise Illegally, LEGALLY INDIA (July 9, 2012), http://www.legallyindia.com/201207092942/Law-firms/silf-view-clashes-with-bci-sc-appeal-over-foreign-lawyers-but-says-ca-firms-practise-illegally (last visited Oct. 16, 2014).
39 See Garg, supra note 9, at 1179.
40 See id. at 1176 (including examples of how several firms operate their Indian practices).
41 See id. at 1180–81.
42 See Ganz, supra note 4 (pointing out that while firms in best friend arrangements claim they do not engage in cross-border profit sharing, it is believed that some use complex financial
The Lawyers Collective decision did not close the loopholes that emerged as it was being decided. Although the decision precludes foreign lawyers from practicing Indian law, the Bombay High Court did not answer the question of whether foreign lawyers could practice their own foreign law in India. In sum, aside from setting up permanent offices in India, it was unclear how much further the ban on foreign lawyers extended.

II. DISCUSSION

On March 18, 2010, A.K. Balaji, an Indian lawyer acting on behalf of the Tamil Nadu-based Association of Indian Lawyers, filed a writ in the Madras High Court demanding a complete ban on foreign lawyers operating in India. The petition named thirty-one foreign law firms as defendants, including major U.K.-based firms Freshfields Bruckhaus Deringer, Allen & Overy, and Clifford Chance, as well as U.S. firms like Wilmer Hale, Perkins Coie, Davis Polk & Wardell and White & Case, and Australia’s Clayton Ut and Freehills.

In his petition, Balaji contended that the defendants violated the Advocates Act by practicing law in India without being enrolled as advocates. Specifically, Balaji objected to foreign lawyers establishing Indian practices in neighboring countries, and entering India on a temporary basis to provide corporate legal services and conduct arbitrations.

structures to skirt the issue); see also Garg, supra note 9, at 1188–90 (defending best friend arrangements).

43 See Jain, supra note 22.
44 See Ganz, supra note 4.
45 See Jain, supra note 22 (“The Lawyers Collective may have temporarily succeeded in halting the formal entry of certain law firms but the victory was hollow: many foreign law firms have entered into ‘best-friend’ agreements with domestic firms or found other surreptitious ways in which to operate out of India.”); Ganz, supra note 4.
47 See Affidavit of Petitioner, supra note 46, ¶ 18. The petition also named Integreon, an LPO firm, which Balaji alleged was acting like a law firm. See id. ¶ 12.
48 See id. ¶¶ 3–7, 10–11, 15–16, 18, 21.
49 See id. ¶ 11. As the petition stated, “[a]dvocates from various foreign law firms are often visiting India and conducting seminars in various parts of our country . . . Moreover they are also conducting arbitration in Indian Hotels . . . .” Id. Balaji also suggested that foreign lawyers, by flying in and out of India, were in violation of Indian income tax and immigration laws, “[t]hey are entering in to India through visitor’s visa but the actual intention of their visit is to indirectly market and earn money out of clients from India by way of seminars.” Id.
Balaji grounded his claim in the plain language of the Advocates Act, and its underlying policy concerns. As a preliminary matter, Balaji asserted that the Act makes it “abundantly clear” that any lawyer who has not been admitted as an advocate by the BCI cannot practice law in India “in any manner.”

Moreover, Balaji asserted that the defendants did not come within the Act’s reciprocity exception. In fact, Balaji dedicated a substantial portion of his petition to the issue of reciprocity. Balaji conceded that non-Indian lawyers can practice law in India if their country of origin permits Indian lawyers to practice as well. He claims, however, that true reciprocity did not exist because the conditions those countries imposed on Indian lawyers were “far more cumbersome as compared to the easy accessibility of the Indian legal market.” Balaji defined reciprocity as “reciprocal arrangements” whereby India and a foreign country impose equivalent conditions on entry into their respective legal markets.

In addition to a textual argument, Balaji also made the policy argument that permitting entry of foreign lawyers without a reciprocal arrangement disadvantages domestic practitioners. As his petition stated, “foreign law firms should not be allowed to exploit the Indian legal market without actually opening up their domestic markets to Indian Lawyers.”

