REFORMS IN THE NON-LITIGIOUS SERVICES SECTOR: A ROADMAP FOR GROWTH

A report prepared by the Centre for Trade & Investment Law

ABSTRACT

An in-depth study of the flaws and gaps in regulations in relation to non-litigious services, entry of foreign law firms and making India an 'arbitration hub'.

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Disclaimer

The views expressed in this Report represent the views of the contributors and is a product of professional research conducted at the Centre for Trade and Investment Law, Indian Institute of Foreign Trade. These views cannot be attributed to the Government of India or any of its officials.

This Report is the product of ongoing research and consultations with the members of the bar, the government ministries and the industry. Accordingly, this Report is subject to modifications.

Foreword

It is a pleasure to know that the Centre for Trade and Investment Law has prepared a comprehensive report on the legal reforms required for the governance of non-litigious legal services in India. The role of non-litigious services in India has gained prominence over the last decade. However, the extant rules and framework need to be fine-tuned to facilitate the growth and orderly functioning of non-litigious services to keep in line with international trends.

On 28 February 2018, the Union Cabinet chaired by the Hon'ble Prime Minister has approved the proposal of the Department of Commerce to give focused attention to twelve identified "Champion Services Sectors" for promoting their development, and realizing their potential. The legal services sector is one such Champion Services Sector. In this light, a comprehensive, systematic and analytical approach needs to be adopted to chart out the course of regulatory reform in this sector keeping in mind potential benefits to India and in alignment with various Supreme Court judgements. Any reform of the legal services sector must not only contemplate the increasing globalization of the legal profession, but must also take into account the changes required in the regulatory regime to ensure a level-playing field for domestic lawyers and legal services.

I would like to compliment the Centre for Trade and Investment Law for the preparation of this report on "Reforms in the Non-Litigious Legal Services: A Roadmap for Growth". This is an important step in establishing a robust regulatory framework for the regulation of non-litigious legal services in India.

Sudhanshu Pandey, IAS
Additional Secretary
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About the Centre for Trade and Investment Law

The Centre for Trade and Investment Law ("**CTIL**") was established in the year 2016 by the Ministry of Commerce and Industry, Government of India, at the Indian Institute of Foreign Trade. The Centre's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. The Centre is aiming to create a dedicated pool of legal experts who could provide technical inputs for enhancing India's participation in international trade and investment negotiations and dispute settlement. The Centre also aims to be a thought leader in the various domains of international economic law such as WTO law, international investment law and legal issues relating to economic integration.

It is CTIL's mission to identify, analyse and provide creative ideas and perspectives to influence the international discourse on wide ranging aspects of international economic law. The Centre engages on a regular basis with different stakeholders including central and state governments, think-tanks, research centres, national law schools and other institutions rendering legal education in international economic law, independent legal professionals, industry organizations and the private sector. The Centre is also conceived as a ready repository of trade and investment related information including updates on ongoing trade negotiations and disputes.

Introduction to the Report

This report seeks to provide an outline of the principal changes required in the regulatory regime for non-litigious services. It first analyses the flaws and gaps in the current regulatory regime and then evaluates the regulatory regime in the United States of America, the United Kingdom, Singapore and Malaysia for best practices.

This Report deals with three key areas and is accordingly divided into three sections:

(i) Regulatory Model for Non-Litigious Services

This section of the Report studies three key sub-sectors of non-litigious services: in-house counsels, law firms and legal process outsourcing firms. It conducts an in-depth analysis of the evolution of judicial precedent on critical issues and seeks to draw out best practices by analysing how different regulatory regimes have addressed the legal issues underlying the current flaws and gaps in regulation.

(ii) Regulatory Model to make India an 'Arbitration Hub'

This section of the Report studies the regulatory reforms required to promote India as a seat and venue for both domestic and commercial arbitrations. It does this in the context of the extensive recommendations put forth by the BS Srikrishna Committee and charts out the current status of each of its recommendations.

(iii)Regulatory Model for the entry of Foreign Law Firms and Lawyers

This section of the Report aims to provide a bipartisan analysis of the proposals put forth by the Society for Indian Law Firms, the Indian National Bar Association and the Indian Corporate Counsel Association in the context of the draft Registration and Regulation of Foreign Lawyers in India, 2016.

Executive Summary

SECTION I: REGULATORY MODEL FOR NON-LITIGOUS SERVICES

Capitalised terms used in the Executive Summary but not defined herein have the same meaning ascribed to it in the substantive portion of the Report.

PART I: IN-HOUSE COUNSEL

1. Current Flaws and Gaps in Regulations for In-House Counsel

1.1 The prohibition on full-time salaried employment for lawyers under Rule 49, Chapter II, Part VI of the BCI Rules has been interpreted to mean that all in-house counsels not regularly litigating must cease their practice.

1.2 Strictly speaking, attorney client privilege is applicable to in-house counsel. However, in the absence of a clear regulatory framework, due to the operation of Rule 49, a Court may take a view that communications by in-house counsel are not protected by attorney-client privilege.

1.3 Lack of rules on conflict of interest for non-litigious services leads to a potential for in-house counsels to render services to the detriment of clients due to conflicts of interest.

1.4 Lack of clarity on the impact of non-legal functions performed by in-house counsels leads to uncertainty about the legal characterisation of the in-house counsel's work product.

2. Comparative analysis of Regulatory Regimes

2.1 *United States of America*: The text of the rules of professional conduct recognize in-house counsel as lawyers. Judicial interpretation has extended the coverage of attorney-client privilege to in-house counsels. Specific rules have been drafted relating to confidentiality, independence and conflict of interest of in-house counsels. The in-house counsel is not restricted from carrying out any legal function.

2.2 *United Kingdom*: The in-house counsel is separately recognized. Judicial decisions prescribe tests to determine whether a communication has been made for the purpose of legal advice for the purpose of attorney-client privilege. Specific rules drafted for conflict of interest provide guidance to in-house counsel in relation to conflict of interest. The in-house counsel is not restricted from carrying out any legal function.

2.3 *Singapore*: In-house counsel are not statutorily regulated and they need not be admitted to the bar to be employed as an in-house counsel. To bridge the regulatory gap the Singapore Corporate Counsel Association introduced the Competency Framework and Code of Ethics and Standard of Professional Conduct. This code of conduct separately recognizes in-house counsel and prescribes norms relating to independence and integrity. There are no specific rules relating to conflict of interest for in-house counsels. Protection of attorney-client privilege is extended to communication by in-house counsel regardless of whether such communication is made in anticipation of litigation. In-house counsels not admitted to the bar are restricted from pleading or appearing in front of judicial and regulatory bodies.

2.4 *Malaysia:* In-house counsels have not been specifically defined under Malaysian law. Due to the presence of a prohibition on full-time employment of lawyers (similar to Rule 49), it is unclear if attorney-client privilege protection extends to communications by in-house counsel.

3. Action Points

3.1 *Substantial re-drafting of BCI Rules to govern In-House Counsel*: A cursory reading of the professional ethics regulations set out in the BCI Rules makes it clear that it has been drafted in the context of litigious services. Accordingly, the Central Government should formulate a code of conduct for non-litigious services which can prescribe rules relating to competence, independence, integrity, conflict of interest and confidentiality. This can be notified under Section 49A of the Advocates Act and will not require any intervention from the BCI.

3.2 *Deletion of Rule 49 from BCI Rules*: The prohibition on salaried employment for lawyers has no place in the regulatory regime for lawyers in any modern society. Rule 49 should be deleted with immediate effect. If this requires intervention of the BCI, the Central Government may notify a rule which prohibits the rejection of any application or initiation of any action on the grounds that the lawyer is engaged in salaried employment. However, this is not an ideal solution and preference should be given to deletion of this rule.

3.3 *Independent provisions for Attorney-Client Privilege:* Currently, the BCI Rules have no independent rules on confidentiality and attorney-client privilege. A set of professional rules need to provide for the duty of the lawyer to keep confidential all communication and set out its contours.

3.4 *Special provisions for single-organisation lawyers:* Standard professional ethics may be difficult to implement in the case of in-house lawyers who mostly advise a single client i.e. their employer. Therefore, a rule needs to be formulated and Rule 1.13 of the NY Rules may be used as a starting point.

PART II: LAW FIRMS

1. Current Flaws and Gaps in Regulations for Law firms

1.1 The prohibition on full-time salaried employment for lawyers under Rule 49, Chapter II, Part VI of the BCI Rules and its judicial interpretation effectively means that law firm lawyers not engaged in litigation may have to cease their practice.

1.2 Applicability of attorney-client privilege to non-litigious services is not entirely clear. This lack of clarity is exacerbated due to the operation of Rule 49.

1.3 Conflict of interest provisions have been drafted in the context of litigation. Given the myriad conflicts of interest that law firms face in handling mandates, this gap in the regulations needs to be addressed.

1.4 While law firms have limited advertisement rights, advertisement beyond the currently prescribed limits is widespread and imminent. Accordingly, there needs to be a dispensation for advertisements that can educate potential consumers. Further, the bar on solicitation needs to be deleted at the earliest to enable corporate law firms to allow law firms to generate business legally.

1.5 Despite the unequivocal prohibition on multi-disciplinary practices, multi-disciplinary practices of the 'Big 4' accountancy firms are proliferating.

1.6 Clarity is required on whether law firms can incorporate as LLPs and the capital gains tax implications on such conversion. Further, law firms should require registration with the BCI for effective regulation.

2. Comparative analysis of Regulatory Regimes

2.1 *United States of America*: Barring a few, all rules of professional ethics govern law firms. The Model Rules and the NY Rules delineate the role of supervisory lawyers in law firms. These rules also comprehensively deal with publicity and advertisement by prohibiting false, deceptive or misleading advertisement, paid testimonials and use of fictitious content. However, if such conditions are met, advertisements may make statements relating to reasonably likely outcomes and comparisons with

other lawyer's abilities. Further, the NY Rules have detailed regulations on conflict of interest. The NY Rules allow multi-disciplinary practices as long as there is a strict division between lawyers and non-lawyers.

2.2 *United Kingdom*: The Solicitor's code of conduct allows advertisements through brochures, websites, directory entries, media appearances, promotional press releases, and direct approaches to potential clients and other persons. Regulations in the UK differentiate between a conflict of interest between clients and a conflict of interest between the firm's interests and the interest of another client. Lastly, regulations in the United Kingdom allow multi-disciplinary practices.

2.3 *Singapore*: Regulations in Singapore allow advertisement through print or any other mass medium, electronic or otherwise, however, there is a prohibition on misleading, deceptively inaccurate or false advertisements. Regulations relating to conflict of interest also apply to non-litigious services. Further, multi-disciplinary practices are allowed to the extent that the non-legal service is "law-related".

2.4 *Malaysia:* Malaysian professional regulations strictly prescribe publicity regulations: while advertisements in directories are allowed, there is a prohibition on dissemination of information relating to the number of successful litigations, the fees charged and advertisements through clients. Further, Malaysian law prohibits multi-disciplinary practices.

3. Action Points

3.1 *Substantial re-drafting of BCI Rules to govern Law Firms*: A cursory reading of the professional ethics regulations set out in the BCI Rules makes it clear that it has been drafted in the context of litigious services. While it is not advisable to create separate classes of advocates with distinct rights, it is essential to prescribe how different professional regulations apply to law firms.

3.2 *Deletion of Rule 49 from BCI Rules*: Similar rationale as discussed in the section for in-house counsels.

3.3 *Independent provisions for Attorney-Client Privilege:* The BCI Rules need to have independent rules on confidentiality and attorney-client privilege.

3.4 *Expand the right to advertise and allow solicitation:* Regulators in India need to recognize the existence of public policy benefits to advertisement by lawyers. Further, while rampant solicitation prevalent in the United States may not be desirable, the current prohibition on solicitation is antithetical to the growth of the Indian legal profession. At the minimum, regulations should allow one-to-one solicitation with prior consent of the consumer.

3.5 *Prohibition on multi-disciplinary practices*: The current prohibition needs to be strictly enforced.

PART III: LEGAL PROCESS OUTSOURCING

1. Current Gaps in Regulations for Legal Process Outsourcing

1.1 There is no statutory authority or regulation governing the functioning of Legal Process Outsourcing entities in India.

1.2 There is ambiguity in characterisation of the legal services being imparted by Legal Process Outsourcing entities.

2. Comparative analysis of Regulatory Regimes

2.1 *United States of America*: The Model Rules and NY Rules do not require the tasks to be performed in-house but only requires the tasks to be performed competently. Further, the outsourced work must be done with client's knowledge and transparency.

2.2 *United Kingdom*: Law Society and Solicitor's Regulation Authority recognizes Legal Process Outsourcing in United Kingdom. The rules governing Legal Process Outsourcing states that when legal services are outsourced, they should be in best interest of the client, provide good standard of service, avoid conflict of interest and maintain client's confidence and avoid breach of confidential information and communication.

2.3 *Singapore*: Legal Process outsourcing in Singapore is currently unregulated. Entities engaged in providing legal process outsourcing services are incorporated and regulated according to the juridical entities mentioned under Singaporean domestic laws.

3. Action Points

3.1 *Incorporation of LPOs*: LPOs should be required to register itself with the BCI.

3.2 *Qualification of the persons employed in LPOs*: Persons who are employed in LPOs shall be qualified as lawyers in India under the applicable governing rules and regulations. If such persons are providing legal services pertaining to foreign laws, then they should also be a qualified as a lawyer of that particular jurisdiction.

3.3 *Mandatory provisions in Master Service Agreements:* Ordinarily, LPOs enter into master service agreements with clients which incorporate prevalent legal provisions of the outsourcing jurisdiction. Stakeholder consultations should be held to arrive at a mandatory list of provisions which must be included in each and every master service agreement.

3.4 *No surrogacy of Foreign Law Firms:* Provisions should be implemented to the effect that LPOs established in India are only providing back-end and legal management of foreign law firms. They should not become a substitute or a surrogate mechanism through which foreign law firms are imparting legal services.

SECTION II: INSTITUTIONAL ARBITRATION IN INDIA: ISSUES AND CHALLENGES

1. In 2017, the Government of India proposed to make India an international hub for arbitration. The Arbitration and Conciliation Act ("**ACA**") was enacted to introduce alternative dispute resolution in India. Currently, India houses more than 35 institutional arbitration centres, for example Indian Council of Arbitration ("**ICA**"), Delhi International Arbitration Centre ("**DAC**"). Mumbai Centre for International Arbitration ("**MCIA**") etc. However, majority of arbitrations conducted in India are still ad-hoc in nature.

2. This report seeks to review the institutionalisation of arbitration in India by providing a comprehensive analysis, the challenges faced in India and the recommendations towards establishing India as an international arbitration hub.

3. Issues and Challenges Faced by Institutional Arbitration in India

3.1 Srikrishna Committee Report suggests that India does not attract enough pool of disputants. And there is still preference for ad-hoc arbitration.

3.2 Arbitral Institutions India lack access to quality legal expertise and exposure to international best practices rendering the rules of Indian institutional arbitration centres obsolete and insufficient.

3.3 There are misconceptions related to the institutional arbitration centres leading to their infrequent use, even by the government.

3.4 Currently, the institutional arbitration centres are unregulated. There is no statutory authority governing the functioning of these centres.

4. Recommendations to make India an International Arbitration Hub

4.1 Setting up of an independent body to assess the working of arbitral institutions, grade them and set benchmarks for their functioning.

4.2 Creation of a robust arbitration bar comprising of highly qualified, well-trained and efficient arbitrators.

4.3 Accreditation of arbitrators to regulate the standard and quality of arbitrators in India.

4.4 Amendments are required in the ACA to remove ambiguities, bring in clarity and provide for speedier and effective arbitrations.

SECTION III: REGULATORY MODEL FOR ENTRY OF FOREIGN LAW FIRMS

1. On 24 June, 2016, the Bar Council of India released the draft Registration and Regulation of Foreign Lawyers in India, 2016 ("**Draft BCI Regulations**"). Subsequently, the Society for Indian Law Firms ("**SILF**"), the Indian National Bar Association ("**INBA**") and the Indian Corporate Counsel Association ("**ICCA**") have tabled detailed proposals and critiques of the Draft BCI Regulations.

2. Our Proposal

3.1 A phased entry is essential. Phase I should include reforms involving substantial re-drafting of the BCI Rules to govern law firms, in-house counsels and LPOs, regulatory clarity on LLP structure and expansion of right of advertisement and solicitation. If these reforms seem impractical, this list may be watered down depending on the exact scope of permitted activities of foreign lawyers in Phase II.

3.2 Registered foreign lawyers should not be provided rights to collaborate and form partnership with Indian advocates in Phase I. Further, function of registered foreign lawyers cannot extend to providing any advice on Indian law, including if such advice is rendered as a part of an international arbitration case or as a representation before a regulatory authority.

3.3 Unregistered Foreign Lawyers operating on a fly-in-fly-out basis should be subject to certain basic intimation requirements.

3.4 A separate code of conduct needs to be drafted for Registered Foreign Lawyers.

3.5 Amendment to the definition of "international arbitration case".

3.6 Separate regulatory regimes need to be instituted for foreign lawyers and foreign law firms.

3.7 Determination of reciprocity needs to be done on a holistic and systematic basis.

Section I: The Regulatory Model for Non-Litigious Services[1]

PART I: INTRODUCTION TO NON-LITIGIOUS SERVICES

The Indian market for legal services was historically dominated by lawyers offering litigation services. However, the demand for non-litigious legal services has been increasing in the areas of regulatory compliance (49%) and mergers and acquisitions sector (42%).[1] Non-litigious services can generally be understood to include the whole gamut of legal services which are not related to or in anticipation of litigation proceedings, including rendering of legal assistance by drafting documentation, advising clients on legal structuring of transactions, commenting on regulatory policies and giving legal opinions.[2]

In-house legal teams and law firms are the major providers of such non-litigious services and there is a need to re-evaluate the efficacy of the present regulatory system to govern in-house legal counsel and law firms. The Indian market has also witnessed the rise in legal process outsourcing ("**LPOs**") which is a process by which in-house legal departments, law firms and other organizations outsource legal work from geographic areas where it is costly to perform, such as the US or Europe, to those where it can be performed at a significantly decreased cost.[3]

In India, the Advocates Act, 1961 ("**Advocates Act**") recognizes only 'advocates' as a class of persons who are entitled to practice law.[4] An advocate is defined as a person '*entered in any roll under the provisions of the [Advocates Act]*.[5] 'Advocates' have been further categorized into 'senior advocates' and 'advocates'[6] and the Advocates Act sets out other disciplinary and professional requirements in respect of 'advocates'. Apart from passing references to services of law firms,[7] the Bar Council Rules do not explicitly regulate the rendering of non-litigious services by law firms, in-house counsel and LPOs. While regulations do not need to explicitly regulate every type of service provider, broadly worded provisions can only regulate effectively if there are no specific situations which need to be addressed. In the case of regulation of legal services, however, there are many specific issues which need to be addressed to provide predictability to the regulatory regime and ensure effective rendering of legal services.

The lack of specificity of the Advocates Act and the Bar Council Rules have led to the rise of various legal issues in relation to non-litigious services rendered by law firms, in-house counsel and LPOs. Part II of this chapter deals with the current deficiencies and gaps in the current regulatory framework in relation to in-house counsel, a comparative analysis of different regulatory models and the major changes that need to be brought about in this regard. Similarly, Part III of this chapter deal with deficiencies, gaps, comparative analysis and action points in relation to law firms.

PART II: REGULATORY MODEL FOR IN-HOUSE COUNSEL

1. THE RISE OF THE IN-HOUSE COUNSEL

Innovative business models, increasing litigations and the need to ensure compliance in light of changing regulatory landscape in India has led to the role of in-house counsel in Indian corporations / corporate firms gaining prominence. Legal functions in Indian corporates were traditionally divided between compliance functions (which were handled in-house) and legal functions (which were outsourced to law firms), however, increasingly there is a trend to get most of the work done in-house.[8] Many corporate houses now endeavour to execute mergers and acquisitions without any legal support from law firms.[9] The lack of delegation has also lead to an increase in responsibility and scope of in-house counsel who are now taking business decisions based on a cost-benefit analysis.[10] Empirical research also suggests that the general counsel of corporate houses ("**GCs**") have started playing the role of senior management, with over 47% of the GCs directly reporting to the CEO and 28% reporting to regional or global general counsel.[11] Further, 75% of the GCs reported that the corporate house expects the GCs to influence board decisions.[12]

In-house legal teams are also uniquely positioned to deal with novel legal issues due to their proximity to the management and their understanding of the

[1] The authors of this Report would like to acknowledge the invaluable contribution of **Mr. Rakesh Roshan**, currently a student at National Law University, Delhi to this Section.

commercial aspects of the business. For instance, as per news reports, disruptive start-ups like Ola, Uber and Grofers are expanding their in-house legal teams to enable faster decision making on operational issues and business strategy.[13] Accordingly, apart from handling an increasing amount of consumer and vendor litigations, legal expertise regarding complex areas of law is being concentrated in in-house legal teams of corporates. For instance, until recently in-house legal teams of Uber and Ola were grappling with their status as "on-demand information technology-based" transport aggregators and many start-ups which engage in delivery of goods have to consult with the government on labour laws. In-house legal teams also focus on brand and reputational issues, compliance, strategic decision making regarding corporate governance, crisis management, and department management.[14]

2. CURRENT FLAWS AND GAPS IN REGULATION OF IN-HOUSE COUNSEL

The same factors which have led to the role of in-house counsel gaining prominence also give rise to complex legal issues. Presently, the legal discourse relating to in-house counsel is largely dominated by critiques of the judicial interpretation of Rule 49 of the Bar Council Rules.[15] Rule 49 provides that an advocate cannot be a full-time salaried employee of any person, government, firm, corporation or concern and on taking up such employment, such advocate is required to intimate the Bar Council of India on whose roll his/her name appears and cease practicing as an advocate.[16] However, an analysis of legal issues relating to in-house counsel which have arisen in jurisdictions such as the United States, United Kingdom, Singapore and Malaysia demonstrates that the role of the in-house counsel may lead to several legal and ethical issues which ideally should be addressed in the Bar Council Rules. Set out below is an analysis of the current flaws and gaps in regulations relating to in-house counsel in India.

2.1 Rule 49 and 43, Chapter II, Part VI of the BCI Rules: The prohibition on full-time salaried employment

(i) Textual Analysis of Chapter II, Part VI of the BCI Rules

Any analysis relating to the permissibility of advocates acting as in-house counsel must necessarily begin with a textual analysis of the BCI Rules. Chapter II, Part VI of the BCI Rules prescribes the "Standards for Professional Conduct and Etiquette" for advocates ("**Chapter II**"). Chapter II is further divided into seven sections each of which prescribe different set of duties of the advocate.[17] A cursory reading of Chapter II of the BCI Rules makes it clear that it is primarily intended to govern litigious services. While it can be argued that the same provisions can also govern the conduct of non-litigious services, an analysis of Chapter II demonstrates that it is litigious services which form the context of Chapter II of the BCI Rules (and not non-litigious services). Accordingly, Section II of Chapter II which prescribes duties of the advocate towards the client, provides conditions relating to accepting "briefs in the courts or tribunals" but does not provide for conditions relating to accepting matters other than briefs, such as, transaction advisory.[18] Similarly, Rule 20 prohibits fee contingent on the results of "litigation" but does not prohibit any fee contingent on the success of other kind of legal service, such as the receipt of a government approval after extensive correspondence with sectoral regulators. Further, Rule 22 prohibits the bid or purchase of the property sold in execution of a decree or order in any suit, appeal or proceeding in which he was professionally engaged – however, if an advocate was not involved in the proceedings relating to such bid or auction and was simply advising on the legal documentation for such a bid, her participation in such a bid or auction would fall outside the scope of Rule 22.

All these gaps in regulations place the in-house counsel in uncertain territory as the rules intend to prohibit certain actions (participation in bids they have advised on) to presumably avoid undesirable consequences of such actions (information asymmetry), but since Chapter II does not apply directly to non-litigious services, the applicability of such prohibitions on non-litigious services is unclear. As a consequence, the BCI Rules can be either interpreted to apply to all types of legal services and such an interpretation would run counter to the ordinary meaning of the text or simply be interpreted to not apply to non-litigious services at all. In case one takes the latter interpretation, a large portion of legal services will be unregulated which will certainly not be a desirable policy outcome.

Chapter II also explicitly prescribes conditions relating to taking up employment other than litigious services. Rule 47 prohibits advocates from actively engaging in any business, further, Rule 48 prescribes that even if the advocate is acting as a

director or a chairman, she is not entitled to perform any activity of an executive character. Similarly, in the context of inherited businesses, Rule 50 provides that an advocate may continue the business but may not personally participate in its management. Two relaxations are provided to advocates to engage in other employment: first, the relaxation in Rule 51 which states the following:

> "An advocate may review Parliamentary Bills for a remuneration, edit legal text books at a salary, do press-vetting for newspapers, coach pupils for legal examination, set and examine question papers; and subject to the rules against advertising and full-time employment, engage in broadcasting, journalism, lecturing and teaching subjects, both legal and non-legal."

Secondly, Rule 52 provides that the advocate may engage in part-time employment provided that she has obtained the consent of the State Bar Council. With this backdrop, we can now proceed to analyse the two rules which directly govern the permissibility of advocates engaging in salaried employment i.e. Rule 43 and Rule 49 of Chapter II.

(ii) Textual Analysis of Rule 43 and 49, Chapter II

Rule 49 of Chapter II provides as follows:

> "An advocate *shall not be a full-time salaried employee* of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon *cease to practise as an advocate so long as he continues in such employment*…(emphasis supplied)"

Rule 43 of Chapter II provides as follows:

> "An Advocate who has been convicted of an offence mentioned under Section 24A of the Advocates Act or has been declared insolvent *or has taken full time service or part time service or engages in business or any avocation inconsistent with his practising as an advocate* or has incurred any disqualification mentioned in the Advocates Act or the rules made thereunder, shall send a declaration to that effect to the respective State Bar Council in which the advocate is enrolled, within ninety days from the date of such disqualification. If the advocate does not file the said declaration or fails to show sufficient cause for not filing such declaration provided therefor, the Committee constituted by the State Bar Council under rule 42 may pass orders suspending the right of the advocate to practise." (emphasis supplied)

A joint reading of Rule 43 and 49 indicates that the prohibition on salaried employment for advocates is unequivocal. The phrase "shall not be a full-time salaried employee" clearly prohibits an advocate from being engaged as an employee, unless the advocate so employed can argue that her terms of engagement cannot be properly termed as "employment". Further, upon taking up such an employment the advocate is obligated to intimate the BCI and thereafter cease to practice as an advocate. This report will not deal with the legal implications of the second and third paragraphs of Rule 49 as the judicial interpretation of Rule 49 renders these paragraphs obsolete as far as analysing the regulatory framework applicable to in-house counsel is concerned.