Even if reciprocity existed, Balaji argued that foreign lawyers should not be permitted to practice law in India without enrolling as advocates first. The Advocates Act subjects Indian lawyers to numerous restrictions, including a prohibition on advertising, which puts Indian firms at a disad-

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50 See id. ¶¶ 5, 11, 16 (“So far as the Advocates on the rolls of the State Bar Council are concerned, they are subjected to various restrictions as the [legal] profession is treated as a noble profession in the country and is not treated as a trade or a business.”).
51 Id. ¶ 7.
52 See id. ¶ 6.
53 See Zach Lowe, Blocking a (Kind of) Already Blocked Passage to India, THE AMLAW DAILY (Apr. 16, 2010), http://amlawdaily.typepad.com/amlawdaily/2010/04/passagetoindia.html (last visited Oct. 16, 2014), (“Balaji spends about five pages in his 24-page complaint outlining the hurdles Indian lawyers face in gaining a license to practice in London, including earning an LLM degree and paying thousands of pounds in admissions fees.”); see also Affidavit of Petitioner, supra note 46, ¶¶ 8–10, 17–20 (“[T]he issue being raised is not just that of opening up the Indian legal sector . . . but also reciprocally permitting Indian lawyers and law firms to gain free and unhindered access to enter the UK and practice law as a profession.”). Balaji’s reciprocity demands also required reciprocal immigration policies. See id. ¶ 20 (“It is equally important that immigration clearances are made easy for Indian lawyers in exchange for permitting foreign law firms to set up practice in India.”).
54 See Affidavit of Petitioner, supra note 46, ¶ 5.
55 Id. ¶ 8.
56 See id. ¶ 9. Balaji does not cite any judicial precedent for this proposition. See id.
57 See id. ¶¶ 9, 22.
58 Id.
59 Id. ¶ 18.
vantage compared to their foreign competitors. According to the petition, these restrictions are imposed because “the [legal] profession is treated as a noble profession in [India],” unlike foreign countries that treat it as a business or money making venture.

The defendant law firms disputed the notion that the Advocates Act bars foreign lawyers from practicing non-domestic law. On the contrary, the Advocates Act omits any explicit mention of foreign or international law. Therefore, defendants argued, the Act only regulated the practice of Indian law. Defendants found further support in the Lawyers Collective judgment, which, they claimed, was limited to a resolution of the question that “practice of law,” under Section 29 of the Advocates Act, meant litigious and non-litigious activities. Moreover, as one firm reasoned, “[F]oreign law, including English and US law are not taught in Indian Law Colleges. Therefore, lawyers with Indian law degrees clearly do not have the knowledge to practice foreign law.” Accordingly, the firm asserted, it is unreasonable to construe the Advocates Act as applying to non-domestic law.

Ultimately, the Madras Court dismissed Balaji’s petition. In doing so, the Court announced four rulings. The first affirmed that foreign lawyers cannot engage in law practice—litigation or otherwise—in India without first enrolling as advocates.

In its second holding, the Madras Court determined that the Advocates Act did not bar foreign firms from visiting India on a temporary basis in order to advise clients on matters of foreign and international law. In reaching this conclusion, the Madras Court distinguished the Lawyers Collective decision. The Madras Court observed that the issue raised in Law-

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60 See id. ¶ 17.
61 Id. ¶ 16.
62 See id. (“[S]o far as Lawyers and Law Firms from outside the Territory of India are concerned, they are treating it as a business venture, a trade and a money spinner . . . .”). In Lawyers Collective, the Bombay High Court made a similar point, that is distinguishing between commercial and professional (e.g. legal) activities, when deciding that RBI lacked the authority to issue liaison licenses to foreign firms. See Lawyers Collective, W.P. No. 1526 of 1995, ¶ 55.
63 See Balaji, W.P. No. 5614 of 2010, ¶¶ 7, 8, 11–13, 18, 20, 24.
64 See id.; see generally Advocates Act.
66 See id. ¶ 20 (“The said judgment does not hold that the Advocates Act applies to the practice of foreign law or international law within the territory of India.”).
67 Id.
68 See id.
69 See id. ¶ 64.
70 See id. ¶ 63.
71 See id.
72 See id.
73 See id. ¶¶ 39–45.
yers Collective was whether the RBI had the authority to grant foreign law firms liaison offices, and, if so, whether a foreign lawyer engaging in transactional work must first enroll as an advocate. In contrast, the issue in Balaji was whether the Advocates Act bars foreign lawyers from engaging in “fly in, fly out” activities to advise on matters of foreign law. Because the Advocates Act did not specifically address the question, the Madras Court held that the Act did not prohibit it.