(iii) Judicial Analysis of Rule 43 and 49 of Chapter II in Deepak Agarwal

Rule 49 has been interpreted by many judgments of the High Courts and the Supreme Court,[19] however the Supreme Court's ruling in *Deepak Agarwal v Keshav Kaushik*[20] is the determinative judgment in this regard.[21] The Supreme Court's judgment, in this case interpreted Rule 49 in the context of adjudging the legality of the appointment of government law officers to the post of a district judge pursuant to Article 233(2)[22] of the Constitution of India.[23]

The Supreme Court was adjudging an appeal from the decision of the Punjab and Haryana High Court which had quashed the appointment of the appellants as Additional District and Sessions Judges.[24] The Appellants were employed as deputy advocate general, assistant district attorneys / prosecutors.

The Court noted that apart from Article 233(2) of the Constitution of India, the process of appointment was also governed by Haryana Superior Judicial Service Rules, 2007 and Rule 5(ii) of these rules provided that the recruitment for these posts shall be made "by direct recruitment from amongst eligible advocates on the recommendations of the High Court on the basis of written and viva voce test conducted by the High

Court". Further, Rule 11(b) provided that the direct recruits must "have been duly enrolled as an advocate and practiced for a period of not less than seven years".[25] Given that a direct recruit must be enrolled as an advocate, the High Court had quashed the appointment of the appellants on the grounds of the prohibition on full-time salaried employment contained in Rule 49.[26] Therefore, amongst other questions of law, the Supreme Court was adjudging whether "*district attorney/ additional district attorney/public prosecutor/ assistant public prosecutor/ assistant advocate general, who is a full-time employee of the Government is eligible for appointment to the post of the District Judge under Article 233(2) of the Constitution of India?*".[27]

The Supreme Court commenced its analysis by reviewing the prevailing position of law. It relied on the position laid down in *Sushma Suri,*[28] where it had held that if a person was on the rolls of any Bar Council and is engaged either by employment or otherwise by the Union or State and practices before a court as an advocate, such person does not cease to be an advocate.[29] In other words, the test was not whether such person is engaged on terms of salary or by payment of remuneration but whether he is engaged to act or plead on its behalf in a court of law as an advocate.

The Supreme Court then analysed the consistency of the position in *Sushma Suri* with other judgments of the High Courts and the Supreme Courts.[30] After concluding that there was no inconsistency in such judgments the Supreme Court placed reliance on Rule 43 by making an *a contrario* interpretation. After quoting Rule 43, the Supreme Court held that "if full-time service or part-time service taken by an advocate is consistent with his practicing as an advocate, no declaration [under Rule 43] is necessary".[31] Accordingly, by relying on *Sushma Suri* and interpreting Rule 49 harmoniously with Rule 43, the Supreme Court formulated the following test:

> "The factum of employment is not material but the key aspect is whether such employment is consistent with his practicing as an advocate or, in other *words, whether pursuant to such employment, he continues to act and / or plead in the Courts*. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in negative, he ceases to be an advocate" (emphasis supplied).

(iv) Judicial Inconsistency after Deepak Aggarwal

The Supreme Court held that since certain appellants were regularly acting / pleading in Courts, Rule 49 did not apply to them. Though the Supreme Court was clear that the nature of the services rendered would be the determinative factor (instead of the terms of engagement), this approach has not been consistently adopted by High Courts. In *Jalpa Pradeepbhai,*[32] the Gujarat High Court was adjudging whether a legal consultant appointed by the Gujarat Industrial Development Corporation would be considered to be a "full-time" salaried employee in terms of Rule 49. Neither the litigants nor the Court discussed the decision of the Supreme Court in *Deepak Aggarwal*. Contrary to the approach adopted by the Supreme Court, the Gujarat High Court analysed the terms of engagement. It stated that the contractual conditions requiring presence in office, reimbursement of travel expense and monthly remuneration and the annual renewal of the contract would lead to the engagement of the appellant being considered "full-time salaried" employment in terms of Rule 49.[33]

To further complicate matters, a similar flaw in reasoning was also committed by the Supreme Court recently in *Ashwani Kumar.*[34] The petitioner had approached the Supreme Court to debar legislators from practicing as an advocate during the period such persons are Members of Parliament or of State Assembly / council.[35] The Supreme Court rejected this contention as legislators could not be understood to be employees.[36] The Supreme Court's rationale for that conclusion was as follows:

> "Indubitably, legislators cannot be styled or characterized as full-time salaried employees as such, much less of the specified entities. *For, there is no relationship of employer and employee*. The status of legislators (MPs/MLAs/MLCs) is of a member of the House (Parliament/State Assembly). The mere fact that they draw salary under the 1954 Act or different allowances under the relevant Rules framed under the said Act does not result in creation of a relationship of employer and employee between the Government and the legislators, despite the description of payment received by them in the name of salary. Indeed, the legislators are deemed to be public servants, but their status is *sui generis* and certainly not one of a full-time salaried employee of any person, government, firm, corporation or concern as such."

While it may seem reasonable to conclude that

elected representatives of the people are not "employees", the analysis of the Supreme Court should have focussed on the nature of service by the elected representative rather than her terms of engagement. The verdict in *Ashwani Kumar* implies that while an in-house counsel giving regulatory advice must cease her practice as an advocate, an elected representative is entitled to continue her litigating practice. Instead, the Supreme Court should have simply analysed whether "in such employment, [the elected representatives] continue to act / plead before Courts". The answer would be in the negative if the strict text of Rule 49 is to be respected. Elected representatives should have been prohibited from appearing before judicial forums by virtue of Rule 49.

(v) Implications of the judicial interpretation of Rule 49

By emphasizing acting and pleading in courts as a sine-qua-non to be an advocate under the Advocates Act, the Supreme Court has formed an exclusive and irrefutable nexus between litigious services and the status of an "advocate" under the Advocates Act. The nature and terms of engagement may no longer be material,[37] but the key aspect is the nature of services being rendered by the employee. The implications of this judgment on the status of in-house counsel are far-reaching. For in-house counsel who are engaged in the litigation department of corporates, reliance may be placed on *Deepak Sharma,* to argue that such advocates are not required to intimate the Bar Council or cease their practice as an advocate under Rule 43 and Rule 49. However, in-house counsel engaged in regulatory, compliance, corporate or transactional advisory teams are obligated to cease their practice as an advocate under Rule 43 and Rule 49. Stripping off in-house counsel of their status as an 'advocate' also has consequences for whether attorney client privilege can be claimed in relation to the communication between the in-house counsel and other employees of the company. Further, there is no clarity on the ethical and professional standards that in-house counsel have to follow in cases of conflict of interest and other ethical conundrums of the legal profession.

2.2 Applicability of attorney-client privilege to legal advice given by the in-house counsel

(i) Relevant provisions of the Indian Evidence Act, 1872

Attorney-client privilege in India is governed by Sections 126 and 129 of the Indian Evidence Act, 1872 ("**Evidence Act**") and are set out below:

"**Section 126 – Professional communications**

No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as *such barrister, pleader, attorney or vakil, by or on behalf of his client*, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure--

(1) Any such communication made in furtherance of any 1 [illegal] purpose;

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, 2 [pleader], attorney or vakil was or was not directed to such fact by or no behalf of his client.

Explanation.-The obligation staled in this section continues after the employment has ceased."

Section 129 – Confidential communications with legal advisers

No one shall be compelled to disclose to the Court *any confidential communication which has taken place between him and his legal professional adviser, unless he offers him as a witness*, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.(emphasis supplied)"

A preliminary reading of Section 126 and 129 of the Evidence Act demonstrates that while Section 126 prohibits barrister, attorney, pleader or vakil from disclosing confidential information, Section 129 places the same restriction more generally on "legal professional adviser". The interpretative import of this textual difference has been the subject matter of judicial discussion and will be explored further in the later sections.

The BCI Rules does not contain a regime on

attorney client privilege and merely refers to the provisions of Section 126 of the Evidence Act.[38] Accordingly, Sections 126 and 129 of the Evidence Act along with the judicial interpretation of these sections governs the law on attorney-client privilege. It is important to review the judicial decisions in this regard specifically to see whether an in-house counsel can claim attorney client privilege against the discovery of disclosure of certain documents. If the answer is in the affirmative, it also needs be analysed whether such documents arise in the course of litigious or non-litigious services.

(ii) Judicial analysis relating to attorney client privilege[39]

Any analysis of Indian law relating to attorney client privilege must begin with an analysis of the judgment rendered by the Bombay High Court in *Vijay Metal Works*[40] in 1982. The Municipal Corporation of Greater Bombay had instituted eviction proceedings against the respondents, during the course of which, the Municipal Corporation had issued an original letter. When the respondents requested production of the original letter in court, the advocate of the Municipal Corporation claimed that the disclosure was prohibited under Section 129 of the Evidence Act.[41] The respondent counsel argued that the "salaried law officer of his Corporation is not the Legal Adviser, or even Barrister, Vakil or Attorney. He is a paid employee of the Corporation and there is no relationship between the Corporation and him as that of client the Corporation and him as that of client and Legal Adviser".[42] The Bombay High Court rejected this contention, it emphasized the confidential nature of the legal advice given by salaried law officers and the confidentiality was unaffected by whether the salaried law officers regularly appeared in court:

> "In the recent past a practice of employing legal advisers who are well qualified in law has grown up. Instead of going to the professional lawyers every now and then a practice has come into operation to retain the lawyers in full time employment of the Corporation. *Their nature of duty is to advise their employers on the questions which are of a legal character. They advise their employers on all matters pertaining to law and litigation. Their nature of duties is the same as that of barrister, pleader, vakil, or attorney except that they do not appear in Courts. If it is so, then I do not see any reason why they should not get same protection of law as the other legal advisers who appear in Courts of law.* In my opinion, therefore, a Paid or salaried employee who advises his employer, on all questions of law and relating to litigation, must get the same protection of law and therefore any such communication made in confidence by his employer to him for the purpose of seeking legal advice or vice versa should get protection of Sections 126 and 129 of the Evidence Act. (emphasis supplied)"[43]

Therefore, the judgment of the Bombay High Court not only interpreted Section 126 and 129 of the Evidence Act but also grounded its rationale in the nature of duties of an in-house counsel and its equivalence to the functions performed by an external counsel. However, since *Vijay Metal Works* did not delve into the BCI Rules, it failed to consider how the status of salaried law officers would be affected by Rule 49 of the Bar Council Rules.

Two decades later, the Bombay High Court in *Larsen and Toubro*,[44] was called upon to adjudge the impact of Rule 49 on the availability of attorney client privilege to in-house counsel. In *Larsen and Toubro*, respondent companies had filed company petitions against the Larsen and Toubro on account of disputed payments under hoarding contracts.[45] The legal counsel of Larsen and Toubro contended that certain documents relating to the hoarding contracts, which were prepared in anticipation of litigation, should not be disclosed as they were subject to attorney-client privilege.[46] It is important to note that such documents included legal opinions and advice provided by the in-house legal counsel in anticipation of litigation and other documents which were disconnected from the litigation.[47]

To counter the claim of attorney-client privilege, the respondent counsel contended that the Bombay High Court verdict in *Vijay Metal Works* was no longer good law after the interpretation of Rule 49 by the Supreme Court in *Satish Sharma.*[48] The respondent counsel's legal critique of *Vijay Metal Works,* is worth quoting extensively:

> "He submits that *the judgment of this court in the case of Municipal Corporation of Greater Bombay MANU/MH/0282/1982: AIR1982Bom6 relied on by the applicant cannot be said to be good law*, because, firstly, in that also, the question whether the opinion of the legal adviser who is employed by company is entitled to privilege under Section 129 did not arise. He further submits that the court has also not

considered that provisions of the Advocates Act and the rules framed thereunder, which according to the learned counsel, were relevant for considering the question. He further submits that the law on this point is now established by the judgment of the Supreme Court in the case of Satish Kumar Sharma v. Bar Council of H.P. MANU/SC/0005/2001 : (2001) 2 SCC 365 . *He submits that in view of the judgment of the Supreme Court in the case of Satish Kumar Sharma, the judgment of this court in the case of Municipal Corporation of Greater Bombay [v. Vijay Metal Works, Bombay MANU/MH/0282/1982 : AIR1982Bom6] has lost its binding force.* He submits, by referring to various Sections of the Advocates Act, especially, Section 29, *that no person can claim to be entitled to practise the profession of law unless he complies with the provisions of the Advocates Act.* He submits that giving professional legal advice is practising of profession of law, which only an advocate who is on the roll of the Bar Council can undertake."

Unfortunately, the Bombay High Court did not conclusively decide this argument due to the absence of specific evidence demonstrating the qualifications of the internal legal department.[49] However, the Bombay High Court did rule that documents prepared "in anticipation of litigation either for seeking legal advice or for using them in that litigation"[50] are protected by Section 126 and 129 of the Evidence Act. Accordingly, while *Larson and Toubro* may be relied upon for the proposition that legal advice provided by an internal legal department in anticipation of litigation is protected by Sections 126 and 129 of the Evidence Act, this exact question was not conclusively settled by the Bombay High Court.

Justice BN Srikrishna, retired judge of the Supreme Court has also opined on this issue, on request, as an expert in Indian law for the proceedings before the Delaware District Court in *Shire Development Inc v Cadilla Healthcare Limited.*[51] Justice BN Srikrishna opines that the position in *Vijay Metal Works* can no longer said to be good law on account of the judgment of the Supreme Court in *Satish Sharma*[52] and *Sushma Suri.*[53] Therefore, Justice BN Srikrishna concluded that coverage of Section 126 and 129 does not extend to in-house counsel.