Moreover, in its third holding, the Madras Court declared that foreign lawyers may enter India for the purpose of conducting international arbitrations. Here, the Madras Court did not mention the Advocates Act. Instead it relied on the Arbitration and Conciliation Act of 1996. Specifically, the Madras Court found force in the defendants’ argument that debarring foreign lawyers from conducting arbitrations in India would have a counterproductive effect on the Indian government’s express goal of making India a hub for international arbitration. The Madras Court observed that India’s membership in the World Trade Organization fueled a cottage industry in international commercial arbitration:

[I]nternational establishments entering into trade agreements would require to (sic) consult legal experts on the implications of such agreements on their country’s laws, and advocates practising Indian law would not be competent to offer them advise on their laws. Therefore, this makes it utmost necessary for foreign legal experts to visit India, stay here and offer advice to their clients in India on their respective laws, and there is no specific provision in the Act prohibiting a foreign lawyer to visit India for a temporary period to advise his/her clients on foreign law.

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74 See id. ¶ 39–44. After framing the issue as such, the Madras High Court did indeed affirm that aspect of Lawyers Collective: “The Bombay High Court, therefore, rightly held that establishing liaison office in India by the foreign law firm and rendering liaising (sic) activities in all forms cannot be permitted since such activities are opposed to the provisions of the Advocates Act . . . .” Id. ¶ 44.

75 See id. ¶ 45. The Madras High Court asserts that this issue was not raised in Lawyers Collective. See id. ¶¶ 39–45.

76 See id. ¶ 60. In reaching its conclusion, the Court agreed with defendant law firms’ arguments. See id. The court declared that if “an interpretation is given to prohibit practice of foreign law by a foreign law firms [sic] within India, it would result in a manifestly absurd situation wherein only Indian citizens with Indian Law degree[s] who are enrolled as an advocate under the Advocates Act could practice foreign law . . . .” Id.

77 See id. ¶ 63.

78 See id.

79 See id.

80 See id. ¶ 51.

81 Id.
The final holding pertained to legal process outsourcing providers (LPO). The Madras Court found that the defendant LPO was not performing legal services, and therefore did not come within the scope of the Advocates Act. The Madras Court did state, however, that the BCI has the authority to take appropriate action against an LPO in the event that a provider is accused of violating the Act.

### III. Analysis

The Madras Court’s decision further exposed the weaknesses of the 1961 Advocates Act. As the Madras Court’s practical approach demonstrates, the Act is incompatible with the economic policies of the Indian government. Furthermore, the text of the Act itself facilitates a standoff between domestic and foreign lawyers, specifically resulting from its failure to define “practice of law” and “reciprocity.” Finally, the decision largely ignores the inherent difficulties of enforcing the Act’s provisions.

The Advocates Act ban of foreign lawyers is at odds with India’s Arbitration and Conciliation Act of 1996, and the government’s express goal to make India a hub of international arbitration. Under the language of the Advocates Act, in order for a foreign lawyer to argue in arbitration without running afoul of the Act, such activity cannot in any way constitute the “practice of law.” The Madras Court did not even try to make such an argument. Instead, the judges took a pragmatic approach by citing the government’s national interest in encouraging international commercial arbitration, which required the participation of foreign lawyers.

In supporting their decision, the judges also relied on the Indian Supreme Court’s observations in a 2012 case pertaining to the impact of for-
eign direct investment (FDI) on the Indian economy, which, the Indian Supreme Court held, was a matter of significant public importance. The Madras Court further reasoned that the availability of international arbitration played a “vital part” in the inflow of FDIs into India. It is interesting that in *Lawyers Collective*, the Bombay High Court, in revoking the foreign firm’s commercial operating licenses as violations of the Advocates Act, concluded that there was a fundamental distinction between commercial and professional, i.e. legal, enterprises; whereas here the Madras Court relied upon a case dealing with commercial matters to justify the entry of foreign lawyers.

In addition to the Act’s incompatibility with India’s modern economic policies, the text itself perpetuates the faceoff between domestic and foreign lawyers. The text does not define “practice of law,” and this omission has opened the door for defendant firms to argue, before Indian attorneys and judges no less, that the “practice of law” does not include foreign and international law; therefore, the law that regulates all lawyers in India is inapplicable to foreign lawyers.