(iii)Implications on in-house legal professionals

Strictly speaking, Sections 126 and 129 are currently applicable to in-house counsel, however, in the absence of clear regulatory framework, it is likely that a Court may take a view consistent with Justice BN Srikrishna's opinion. While the state of the law on this issue is far from satisfactory, it is important to note that the Courts were always constrained by the absence of detailed regulations in this regard. Further, many threshold issues are still undecided. For instance, what is the status given to non-litigious legal advice, such as a memo on tax implications of a corporate restructuring or intellectual property rights advisory. With the onset of specialisation in legal services, Courts will encounter even more peculiar and specific fact situations, which will lead to a lack of predictability in relation to attorney-client privilege. An absence of such privilege strikes at the very core of the legal function and stifles open communication which is essential for legal strategy.

2.3 Gaps in regulations relating to independence and conflict of interest

While the Indian regulatory framework is still grappling with threshold and applicability questions relating to role of the in-house counsel, other jurisdictions of the world have encountered and solved certain legal disputes in this regard. The regulatory framework for Indian advocates would greatly benefit from such experience. While the next section will deal with regulatory regime for in-house counsel in the USA, UK, Singapore and Malaysia, in this sub-section we will simply examine certain situations which may lead to regulatory uncertainty:

(i) Lack of clarity on identity of the client of the in-house counsel

In-house counsel may often find themselves advising on legal affairs of group entities of their employee company, directors of their employee company and even senior management. In all these instances, the in-house counsel is acting as a legal advisor to persons other than his / her client (i.e. the employer organisation). In cases where the interests of such persons are not aligned with the employer organisation it may lead to a conflict of interest. Further, such confusion can also have implications for the applicability of attorney-client privilege on such legal advice. For instance, if a member of the legal team is involved in the investigation of a prevention of sexual harassment investigation, she could be at one point communicating with multiple stakeholders to the dispute. In such a scenario, there may even be a risk

of a stakeholder like the complainant unwillingly divulging sensitive information to the in-house counsel under the belief that such information was protected by attorney client privilege.

(ii) Legal characterisation of the in-house counsel's work product

For in-house counsel advising on non-litigious matters such as mergers and acquisition, tax, compliance and intellectual property, it may be difficult to always determine whether a communication is "in anticipation of litigation". Technically, every legal advice has some element of either avoiding litigation or optimizing the outcome in case a dispute arises – however, if such an expansive view of privilege is taken virtually every document would be privileged and confidential. Furthermore, the impact of non-legal functions of the in-house counsel on their rights is also not clear. If an in-house counsel also advises business risk and strategy – would that mean that no advice provided by her would be considered "legal advice"? While it may seem unlikely that such a prohibition would exist, one can argue that excessive involvement of in-house counsel in business matters may compromise the "independence" a legal advisor is supposed to exercise.

In the next section, we will analyse the broad contours of the regulatory regimes in USA, UK, Singapore and Malaysia and evaluate whether such regimes have successfully addressed the issues plaguing the in-housel community in India.

3. COMPARATIVE ANALYSIS OF REGULATORY REGIMES

3.1 United States of America

(i) Overview of regulatory and statutory framework

Each state in the United States has its own set of rules of professional conduct of lawyers. While such rules of professional conduct are based on the American Bar Association Model Rules of Professional Conduct ("**Model Rules**"),[54] rules of professional conduct of different states significantly differ from the Model Rules. For instance, the New York Rules of Professional Conduct ("**NY Rules**"),[55] are far more detailed than the Model Rules in various aspects. Further, there are also certain professional standards which are formulated through common law and independent of the prevailing rules of professional conduct of the state.[56] The cumulative impact of these factors is that a unified understanding of the regulation of lawyers in the United States is not possible. However, this Report analyses the regulatory framework for lawyers in the United States as the rules of professional conduct and their commentary prove to be an insightful source of regulation and its rationale. Further, the United States continues to attract legal talent from all over the world. Lastly, since a review of all the rules of professional conduct in all states of the US will prove to be a cumbersome, we have focussed on the NY Rules as a textual source and referred to precedents from other states, wherever relevant.

Compared to the BCI Rules, the NY Rules and the commentary are far more detailed and prescribe professional rules to guide conduct for various roles that a lawyer may fulfil in her career. The NY Rules, much like the Model Rules, regulate lawyers engaged in litigation practice, as neutral third-party advisors, judges, law firm managers and supervisors, in-house counsel and in a pro bono capacity.[57] Further, the NY Rules on the classic legal-ethical issues such as confidentiality, conflict of interest and independence are far more specific than the BCI Rules.[58]

(ii) Whether in-house counsel have been specifically recognized

The in-house counsel is recognized as lawyers under the Model Rules and the NY Rules. To ensure that professional rules are applicable to in-house counsel, the definition of "firm" or "law firm" includes "the legal department of corporation or other organisation".[59] For instance, Rule 1.10 titled "Imputation on Conflict of Interest" which states that lawyers associated in a firm cannot knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules. Accordingly, even lawyers working in-house would be covered by the operation of this rule. In this manner, the NY Rules and the Model Rules don't create separate categories of lawyers and does not prohibit the in-house counsel from performing any legal functions. The NY Rules and the Model Rules, do however, prescribe certain rules which are specifically applicable to in-house counsel which will be discussed in detail below.

(iii) Applicability of attorney-client privilege to in-house counsel

Rule 1.6 prescribes the obligations of the lawyer in relation to confidentiality and the obligation to not knowingly reveal information protected by attorney-client privilege forms a subset of this

obligation. "Confidential information" is defined as follows:

> ""Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

While the implication of certain information being "confidential" is that the lawyer cannot disclose such information without the consent of the client or without meeting the other exceptions set out in Rule 1.6, the implication of information being protected by attorney-client privilege is that it is not subject to "discovery" in litigation proceedings i.e. disclosure to the adversarial party in litigation. The instructive decision on the applicability of attorney-client privilege on communications by in-house counsel is the US Supreme Court's decision in *Upjohn Co.,*[60] which overturned the "control group" test formulated by certain lower courts and followed by the Court of Appeals.[61]

Under the "control group" test, attorney-client privilege was only applicable with respect to communications with employees who are in a position to control, or take substantial role in determining the course of action a corporation may take based on legal advice.[62] The US Supreme Court held that the "control group" test "frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client." Further, emphasizing the rationale for attorney-client privilege, the US Supreme Court held as follows:

> "The control group test overlooks the fact that such *privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice*. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context, it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. *Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties,* and it is only natural that these employees would have the relevant information needed by corporate counsel *if he is adequately to advise the client with respect to such actual or potential difficulties*."

The Supreme Court in *Upjohn Co.* held that attorney-client privilege attached to communications between the in-house counsel and mid and lower-level employees as it was made for the purpose of obtaining or providing legal advice to the corporation, it was known by the parties that the.[63] While *Upjohn Co.* formulated the brightline test to evaluate whether attorney-client privilege should apply to communications by in-house counsel,[64] not all communications by in-house counsel is subject to privilege. For instance, where the in-house counsel acts in a legal and a business capacity, only the communication "primarily for the purpose of rendering legal advice" would be subject to attorney-client privilege.[65]

(iv) Are there any restrictions on activities of in-house counsel?

There is no specific restriction on the legal functions that an in-house counsel can perform.

(v) Rules on conflict of interest

Rules 1.7 to 1.12 of the NY Rules prescribe the rules relating to conflict of interest. Rule 1.7 states that a lawyer shall not represent a client if it involves representing "differing interests" or if there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyers own financial, business, property or other personal interests. "Differing interests" has been defined to include every interest that will adversely affect either the judgment or the loyalty of a lawyer to the client, whether it be a conflicting, inconsistent, diverse or other interest.[66]

Rule 1.7 also draws a distinction between conflicts that can be waived by the client and conflicts which are non-waivable. Accordingly, a lawyer cannot engage in a representation which is prohibited by law or a representation which involves the assertion of claim by one client against another client

represented by the lawyer in the same litigation / proceeding, even if the client consents to the same.

The commentary to the NY Rules recognizes that conflicts of interest also arise in transactional and non-litigation matters[67] and specifically deals with two situations relevant for in-house counsel: (i) in-house counsel being conflicted when advising subsidiaries or affiliates of the employee organisation;[68] and (ii) the role of in-house counsel conflicting with their role as a director on the board of the employee organisation or its group entities.[69]

Rule 1.13 prescribes rules for conflicts which may arise when an in-house counsel is dealing with the organisation's directors, officers, employees, members, shareholders or other constituents. If the interests of such persons differ from the interests of the organisation, then the lawyer is bound to explain that she is acting for the organisation and not for any such persons. Further Rule 1.13(b) provides for a scenario where if the lawyer is aware that an officer, employee or other persons with associated with the organisation is acting in a manner which violates the law or is likely to result in substantial injury to the organisation the lawyer may, ask for a reconsideration of the matter, advise that a separate legal opinion on the matter may be sought, refer the matter to a higher authority. If despite the lawyer's efforts, if the refusal to act is clearly a violation of the law or likely to result in substantial injury, the lawyer may reveal confidential information. This rule often presents a hobson's choice for in-house counsel who are faced with a difficult choice to report legal infractions to the authorities in case their plea to reconsider the matter is not heard.[70]

3.2 United Kingdom

(i) Overview of regulatory and statutory framework

The legislative framework for the regulation of legal services in the UK set out in the Legal Services Act, 2007 ("**LSA**"). Under the LSA, only authorised persons and businesses authorised by an 'approved regulator' and 'relevant approved regulator' or those exempt from the requirement to be authorised are entitled to provide 'reserved legal activities'[71] and 'legal activities'.[72] The professionals that can be authorised to carry out reserved legal activities under the LSA are- Solicitors, Barristers, Legal executives, Licensed conveyancers, Patent attorneys, Trade mark attorneys, Costs lawyers, Notaries, Chartered accountants, Non-LSA regulated providers. The SRA Handbook ("**Handbook**") gathers in one place all the Solicitors Regulation Authority ("**SRA**") rules that apply to regulated individuals and entities.[73] The Handbook applies to all in-house lawyers.[74] The areas of most relevance to solicitors admitted and practising in England and Wales are the SRA Principles[75], the SRA Code of Conduct[76] and the SRA Practice Framework Rules[77].

(ii) Whether in-house counsel have been specifically recognized / whether there are any specific provisions for in-house counsel

Under Rule 4 of the SRA Practice Framework rules, in-house counsel are subject to a number of regulatory duties to their client which arise out of the Principles and the Code of Conduct.[78] Under English law, a qualified Solicitor/ Barrister could be engaged as in-house counsel under a single client such as commercial organizations, government departments, legal firms, etc.[79] and they have been regarded at par with litigating lawyers.[80] Under the Handbook, an in-house counsel must act in the best interest of each client.[81] The Principles and the Outcomes in the Code of Conduct also set out more specific standards relating to the service in house counsel provide to clients and third parties[82] which need to be considered with other duties imposed by the court.[83]

(iii) Applicability of attorney-client privilege to in-house counsel

Section 190 of the LSA states the following in relation to attorney-client privilege:

> Section 190: Legal Professional Privilege- 1) Subsection (2) applies where an individual ("P") who is not a barrister or solicitor— (a) provides advocacy services as an authorised person in relation to the exercise of rights of audience, (b) provides litigation services as an authorised person in relation to the conduct of litigation, (c) provides conveyancing services as an authorised person in relation to reserved instrument activities, or (d) provides probate services as an authorised person in relation to probate activities. (2) Any communication, document, material or information relating to the provision of the services in question is privileged from disclosure in like manner as if P had at all material times been acting as P's client's solicitor.

Under English common law, salaried legal advisors are subject to the same duties to their client and to

the court as other classes of lawyers.[84] In this context, it is important to establish who the client of in-house counsel is.[85] The Court of Appeal decision in *Three Rivers No 5*[86] held that the "client" is the person actually seeking the advice, i.e. giving instructions as to what he wants to know as opposed to a different type of communication in which only factual material is conveyed.[87] This led to a risk that the "client" could be limited to some smaller group within the client company or organisation rather than all of its employees. This risk has been exacerbated in light of The High Court decision in *The RBS Rights Issue Litigation*[88]. Views differ as to whether it is helpful to list those within the client organisation who are part of the "client" or whether a better approach would be to list the primary individuals responsible for instructing the legal team and obtaining legal advice.[89]

Since in-house counsel generally provide commercial and legal advice which are not easily distinguishable, the Court of Appeals in *Balabel*[90] formulated the '*purpose of legal advice'* test to evaluate whether a communication was made confidentially for the purpose of obtaining legal advice. The Court of Appeals held that legal advice is not confined to telling the client the law but also includes advice as to what should prudently and sensibly be done in "the relevant legal context". Further, the "relevant legal context" need not necessarily be litigation but can extend to any context calling for specific legal expertise.

Accordingly, it follows that attorney client privilege may be claimed in the context of litigious and non-litigious services. The Court of Appeal, Chancery Division in *Anderson v Bank of British Columbia*[91] clearly enunciated distinction between legal advice privilege and litigation privilege. Litigation privilege protects the assembly and content of evidence for the purpose of litigation and thus focuses on the purpose for which the documentation has been obtained or assembled; whereas legal advice privilege applies only to the confidential communications between a party and his legal advisers for the purpose of enabling that party to obtain informed and professional legal advice, and thus is confined to confidential communications within that relationship and for the purpose of its fulfilment.

However, it may be necessary to consider the implications of the privilege rules of other countries in appropriate cases. In particular, in an investigation or dawn raid by the European Commission under EU law, EU privilege rules may apply which significantly differ from those under English law. The Court of Justice has confirmed that the principles governing privilege under EU law do not generally apply to in-house counsel (or non-EEA qualified counsel).[92]

(iv) Are there any restrictions on activities of in-house counsel?

In-house lawyers practising in England and Wales are subject to restrictions on who they can act for. Rule 4 (In-house practice), Practice Framework Rules states that in-house lawyers may act only for their employer, a related body of their employer, a work colleague and subject to certain restrictions, members of the public on a pro bono basis.[93]

(v) Rules on conflict of interest

Under the Code of Conduct, a "conflict of interest" is defined as any situation where: (a) in house counsel owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "**Client Conflict**"); or (b) in-house counsel's duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter (an "**Own Interest Conflict**").[94]

Outcome 3.5 states that in-house counsel must not act where there is a Client Conflict, or a significant risk of one, unless they can establish that their clients have a substantially common interest, or that they are competing for the same objective.[95] Outcome 3.4 prohibits in-house counsel from acting where there is an own interest conflict, or a significant risk of one.[96] As in private practice, an own interest conflict may arise whenever a lawyer is asked to advise on a course of action that could be detrimental to him or her personally – for example, because it affects his or her financial position. However, in the in-house context, the scope for own interest conflicts is much greater because in-house lawyers are invariably acting for their employers (or, if not, in their employer's interests). The implied duty of good faith owed by in-house lawyers to their employer in their capacity as employees and the fact that in-house lawyers are financially dependent on their employer mean that it is hard for them to be completely independent advisers in any work- related context.

The courts have recognised two types of conflict of

interest: existing client conflicts and former client conflicts. Where a lawyer acts for two clients with adverse interests at the same time, the fiduciary duty of loyalty owed to each makes it impossible for him to continue without the consent of both.[97] The House of Lords in *Hilton v. Barker Booth & Eastwood*[98] interpreted Rule 6 of the Solicitor's Practice Rules, 1990 to mean if that the same firm of solicitors acting for both sides and a conflict of interest arose between such parties, then the prohibition could not be waived by the clients. Further, it was held that it was professionally improper for the defendants to work for both parties and the defendants had a duty to inform the claimant they could not act for him and that he should seek legal advice from other solicitors. The Court held that:

> *"… if a solicitor put himself in a position of having two irreconcilable duties it was his own fault; that although a solicitor who had conflicting duties to two clients could not prefer one to another and he had to perform both as best he could, that might involve performing one duty to the letter of the obligation and paying compensation for his failure to perform the other; but that, the fact that he had chosen to put himself in an impossible position did not exonerate him from liability and he could not use his discomfiture as a reason why his duty to either client should be taken to have been modified;."*[99]

Chapter 3 requires those with "management responsibilities" to ensure that their legal department has effective systems and controls in place to enable in-house counsel to identify and assess potential conflicts of interests in relation to both clients and personally.[100] Despite the references to "firm" in Outcomes 3.2 and 3.3, the SRA has made it clear that these Outcomes apply to in-house practice.[101]

3.3 Singapore

(i) Overview of regulatory and statutory framework

Legal Professional Act, 1966 ("**Singapore LPA**") is the main statutory regulation governing the legal services in Singapore. The Singapore LPA governs legal services, admission and qualification and professional conduct of advocates and solicitors and foreign lawyers in Singapore and incorporation and regulation of law firms in Singapore. Legal Profession (Professional Conduct) Rules, 2015 stipulates the code of conduct of Advocates and Solicitors in Singapore. Lastly, Legal Service Regulatory Authority oversees the regulation of law practices entities and registration of foreign lawyers in Singapore.[102]

The in-house counsel is not regulated under the Singapore LPA. Lawyers working as in-house counsel in Singapore need not be admitted to the Bar or have obtained a practice certificate to be employed as an in-house counsel. This means they are not required to meet industry standards or adhere to a code of conduct. There is also no mandatory requirement for them to undertake any form of continuing professional education to upgrade their skills.

Therefore, to bridge the gap in regulatory framework concerning in-house counsel in Singapore, the Singapore Corporate Counsel Association ("**SCCA**") a pioneer national organisation representing the interest of in-house lawyers working for companies and other entities based in Singapore[103]; recently, in 2018, the SCCA introduced Competency Framework and Code of Ethics and Standard of Professional Conduct[104] ("**SCCA Code**"). These are private framework governing the members of SCCA only.[105]

The SCCA Code defines the term 'In-House Counsel' as "*a qualified lawyer who is employed by a Client or Employer for the purpose of providing that Client or Employer with a dedicated source of Legal Services and Advice in exchange for a salary or remuneration, and phrases and names such as, but not limited to, "legal advisor", "general counsel", "legal counsel", "in-house legal" and "corporate counsel" have the same meaning."*[106]

The SCCA Code regulates and promotes the acceptable ethical behaviour for in-house Counsel based on appropriate values. It is a comprehensive code that provides, amongst others, guidance on the following:

(a) The Code defines terms like, In-House Counsel, Client, Employer, Legal Services and Advice, Conflict of Interest, Ethical Conduct, Independence, Objectivity and Integrity.
(b) Under the Code, In-House Counsel is deemed to be a 'qualified lawyer'.
(c) The Code regulates ethical behaviour of In-House Counsel which includes to act in fair, honest and objective manner; remain impartial; give effect to legal requirements; not engage in act of dishonesty and corruption; not to intentionally misrepresent or permit misrepresentation of one's qualifications or competency; and lastly

provide sound legal advice based on facts.

(d) In-House Counsel must maintain strict confidentiality concerning the business and affairs of an Employer, Client or Organisation acquired during his professional relationship.

(e) In-House Counsel must avoid conflict of interest, financial interest and self-interest in discharge of his duty.

(ii) Whether in-house counsel have been specifically recognized

Under Singapore law, there is no distinction between litigious or non-litigious services. Each lawyer is admitted to the Singapore Bar is an Advocate and a Solicitor of the Supreme Court of Singapore and has the right of audience in any court of justice in Singapore.[107] A lawyer in Singapore can act as an advocate undertaking litigation work in courts and as well as a Solicitor providing advisory, corporate and conveyancing work. As defined under Singapore LPA, an 'advocate' or 'solicitor' mean an advocate and solicitor of the Supreme Court.[108] Under the Legal Professional Act, there is no express clause or definition that governs a 'legal professional' which can fall within the ambit of an in-house counsel providing advisory legal services on a salaried or permanent employment basis to a client or an employer.

However, for the purpose of privilege Section 3(7) of the Singapore Evidence Act, a defines "legal counsel" as "a person who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes"; or a public officer in the Singapore Legal Service who is working in a ministry or governmental department or an organ of the state as legal adviser or seconded as legal adviser to any statutory body established or constituted by or under a public Act for a public function.

(iii) Applicability of attorney-client privilege to in-house counsel

The provisions of the SCCA Code on confidential information also contain provisions relating to attorney-client privilege. Accordingly, an in-house counsel, must at all times hold in strict confidence all information concerning the business and affairs of an employer, client or organisation, acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the Employer and Client;

(b) required by law or a court to do so; [109]

In addition to the provisions in the SCCA Code, laws governing the issue of privilege against the disclosure are the Singapore Evidence Act, the Singapore Patents Act, and the common law. Under Singaporean law two components of Legal Professional Privilege are recognised, 'Legal Advice Privilege' and 'Litigation Privilege' namely.

Litigation privilege is intended to maintain the confidentiality of the strategy and preparation involved in the litigation of the case. This kind of privilege has been recognised in various Singapore Supreme Court Cases, like, *Gelatissimo Ventures Case*[110] and *Skandinaviska Case*[111]. In these cases, it has been held that litigation privilege covers not only communications between the lawyer and client concerning litigation, it also covers information provided by a third party to the lawyer or client predominantly for the purposes of pending or anticipated court proceedings.

There are instances where legal advice privilege overlaps with litigation privilege; instances with respect to communication shared between a client and lawyer concerning litigation. Subsequently, advice given by the advocate and solicitor to his client in relation to court proceedings would be protected by both legal advice privilege and litigation privilege. However, Legal Advice Privilege is regulated through statutory provisions and is applicable to in-house counsel employed in legal entities.

Sec. 131(1) of the Singapore Evidence Act states that "no one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others."[112]

For the purpose of legal advice privilege Sec.131(2) of the Singapore Evidence Act defines "legal professional adviser" as an advocate or solicitor; or *in the case of any communication which has taken place between any officer or employee of an entity and a legal counsel employed, or deemed to be employed [under Section 128A(4) or (5)], by the entity in the course and for the purpose of seeking his legal advice as such legal counsel, that legal counsel.*

In-house counsel are similarly protected, and this

position has been codified in Section 128A of the Evidence Act introduced in 2012 to extend the terms of Section 128(1) to the relationship between "a legal counsel in an entity" and that entity. In *ARX Case*[113], the Singapore Court of Appeal clarified that privilege would attach to pre-2012 communications by virtue of the common law position.

Section 128(1) of the Evidence Act (Ordinance 3/1893)[114] prohibits advocates and solicitors and legal counsel in entities from (a) disclosing any communication made to him in the course and for the purpose of his employment as such legal counsel; (b) stating the contents or condition of any document with which he has become acquainted in the course and for the purpose of his employment as such legal counsel; (c) disclosing any legal advice given by him to the entity, or to any officer or employee of the entity, in the course and for the purpose of employment. Further, Section 128(4) states if the corporations are related under Section 6 of the companies Act[115], Section 128A(1) of the Evidence Act[116] applies in relation to the legal counsel and every corporation so related as if the legal counsel were also employed by each of the related corporations.

However, not all forms and kinds of communication between the legal advisor and his Client or Employer are protected under the Singaporean Law. There are certain exceptions to communication that are not covered under the attorney-client privilege. Section 128A of the Evidence Act provides certain disclosures are not protected under the Evidence Act.[117]

On Legal Advice Privilege, the Singapore Supreme Court considered the *Three Rivers No. 5* decision[118], but ultimately declined to give effect to any restricted definition of 'client'. Instead, the Court strongly endorsed the position of the Australian decision in *Pratt Holdings*[119]. In *Pratt Holdings*, the Federal Court of Australia found that certain communications from third parties were protected by Legal Advice Privilege by focusing on the nature of the function of the third party, rather than the nature of the relationship between the third party and the party that engaged it.

The Singapore Court of Appeal, however, did not finally rule on the scope of Legal Advice Privilege in *Skandinaviska Case*, as the Court was able to dispose of the case by applying litigation privilege instead. It is possible that the Singapore courts could still follow the English law approach as decided in *Three Rivers No. 5* and confirmed by *The RBS Rights Issue Litigation*[120] given English cases are considered persuasive authority in Singapore. However, in light of the Singapore Court of Appeal's comments in *Skandinaviska Case* and its endorsement of Pratt Holdings, it currently seems unlikely that the Singapore courts will adopt the more restrictive approach of the English courts in a future case.

In *ARX Case*[121], the Singapore Court of Appeal held that there is no implied waiver of privilege if the reference to the inhouse counsel's advice in the employee's affidavit filed in court was scant, did not advance any particular point and did not allow the court to make any assumptions as to its contents.

(iv) Are there any restrictions on activities of in-house counsel?

In-house counsel not admitted to the Singapore Bar are restricted from carrying out the following legal services:

(a) appear or plead in any Singapore court unless otherwise permitted by law;
(b) appear in any hearing before a quasi-judicial or regulatory body, authority or tribunal in Singapore unless otherwise permitted by law; or
(c) attest any document which is required to be attested by an advocate and solicitor (i.e. someone who has been admitted to the Bar in Singapore and who holds a practising certificate)

(v) Rules on conflict of interest

Thera rea no specific conflict of interest rules for in-house counsel in Singapore and the general provisions relating to conflict of interest rules applicable to law firms will be applicable to in-house counsel.

3.4 Malaysia

(i) Overview of regulatory and statutory framework

The legal profession in Malaysia is governed by the provisions under the Legal Professional Act 1976 ("**Malaysia LPA**").[122] Under Section 11 of the Malaysia LPA, any 'qualified person'[123] may be admitted as an "advocate and solicitor"[124] and normally does all the work done by barristers and solicitors in England. A person admitted to the Bar has the exclusive right to appear and plead in all courts of justice.[125]Advocates and Solicitors have to also observe the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession

(Publicity) Rules 2001. It is pertinent to note that these Rules apply to every Advocate and Solicitor, whether she is practising as a sole proprietor or as a partner, an employee or a consultant of a firm.[126]

(ii) Whether in-house counsel have been specifically recognized / whether there are any specific provisions for in-house counsel

No provision of the Malaysia LPA defines the term "in-house counsel". Section 37 of the Malaysian LPA restricts any unauthorised person to act as an advocate and solicitor. Section 38 acts as an exception to Section 37 and states that a full-time paid employee of a company and organization may act as an advocate and solicitor.[127] Therefore, while advocates and solicitors can act as in-house counsel, even non-lawyers and lawyers who are not "advocates or solicitors" within the meaning of the Malaysian LPA can act as an "in-house counsel".