For domestic lawyers this is a particularly troubling argument because the Act imposes strict regulations on Indian lawyers, hampering their ability to compete with foreign firms. In short, these restrictions impede the modern Indian’s lawyer ability to effectively compete in a liberalized marketplace.

This argument also puts the Madras Court in a difficult position. In order to further the country’s economic policies, which include encouraging international arbitration, it must construe the Advocates Act as only regulat-

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93 See id.
94 See id. ¶¶ 57–58.
95 Compare *Lawyers Collective v. Bar Council of India*, W.P. No. 1526 of 1995 ¶ 55 (Bombay H.C. Dec. 16, 2009) (India) (“[T]here is a distinction between a bureaucrat drafting or giving opinion, during the course of his employment and a law firm or an advocate drafting or giving opinion to the clients on professional basis.”), with *Balaji*, W.P. No. 5614 of 2010, ¶ 58 (“[E]very strategic foreign direct investment coming to India, as an investment destination should be seen in a holistic manner . . . . Therefore, we should not lose site of the fact that in the overall economic growth of the country, International Commercial Arbitration would play a vital part.”).
96 See Jain, supra note 22; Advocates Act.
97 See Jain, supra note 22; Advocates Act.
98 See *Lawyers in India: Legally Barred*, ECONOMIST (Apr. 24, 2008), http://www.economist.com/node/11090513 (last visited Oct. 16, 2014) (stating that Indian lawyers in favor of liberation argue that the Indian market must be opened gradually in order to give regulators the time to relax the tight restrictions on Indian lawyers.).
99 See *Lawyers in India: Legally Barred*, supra note 98; Advocates Act.
100 See Ganz, supra note 4. The article notes that the Madras Court’s decision regarding arbitration was “pure pragmatism,” as the judges explicitly relied on the government’s stated national interest and ignored the law’s text. See id.
ing the practice of Indian law. 101 By doing so, however, the Madras Court provides foreign lawyers with an opening into the Indian market without addressing the handicaps the Act places on domestic lawyers. 102 In order for Indian law firms to effectively compete with foreign firms, the Act’s antiquated regulations must be relaxed. 103

Finally, the Madras Court’s decision did little to address the difficulties inherent in the enforcement of Lawyers Collective, which permitted foreign firms to find loopholes to participate in the Indian market. 104 To that end, the Madras Court did not address whether Indian law firms are permitted to collaborate with foreign law firms, or whether international law firms can advise on matters that include a mixture of both Indian and non-Indian legal issues. 105 To clear up this matter the courts must better define what it means to “practice law” under the Advocates Act. 106

CONCLUSION

The Madras Court’s decision was a pragmatic attempt to reconcile the Advocates Act with the realities of India’s legal profession today. Foreign firms want access to the Indian market and, despite the Advocates Act’s stringent restrictions, these firms show no signs of giving up on finding a way into that market. Indeed, while the Lawyers Collective decision was pending, foreign law firms found new ways to enter India’s legal market which went unaddressed by the Bombay High Court’s judgment.

The Madras Court’s judgment in A.K. Balaji emphasized the deficiencies of the Advocates Act. On its face, the Act disallows foreign firms from conducting international arbitrations in India. This, as indicated by the Madras Court’s reasoning, conflicts with the Indian government’s express economic goal of making India an international commercial arbitration hub. The Act carefully distinguishes the legal profession from other commercial enterprises, though, as the Madras Court indicates, the legal profession is necessary to further the government’s commercial goals.

Ultimately, the Madras Court’s decision foreshadows that the Indian legal market will have to open to foreign lawyers. The Advocates Act, how-

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101 See Balaji, W.P. No. 5614 of 2010 ¶ 58; Ganz, supra note 4.
102 See Balaji, W.P. No. 5614 of 2010 ¶ 58; Ganz, supra note 4.
103 See Lawyers in India: Legally Barred, supra note 98.
104 Vena, supra note 6, at 205 & n.122 (“[T]he allegations of the recently filed Balaji suit . . . that foreign firms subvert the law by operating India desks out of nearby countries, while true, has no remedy that Indian authorities can enforce.”).
105 See id. at 205 & n.127.
ever, as the ruling illustrated, does not allow for a level playing field. Indian lawyers are prevented from marketing their services and impeded from expanding their firms. This Act needs to be revised to reflect the modern realities of India’s legal profession and to allow domestic lawyers to fairly compete with their international colleagues.