(iii)Applicability of attorney-client privilege to in-house counsel

Section 126 and section 129 of the Malaysian Evidence Act protects professional communications. Section 126 of the Evidence Act 1950 protects communications between clients and their advocates. Although, the Court of Appeal in *See Teow Chuan,*[128] held that attorney client privilege pursuant to the Evidence Act 1950, extends only confidential communications between the advocate and solicitor (and not all communications), the question of whether attorney client privilege is applicable to in-house counsel is still undecided. In considering the probable outcome to this query there are two factors that should be considered. *First*, Section 129 of the Evidence Act protects confidential communications with legal advisors,[129] however, there is no conclusive determination on whether in-house counsel are considered to be advocates and solicitors or legal advisors or both. *Secondly*, Rule 44 (b) of the Malaysia Practice Rules stipulates that lawyers in salaried employment must forgive their certificate of practice and cease their practice as an advocate. Accordingly, the scope of the applicability of attorney client privilege to in-house counsel is far from clear.

(iv) Are there any restrictions on activities of in-house counsel?

Under Rule 44 (b) of the Malaysia Practice Rules, an advocate and solicitor shall not be a full-time salaried employee of any person, firm (other than advocate and solicitor or firm of advocates and solicitors) or corporation and have to cease to practise as an advocate and solicitor so long as he continues in such employment.[130] Nevertheless, such person can act as advocate and solicitor under Section 38 of the Malaysian LPA. But such person has no right to represent the company or organization in Court or in Chambers or attest documents for the company or organization.[131] Accordingly, a person not qualified to be an advocate or solicitor but acting as an in-house counsel does not have the right to represent the company or organisation in Court or in Chambers or attest documents.

(v) Rules on conflict of interest

The Bar Council of Malaysia issued Bar council rulings related to matters of practice, to preserve fundamental principles required in maintaining the dignity of the legal profession, and serve as a guide to Advocates and Solicitors. Chapter 6 of the Bar Council Rulings prescribes rules relating to conflict of interest.[132] Nevertheless, when an advocate and solicitor is on a panel of lawyers for any company, body or organisation, and may act in a matter against that company, body or organisation but before he/she so acts, he/she must inform his/her client in writing that he/she is on the panel of lawyers for that company, body or organisation. But an advocate and solicitor acting for both parties in the preparation of any agreement cannot act for either of the parties later. Moreover, if an advocate and solicitor is also a director or substantial shareholder of a company then the advocate and solicitor cannot act for the other party to any transaction in which the company is a party and cannot act for a purchaser if the Solicitor or his/her sibling, partner, spouse, child or parent is a director or substantial shareholder of the property developer in that transaction. Accordingly, the Bar Council Rulings also incorporate the concept of non-waivable conflicts of interest.

4. Action Points in relation to Regulatory regime for In-House Counsel

4.1 Substantial Re-Drafting of the BCI Rules to govern Non-litigious Services

As stated above, a cursory reading of Chapter II of the BCI Rules makes it clear that it is primarily intended to govern litigious services. Either the BCI Rules need to be redrafted or a fresh code of conduct needs to be drafted to govern in-house counsels. Provisions need to be introduced that lay out professional standards like, degree of skill, care

and diligence, certain level of competency expected from lawyers engaged in non-litigious services. Lastly, defining terms like "integrity" and "independence" of the lawyers engaged in non-litigious service will further help in regulating professional conduct. The following aspects need to be addressed in such a code of conduct:

(i) *New definition which includes non-litigious services*

A definition of "practice of law" or "legal services" which includes due diligence, instrument review and drafting, negotiation of contracts, legal advice and preparation of memorandum relating to issues of Indian law as well as representation of clients before statutory authorities, whether such services are in relation to litigation before a court, tribunal or judicial forum or not. Since only "Advocates" would be licenses to engage in the "practice of law" or render "legal services", this will expand the scope of an advocate's functions and unequivocally include non-litigious services within the scope of the functions of an advocate.

(ii) *Drafting choice: either separate classes or overarching obligations*

As a drafting choice, the new code of conduct can either define separate roles of a lawyer or have obligations which are equally applicable to all lawyers. If the latter option is taken, the code of conduct must specifically deal with how the obligations apply to each class. For instance, while the NY Rules and regulations in the UK have taken the latter approach, the SCCA Code in Singapore has taken the former approach. Since the BCI Rules currently also adopt the former approach (no separate class of advocates are recognized), it would be advisable to adopt the approach adopted by the NY Rules and the UK Regulations.

(iii) *Form of new set of rules*

As is the practice followed in the US, UK and Singapore the code of professional ethics which governs Indian lawyers cannot simply be a list of rules, it must also be accompanied by a commentary that can guide advocates in grey areas.

(iv) *Specificity*

Different jurisdictions follow different degrees of specificity in their code of professional ethics. As the new code of ethics will govern the largest body of lawyers in the world, it is advisable that the code of conduct delves into as much detail as possible. This will also provide guidance to clients should they be faced with a situation where deficient legal services have been provided to them.

4.2 Rule 43 and 49 of Bar Council of India Rules prohibiting full-time salaried employment of lawyers should stand deleted

Rule 49 provides that an advocate cannot be a full-time salaried employee of any person, government, firm, corporation. If upon taking such employment, under Rule 43, the advocate is required to intimate the Bar Council within India whose roll his/her name appears and cease to practice as an advocate. By the judicial interpretation of the Supreme Court[133], In-house counsel engaged in regulatory, compliance, corporate or transactional advisory teams are obligated to cease their practice as an advocate under Rule 43 and Rule 49. Stripping off in-house counsel of their status as an 'advocate' also has consequences for whether attorney client privilege can be claimed in relation to the communication between the in-house counsel and other employees of the company. Accordingly, Rule 43 and 49 must be deleted at the earliest. By scrapping Rule 43 and 49 the conflicting interpretations existing regarding the inclusivity of non-litigious services within the ambit of Advocates Act will cease to be of any legal effect. Thus, providing the regulatory space to govern all kinds of legal services.

If such deletion requires intervention of the BCI, the Central Government may notify a rule which prohibits the rejection of any application or initiation of any action on the grounds that the lawyer is engaged in salaried employment. However, this is not an ideal solution and preference should be given to deletion of this rule.

4.3 Need for a robust and functioning disciplinary mechanism

Bar Council of India is the main disciplinary body governing the professional misconduct and breach of rules and regulations governing the legal professionals in India under Section 49(1)(f) of the Advocates Act, 1961[134]. Often, disciplinary actions initiated by BCI have been reported to be selective and partisan, suggesting BCI may be biased in its dealings.[135] This is due to the fact that members of the disciplinary committee are lawyers governed by BCI which often leads to a conflict of interest. The decisions of the disciplinary committee are not made public and can be accessed only by filing an application and paying applicable fee.

With regulation of legal professionals involved in non-litigious services, there arises a need for providing an overarching disciplinary committee, that is independent and can without prejudice provide adjudication of disciplinary complaints against the advocates, foreign lawyers and persons employed by lawyers.

For this purpose, reference can be made to the Solicitors Disciplinary Tribunal of United Kingdom, which is an independent body devoid of any influence from Solicitors Regulatory Authority consisting on independent members adjudicating instances of professional misconduct and breach of regulations applicable to solicitors and their firms. Thus, a new body which is independent, impartial and transparent in its dealings needs to be established.

4.4 Revised Provisions for Privilege and Confidentiality

Currently, the BCI Rules have no independent rules on confidentiality and attorney-client privilege. A set of professional rules need to provide for duty of the lawyer to keep confidential all communication, there needs to be clarity in relation to the extent of such protection and whether such protection extends to communication which unrelated from litigation. The provisions drafted for this purpose can benefit greatly from the experience in the US and UK:

(i) The judicial principle set out in *Upjohn & Co*[136] may be borrowed and privilege should extend not only to legal advice provided by the in-house counsel but also the factual materials which form the basis of such legal advice. If such protection is not granted, it will render attorney-client privilege meaningless, as the disclosure of the underlying documents is often the contentious issue and not the legal advice itself.

(ii) The 'legal purpose' test formulated by British Courts may be adopted to ensure that only 'legal advice' is protected and business, commercial or strategic roles played by the lawyer are not covered by attorney-client privilege.

(iii) Ideally, attorney client privilege should also extend to legal advice which is not connected to litigation and should include advice relating to compliance with law, structuring advice for transactions and representation before regulatory bodies.

4.5 Provisions which set out specific application of norms to In-House Counsels

In the spirit of the drafting as specific regulations as possible, the code of conduct should also address ethical dilemmas of in-house counsel. The NY Rules may be used as a starting point in this regard. As stated above, Rule 1.13 prescribes rules for conflicts which may arise when an in-house counsel is dealing with the organisation's directors, officers, employees, members, shareholders or other constituents. If the interests of such persons differ from the interests of the organisation, then the lawyer is bound to explain that she is acting for the organisation and not for any such persons. Further Rule 1.13(b) provides for a scenario where if the lawyer is aware that an officer, employee or other persons with associated with the organisation is acting in a manner which violates the law or is likely to result in substantial injury to the organisation the lawyer may, ask for a reconsideration of the matter, advise that a separate legal opinion on the matter may be sought, refer the matter to a higher authority. If despite the lawyer's efforts, if the refusal to act is clearly a violation of the law or likely to result in substantial injury, the lawyer may reveal confidential information. While whistleblowing in India comes at insurmountable personal costs, the regulatory regime should provide a right to in-house counsel to disclose illegalities to promote a compliance culture and respect for rule of law.

PART III: REGULATORY MODEL FOR LAW-FIRMS

1. LAW FIRMS IN INDIA TODAY: ONWARDS AND UPWARDS

The growth of India's legal sector is evidenced by the increase in revenue from USD 5.20 billion in 2013 to USD 6.11 billion (roughly around INR 33,412 crore) as of 2016.[137] India is witnessing the unprecedented growth of commercial law advisory relating to an influx of foreign capital.[138] This has led to the proliferation of practice areas which would have otherwise been unheard of before liberalisation of the Indian economy, such as, mergers and acquisitions, project finance, structured finance and corporate insolvency and capital markets. As set out in a report published by Deloitte ("**Deloitte Report**"), demand for legal services has been increasing in the areas of regulatory compliance (49%) and mergers and acquisitions sector (42%).[139] While exact data is unavailable, the rise in India's legal sector can be partially attributed to the rise of large corporate law firms in India.

At the core of the growth of Indian law firms are a small but influential group of large corporate law firms.[140] Colloquially, these large corporate law firms are called the 'Big 6' of corporate law of India: AZB & Partners, Shardul Amarchand Mangaldas, Cyril Amarchand Mangaldas, Khaitan & Co, Luthra & Luthra and JSA (in no particular order). Each of these firms is a large 'full-service' law firm i.e. it provides all legal services under one roof: ranging from litigation to corporate advisory to taxation and intellectual property advisory and registration. Mergers and acquisitions as a practice area is the most documented with at least two prominent news agencies regularly releasing "league tables" which rank law firms on the basis of the deal value and volume of mergers and acquisitions executed during financial quarters.[141] This practice area, much like other practice areas of large corporate law firms, does not involve 'appearing or pleading before courts' regularly. It does, however, involve the drafting and negotiation of highly complex and valuable legal documentation such as joint venture agreements, shareholder agreements and share purchase agreements. Recent mammoth legal disputes where arbitral tribunals have awarded damages running into thousands of crores have arisen from such legal documentation.[142] Needless to say, the legal services offered by the corporate law firms have high stakes attached to it.

Recently, opinions provided by certain law firms are also playing a prominent role in controversies plaguing corporate India. For instance, Cyril Amarchand Mangaldas recently withdrew its clean chit report given to Chandna Kochhar in relation to the loans provided by ICICI Bank to its related entities.[143] Similarly, Cyril Amarchand Mangaldas was also under the spotlight when its offices got raided in connection with the CBI inquiry on Nirav Modi.[144]Additionally, these corporate law firms offer high salaries even at the entry level, genteel work that avoids the rough and tumble of courtrooms and the promise of relatively meritocratic recruitment and promotion.[145]

All of the aforementioned factors point to the central role played by law firms in shaping non-litigious services in India. In this context, it is critical to evaluate the sufficiency of the regulatory regime governing their conduct. However, as discussed above, the BCI Rules have been drafted in the context of an advocate regularly appearing before courts or tribunals and not in the context of "table practice" of corporate lawyers. The next section will examine the key gaps and flaws in the regulation of law firm lawyers and its implications on law firm lawyers today.

2. CURRENT FLAWS AND GAPS IN REGULATION OF FIRM LAWYERS

The combination of the multifarious functions performed by law-firms today and the sparse regulatory framework prescribed the BCI Rules have made the BCI Rules virtually irrelevant to the average law firm lawyer today. Judicial interpretation of the BCI Rules, which has so far largely focussed on litigation, has also contributed to the inherent unsuitability of the BCI Rules to the governance of non-litigious services in India. In this section, we will not only focus on classic issues of the legal profession but will also try to address certain ethical issues which may arise due to widespread practices in the law firm community.

2.1 Rule 49 and 43, Chapter II, Part VI of the BCI Rules: The prohibition on full-time salaried employment

(i) Supreme Court's judgment in Deepak Agarwal: Employment terms held to be irrelevant

Rule 49 and its judicial interpretation has been discussed in detail above in relation to in-house counsel.[146] The Supreme Court in *Deepak Agarwal,* held that the clinching factor in determining the applicability of Rule 49 would be whether "pursuant

to such employment, he continues to act and / or plead in the Courts. If the answer is in the negative, he ceases to be an advocate". Accordingly, if the law firm lawyer does not regularly act and / or plead in the Courts pursuant to his retainership / employment in the law firm, then she ceases to be an advocate. While some may seek to limit the scope of the judgement in *Deepak Agarwal* as it was rendered in the case of judicial appointments where court practice was a positive attribute making the aggrieved appellants suitable candidates, the dictum of the Supreme Court is clear.

However, while *Deepak Agarwal* is the prevailing Supreme Court judgment in this regard, High Courts have subsequently taken divergent views on Rule 49. Further, many argue that a lawyer is never an "employee" of the firm but is simply hired on a "retainership" basis. This argument was addressed in *Deepak Aggarwal,* although very briefly, when the Court stated that "the factum of employment is not material".[147] The Gujarat High Court, in *Jalpa Pradeepbhai,*[148] after noting that the tax deducted at source for the income[149] was not relevant, did in fact, analyse the contractual conditions and concluded that the contract fell within the scope of "full-time salaried" employment in terms of Rule 49.

This question was squarely addressed by the Calcutta High Court in *Sauvik Mukherjee.*[150] Yet again, a declaration by the Bar Council that the petitioner was ineligible to sit for judicial services examination due to Rule 49 was being contested. The petitioner had disclosed that he is currently employed as an associate in a law firm and contended that his "retainership" with the law firm could not be understood to mean "employment". The Court accepted this contention and held as follows:

> "Scrutinizing the engagement letters, we find that the appellant herein was never appointed as full-time salaried employee by the law firms. As a matter of fact, the appellant herein was a party to a retainership agreement. *In order to avail the services of the appellant herein as a lawyer concerned Lawyers' Firm/Solicitors' Firm retained the appellant as an associate against monthly fees. The acceptance of the retainership by the appellant herein against monthly fees could not be treated as a full-time employment against monthly salary*. The retainership agreement of a law firm in respect of an advocate cannot be equated with the letter of appointment in respect of a full-time salaried employee. (emphasis supplied)"

While *Jalpa Pradeepbhai* and *Sauvik Mukherjee* may provide some comfort to law firm lawyers, the approach adopted by these Courts is diametrically opposite to the approach adopted by the Supreme Court in *Deepak Aggarwal*. Accordingly, it is likely that a Court will hold that Rule 49 is applicable to law firm lawyers.

(ii) Implications for law firm lawyers

Needless to say, a strict application of Rule 49 would be a death knell to the corporate legal sector. However, given that the disciplinary proceedings are virtually non-existent in India and that a complaint against a law firm is unlikely, practical implications of Rule 49 would be restricted to law firm lawyers being precluded from positions (such as district-level judicial appointments) which require experience as an 'advocate'. It may be argued that the application of Rule 49 may have a detrimental impact on client confidence and may embolden investigative authorities to raid law firm's offices.

2.2 Lack of comprehensive attorney-client privilege provisions

(i) Applicability of attorney-client privilege to non-litigious legal communication is unclear

As discussed above, due to the requirement under Rule 49 that lawyers in salaried full-time employment cease practice as an advocate, it may be argued that attorney-client privilege under Section 126 and 129 of the Indian Evidence Act, 1872 is not applicable to law firm lawyers.[151] However, even if the view expressed in *Vijay Metal Works* is taken to be the correct view, it is unclear whether attorney-client privilege will be attracted to communications which are entirely disconnected from litigation i.e. non-litigious services such as due diligence, transaction structuring and contract negotiation. The Bombay High Court in *Larsen and Toubro* stated that documents prepared "in anticipation of litigation either for seeking legal advice or for using them in that litigation"[152] were protected by Section 126 and 129 of the Evidence Act, however, no court has not adjudged the applicability of attorney-client privilege to non-litigious services. This gap in the law is critical as corporate lawyers are today viewed not only as a legal technician but as a "trusted advisor" who have access to information relating to the business of its clients.[153] Nonetheless, the text of Section 126 and 129 of the Evidence Act does

not differentiate between litigation and non-litigation advice. To quote Section 126, Attorney-client privilege extends to:

> "any communication made to him in *the course and for the purpose of his employment as* such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which *he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him* to his client in the course and for the purpose of such employment"

Therefore, if the preliminary question of whether a law firm lawyer would qualify as a "barrister, pleader, attorney, vakil" is answered in the affirmative, then the text of Section 126 should protect any opinions rendered relating to structuring advice, due diligence and contract negotiation as such matters would fall within "communication made to him in the course and for the purpose of his employment".

(ii) Implications for law firm lawyers

Attorney-client privilege rests on the need for the advocate to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.[154] An alternate argument that can be advanced is that Section 129 may be relied upon instead of Section 126 of the Indian Evidence Act, 1872. Section 129 extends the protection of attorney-client privilege to "any confidential communication which has taken place between him and his legal professional adviser" instead of using the term "barrister, attorney, vakil, pleader". The implication, some may argue, being that a law firm lawyer would be included within the term "legal professional adviser" rather than the term "barrister, attorney, vakil, pleader". While this argument has been advanced before Courts, it has never been explicitly addressed. Accordingly, any restriction which strikes at the trust that a client can place in his lawyer will greatly be to the detriment of the corporate legal sector.

2.3 Lack of a clear conflict of interest framework for corporate lawyers

(i) Insufficient regulation of conflicts-of-interest arising in relation to rendering of non-litigious services

The BCI Rules in relation to conflict of interest are not catered to non-litigious services provided by law firm lawyers today. The following BCI Rules prescribe norms in relation to conflict of interest:

(a) Rule 6, Section I restricts an advocate from appearing in a judicial tribunal where any member is a relative;
(b) Rule 7, Section I restricts appearance in Courts against an organisation if the advocate is a member of the executive committee of the organisation;
(c) Rule 9, Section I restricts advocates from *acting or pleading in any matter* in which he is himself pecuniarily interested;
(d) Rule 13, Section II prescribes that an advocate should not accept a brief, appear or discontinue his appearance in a case where he is or has reason to believe that he will be a witness;
(e) Rule 14, Section II obligates advocates to make all such *full and frank disclosure to his client* relating to his connection with any parties and any interest in or about the controversy;
(f) Rule 19, Section II restricts advocates from acting on instructions of any other person other than his client or his authorised agent; and
(g) Rule 33, Section II restricts advocates who have, "at any time", advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, from appearing or pleading for the opposite party.

Even if we were to interpret "acting" in a matter as the rendering of non-litigious services, only a handful of the rules relating to conflict of interest govern the rendering of non-litigious services. However, these rules do not comprehensively cover the wide array of conflicts that law firm lawyers may face when taking up mandates. For instance, there are at least two reported instances where one of the leading corporate law firms in India has acted for both parties to a significant multi-million-dollar transaction.[155] While the standard practice in law firms is to take consent of the parties to the transaction and institute a "Chinese wall" between teams so that no confidential information is shared, the regulatory framework for such conflicts is far from clear. For instance, a stake sale by a promoter of an Indian company may be conducted through a bid process with multiple potential buyers. In such a situation, confidential information shared by a law firm representing both parties can have fatal consequences to the fairness of the bid process.

Conflicts of interest may also arise due to corporate lawyers transferring between firms and a large corporate law firm acquiring another practice as confidential information (such as details of documentation and highly confidential non-compliances) may exchange hands in ongoing transactional matters. Further, there are also no specific conflict of interest provisions relating to ex-judicial members becoming practicing attorneys in their field of specialisation after retirement.

(ii) Implications for law firm lawyers and their clients

As a broad principle, no regulatory intervention may be required as long as the conflict of interest has been notified to the client as soon as it arises or prior to accepting the mandate (if possible). However, information asymmetries may lead to conflicts of interest which have grave implications for the independent legal judgment an attorney is supposed to exercise. This also fundamentally impacts the quality of the legal service being provided to the client.

2.4 Prohibition on advertisement and restriction on solicitation

(i) Limited advertisement and publicity rights available to Indian law firms

Rule 36 of the BCI Rules provides as follows:

> "An advocate *shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned.* His sign-board or name-plate should be of a reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of worker or that he has been a Judge or an Advocate General.
>
> That this Rule will *not stand in the way of advocates furnishing website information as prescribed in the Schedule under intimation to and as approved by the Bar Council of India*. Any additional other input in the particulars than approved by the Bar Council of India will be deemed to be violation of Rule 36 and such advocates are liable to be proceeded with misconduct under Section 35 of the Advocates Act, 1961 (emphasis supplied)."

Accordingly, Rule 36 limits the scope of advertisement and publicity that law firms can undertake to basic information which lawyers can provide on their websites. The rationale for the prohibition on Rule 36 is grounded in the Victorian notions of the legal profession being noble and the practice of law being a public utility. Citing such grounds for the restriction on solicitation, Justice Krishna Iyer in *MV Dabholkar*[156] stated that:

> "Be it remembered that the central function of the legal profession is to promote the administration of justice. *If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms* which make him worthy of the confidence of the community in him as a vehicle of justice-social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation."

While the "administration of justice" is a significant aspect of legal services, the rise of non-litigious services demonstrates that the domain of legal services has outgrown the archetype of litigator fighting for justice. In fact, law firms specialising in mergers and acquisitions, infrastructure, private equity and corporate litigation are far removed from being a "vehicle of social justice". These legal services are enablers of commerce and foreign investment into India. In fact, the changing nature of legal services in India and the rise of the corporate legal sector has itself been acknowledged by the Supreme Court in its judgment rejecting the constitutional challenge to the levy of service tax on legal services.[157]

(ii) Implications for law firm lawyers and their clients

This restriction has not gravely impacted large law firms as Rule 36 now explicitly allows law firms to have websites with basic information and this stand has been explicitly authorised by the BCI before the Supreme Court.[158] Large law firms' clientele mostly depends on relationships with clients and the expertise of its partners. However, even these law firms engage in advertisement which goes beyond the purview of Rule 36 such as entering name in directories, sponsoring conferences and regularly

publishing articles in periodicals.

Further, it is no secret that law firms often prepare presentations on current legal issues to educate deal teams and in the process seek to generate business for their firm. It is also commonplace for partners to go on "business-development" trips to financial centres such as New York, London, Hong Kong and Singapore to solicit mandates. By the express words of Rule 36, such solicitation is prohibited. Therefore, given the changing nature of legal services, the restriction in Rule 36 needs to be watered down further to enable effective business development by law firms.

A restriction on advertisement impacts new entrants adversely.[159] As one critical commentator notes, "a person intending to buy an automobile has more information and research resources at his disposal than someone intending to entrust critical litigation to an advocate".[160] Therefore, young aspiring corporate lawyers may find it difficult to build a practice if they cannot solicit work from clients and small and medium enterprises who cannot afford large law firms may end up settling for sub-standard legal advice within a price range. Such a prohibition also has negative spill-over effects on innovation in the legal services sector, for instance, an app or website which aggregates services from different lawyers will inevitably be in conflict with Rule 36. As per news reports, the Allahabad High Court has already show-caused such aggregator websites on the grounds that their services violate Rule 36.[161] This prohibition would cut off a source or reliable and cost-effective legal advice to small and medium enterprises and start-ups.

2.5 Lack of enforcement on the prohibition on multi-disciplinary practices

Rule 2, Chapter III, Part IV states that "An advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate." This unequivocal prohibition has also been interpreted in *AK Balaji,*[162] to admonish the practice of large chartered accountancy firms to hire lawyers and provide legal services. As per news reports, the Society of Indian Law firms has submitted a complaint before the Bar Council of Delhi against the Big 4 accountancy firms for advising on issues relating to the foreign direct investment policy, exchange control regulations and industry sectoral regulations, through itself and their surrogate practices.[163] The outcome of the complaint before the Bar Council of Delhi is not publicly available.

2.6 Restrictions on business vehicles for law firms and lack of incorporation requirements

Currently, there is no requirement for registration of law firms by the Bar Council of India. This creates uncertainty when any kind of liability needs to pinned on law firms, such a liability may arise in the case of violation of professional ethics or even when a law firm actively abets and contributes to illegal acts. For instance, Rohit Tandon, the founder of the law firm, T&T was recently arrested on grounds of money laundering.[164] If the accused was not immediately apprehended, short of seizing personal assets of the accused, the investigative authorities would have no recourse or information on who to proceed against. Further, had such a situation arisen in a much larger law firm with systemic participation from various law firm partners, data relating to the entity, its accounts and its shareholding pattern would go a long way in helping investigative authorities. Given that an incorporated company under the Companies Act, 2013 is the most preferred business vehicle across all sectors and it entails public accessible filings, there is no reason the same should not extend to lawyers and law firms as well. Therefore, there are various benefits to mandating registration of law firms.

Further, there is lack of clarity on whether existing firms can be incorporated as limited liability partnerships under the Limited Liability Partnership Act, 2008. In fact, upon the notification of the Limited Liability Partnership Act, 2008 several law firms reserved names under the Limited Liability Partnership Act, 2008, however, corporate law firms are awaiting a clarification from the BCI that this is permissible under the Advocates Act.[165] Further, even if such a clarification is issued the capital gains tax incidence upon the conversion of a partnership firm to an LLP is not entirely clear. Anecdotal evidence suggests that most law firms are apprehensive of converting into an LLP due to the requirement of annually disclosing accounts.[166] Nonetheless, from a policy perspective, transparency in the incorporation and functioning of corporate law firms will greatly benefit the regulatory regime as well as aid in investigations into illegal acts by corporate law firms.

3. Comparative Analysis of Regulatory Regimes

3.1 United States of America

(i) Overview of the regulatory and statutory framework

The Model Rules and common law govern the activities of law firms in the United States and we will be taking the NY Rules as an illustrative example of regulation at the state level. As stated earlier, apart from certain specific provisions such as Rule 1.13 (*Organisation as client*) which are applicable to in-house counsel, all provisions of the Model Rules and NY Rules have been framed to govern law firms. Rules 5.1 and 5.2 of the NY Rules delineate the role of supervisory lawyers or lawyers in the management of law firms and subordinate lawyers in law firms. Rule 5.1 stipulates that a lawyer with management responsibility in a law firm / lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that other lawyers conform to the NY Rules. Rule 5.1 also imputes responsibility for a violation of the NY Rules if the lawyer orders or directs the specific conduct or if the lawyer has sufficient managerial responsibility knows of such conduct and does not prevent avoidable consequences or if such lawyer should have known of the conduct in the exercise of reasonable management or supervisory authority.

(ii) Prohibitions on publicity and advertisement

The Model Rules and the NY Rules do not prohibit advertising but seek to regulate its content through restrictions relating to time, place and manner of advertisement. In this context, the commentary to the NY Rules states that advertisements by lawyers serve two social objectives, *first*, they inform the public of legal issues which may not be apparent, and *secondly,* such advertisements generate business for the legal community.[167] As an overarching condition, Rule 7.1(a) provides that there shall be no dissemination of any advertisement which contains statements or claims that are false, deceptive or misleading or an advertisement that violates the NY Rules. As long as Rule 7.1(a) is complied with, an advertisement may include, amongst others, the details regarding educational qualifications, bar membership details, names of regular clients, credit arrangements accepted and legal fees for initial consultation. Further, advertisements are prohibited from including paid endorsement / testimonial, use of fictitious content not related to the law firm. Moreover, as long as statements comply with Rule 7.1(a), are factually supported, the advertisement displays a disclaimer and testimonials are included with prior consent, advertisements may include statements that are reasonably likely to create an expectation of the result the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, testimonials / endorsements of the clients or statement describing the quality of legal services.

While NY Rules and Model Rules recognize and allow advertisement there is a restriction on solicitation. Rule 7.3 prescribes that a lawyer shall not engage in solicitation by in-person or telephone contact or by any form of communication if it violates the rules of professional conduct, the recipient has communicated that she does not want to be solicited, if the solicitation involves coercion, duress or harassment, if the physical, emotional or mental state make it unlikely for the recipient to exercise reasonable judgment or if the lawyer is soliciting on behalf of another lawyer.[168] This distinction between solicitation and advertisement is partially a result of constitutional jurisprudence that has held that there is a substantial state interest in protecting individuals from invasive conduct, preventing erosion of confidence in the legal profession, protection of potential clients from pressure.[169] Accordingly, there is a considerable academic discussion on the point where advertisement ends and solicitation begins, especially in the context of online communication,[170] however, such discussion has not been considered relevant for the purposes of the report.

(iii)Rules on conflict of interest

Rules 1.7 to 1.12 of the NY Rules prescribe the rules relating to conflict of interest. Rule 1.7 states that a lawyer shall not represent a client if it involves representing "differing interests" or if there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyers own financial, business, property or other personal interests. "Differing interests" has been defined to include every interest that will adversely affect either the judgment or the loyalty of a lawyer to the client, whether it be a conflicting, inconsistent, diverse or other interest.[171]

Rule 1.7 also draws a distinction between conflicts that can be waived by the client and conflicts which are non-waivable. Accordingly, a lawyer cannot engage in a representation which is prohibited by law or a representation which involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation / proceeding, even if the client consents to the same. Rule 1.10 of NY Rules states that lawyers in a law firm cannot knowingly represent a client which they would have been prohibited from representing due to conflict of interest principles. In other words,

conflict of interest for one lawyer in a law firm translates to conflict of interest for all lawyers. Rule 1.10 also prescribes that each law firm must have a written record of its engagements and shall implement a system by which proposed engagements are checked against current and previous engagements. The commentary to Rule 1.10 recognizes that principles of the imputation of conflict of interest should not unduly restrict lawyers from switching between law firms or forming new associations. Rules 1.11 and 1.12 prescribe special conflict of interest principles for former government employees, judges, arbitrators and third-party neutrals.

(iv) Regulatory structure relating to multi-disciplinary practices

The NY Rules and the Model Rules prohibit fully integrated multi-disciplinary practices, however, contractual arrangements to offer benefits of multi-disciplinary practices are permitted. Rule 5.8(a) of the NY Rules provides the rationale for this distinction in the following words:

> "Multi-disciplinary practice between lawyers and nonlawyers *is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values*. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public*, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services*"

To this end, the non-legal professional services firm is not permitted, to exercise directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in relation to the provision of legal services. To ensure that only appropriate professional services are involved, a contractual relationship is only provided if the non-legal professional service firm meets eligible standards set out in the quoted regulation.

(v) Is there any regulation of fees?

Rule 1.5 of the NY Rules and the Model Rules regulate the fees that can be charged by lawyers. This rule prohibits charging an excessive or illegal fee or expense and the factors to be considered in determined whether a fee is excessive are as follows:

> "(1) the time and labour required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent."

3.2 United Kingdom

(i) Overview of the regulatory and statutory framework

The legislative framework for the regulation of legal services in the UK set out in the Legal Services Act 2007 ("**UK LSA**").[172] The SRA Handbook ("**UK Handbook**") gathers in one place all the Solicitors Regulation Authority ("**UK SRA**") rules that apply to regulated individuals and entities. The UK Handbook applies to all law-firms. It only regulates rules pertaining to conflict of interest, publicity and advertisement and regulation of fees. Moreover, The UK LSA allows non-lawyers to own and invest in law firms. The rules accommodate Alternative Business Structures ("**ABSs**") which enable lawyers to form partnerships with non-lawyers, seek outside investment and/or operate under external ownership.[173]

(ii) Prohibitions on publicity and advertisement

Rule 7 of the Solicitor's Code of Conduct applies to any publicity of firm conduct(s) or authorise(s) in the course of setting up or carrying on the practice of the firm, and any other business or activity carried on by the firm. Rules 7.01 to 7.05 apply to all forms of publicity including the name or description of the firm, stationery, advertisements, brochures, websites, directory entries, media appearances, promotional press releases, and direct approaches to potential clients and other persons, and whether conducted in person, in writing, or in

electronic form.[174] The firm also has to comply with the general law on advertising. If a firm becomes aware of breaches under Rule 7 in publicity conduct, then it should take reasonable steps to have the publicity changed or withdrawn. While naming the firm, it would be misleading for a name or description to include the word "solicitor(s)", if none of the managers are solicitors. It would be also misleading for a sole principal to use "and partners" or "and associates" in a firm name unless the firm did formerly have more than one principal. The rule also prohibits a firm from making unsolicited approaches, either in person or by telephone, to a member of the public.[175]

(iii) Rules on conflict of interest

Any situation where: (a) in firms owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "**Client Conflict**"); or (b) firm's duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with the firm's own interests in relation to that or a related matter (an "**Own Interest Conflict**").[176] Outcome 3.5 states that firms must not act where there is a Client Conflict, or a significant risk of one, unless they can establish that their clients have a substantially common interest, or that they are competing for the same objective.[177] Most importantly, the size and complexity of the firm and the nature of the work undertaken, and enable a firm to assess all the relevant circumstances, including whether their ability as an individual entity, or that of anyone within the firm, to act in the best interests of the client(s), is impaired.

Much like the conflict of interest principles applicable to in-house counsel, the courts have recognised two types of conflict of interest: existing client conflicts and former client conflicts. The different principles applicable to each have been set out in *Hilton v. Barker Booth & Eastwood.*[178] The SRA Code of Conduct also provides some Exceptions where a firm may act, with appropriate safeguards, where there is a client conflict.[179]

(iv) Regulatory structure relating to multi-disciplinary practices

The regulatory framework in the UK accommodates ABSs which enable lawyers to form partnerships with non-lawyers, seek outside investment and/or operate under external ownership.[180] Two elements distinguish ABS from existing legal professional businesses: *first*, the degree of external ownership and investment; *secondly*, a mix of lawyers and non-lawyers working together in the same firm in client facing roles. UK was one of the jurisdictions to allow first true multi-disciplinary partnership involving lawyers and other professionals.

(v) Is there any regulation of fees?

The SRA Handbook does not seek to regulate the quantum of legal fees that can be charged by lawyers but provides a list of details that must be disclosed to the client and which form the basis for fee determination.[181] The Rules also allow two types of "no win no fee" or contingent cases: (i) Conditional fee agreements where the consumer receives the entire compensation awarded and the lawyer is entitled to a "success fee"; and (ii) damages-based agreements where a percentage of the damages awarded are paid to the lawyer.

3.3 Singapore

(i) Overview of regulatory and statutory framework

In Singapore, the provisions of Legal Profession Act, 1996, Legal Profession (Publicity) Rules, 2000, Legal Profession (Professional Conduct) Rules, 2015 and Legal Profession (Law Practice Entities) Rules, 2015 regulate the activities of law firms. Part IXA, of the Legal Profession Act, 1996 is the main statutory regulation governing the licensing, registration, the name of law firms and its professional misconduct. Legal Profession (Law Practice Entities) Rules 2015 governs the regulation and procedural aspects of registering, naming and conduct of Law Firms in Singapore.

Section 131 of the Legal Profession Act, 1996 states that a Solicitor who wishes to Practice on his own account or to have a partnership licensed (not being limited liability partnership they are licensed under Section 138) need to apply to Director of Legal Services for the issuance of license[182] and approval of proposed name of the practice.[183]

Every partner of the limited liability law partnership must be a solicitor who has in force a practising officer or a foreign layer who is properly registered under the law.[184]

Section138 of Legal Profession Act, 1996 states that a solicitor on the approval of Director of Legal Services can apply for limited liability law

partnership.[185] A limited liability law partnership is authorised to do anything that a solicitor can do by law and is required to do all that a solicitor is required to do by law.[186]

Under Section 132(1) of the Legal Profession Act, the proposed name of the law firm shall be approved by the Director of Legal Services after satisfying the criteria as proposed under section 136.[187] Further, as prescribed in the Legal Entities Rule the name of the law firm should not be similar to any other law practicing entity in Singapore[188] and shall not mislead or detract from the dignity of the legal profession.[189] The name of the law firm shall be in English.[190] The firm name should consist of wholly or partly of the name of any existing partner or sole proprietor of the law firm.[191] And lastly, the name of the law firm must not contain any words which are descriptive of the services provided by or the areas of practice of the law firm.[192]

(ii) Prohibitions on publicity and advertisement

Ancillary to Legal Profession Act, the Legal Professional (Publicity) Rules, 2000 are the main regulations governing the rules for publicity by legal professionals. Under the Legal Professional (Publicity) Rules, 2000, publicity is defined as any form of advertisement and includes any advertisement:

(a) Printed in any medium for the communication of information
(b) Appearing in, communicated through or retrievable from, any mass medium, electronic or otherwise.
(c) Contained in any medium for communication produced or for use by firm and its derivatives, and "publicise", "publicised" and "publicising" shall be construed accordingly.[193]

Expertise or the specialisation of the firm can be advertised.[194] Any contribution to the furtherance of good cause made by the advocates or solicitors practising with the firm in their professional capacity can be publicly acknowledged.[195] Free legal advice can be advertised by the law firm with only an advocate or solicitor's name and his designation.[196] Advocates and Solicitors are free to advertise their law firms outside Singapore in other countries provided such advertisement is consistent with the laws of the other country.[197]

Further, no advertisement or publicity made for an advocate's or solicitor' practice for the practice of the law firm shall not diminish public confidence in legal profession[198], information advertised should not be misleading[199], deceptive, inaccurate[200], false or unbefitting the dignity of the legal profession.[201]

(iii) Rules on conflict of interest

Legal Profession (Professional Conduct) Rules, 2015 provide for the regulation governing conflict of interest for advocates and solicitors and law firms. The Rules 20, 21 and 22 affirms that a law practice owes duty of loyalty and confidentiality to each client of the practice and must act prudently to avoid any compromise of the lawyer-client relationship between the law practice and the client by reason of a conflict, or potential conflict, between two or more clients of the law practice.[202]Such duties of loyalty and confidentiality owed by a law practice to its client continue after the termination of the retainer.[203]Further, a law practice must prudently avoid any compromise of the lawyer-client relationship between the law practice and the client by reason of a conflict, or potential conflict, between interests of the client and the interests of the law practice.[204]

Rule 22 of the Legal Profession (Law Practice Entities) Rules makes provision for the relationship between client and limited liability law partnership with related law corporation. The rule allows an advocate who is a partner or an employee of a limited liability law partnership from a practising concurrently in a law corporation that is related to the limited liability law partnership[205]. However, the involvement of the legal practitioner in the business entity must not impair and must not be in conflict with, the legal practitioner's duties in the law practice in which the legal practitioner practices.[206]

(iv) Regulatory structure relating to multi-disciplinary practices

Rule 34(9) of the Legal Profession (Professional Conduct) Rules, 2015 defines "law-related service" means any service set out in the Fourth Schedule, being a service that may reasonably be performed in conjunction with, and that is in substance related to, the provision of any legal service.

Legal Profession (Professional Conduct) Rules, Fourth Schedule, illustrates 'Law Related Services' that can potentially offer legal advice. These services are as follows:

(a) Intellectual property service, including the registration and the provision of consultancy

and advice on the management and enforcement, of copyrights, trademarks, patents, designs, plant varieties and any other category of intellectual property referred in the Agreement on Trade-Related Aspects of Intellectual Property Rights;

(b) Any tax service, including tax consultancy and advice;

(c) Any trust business or trust business service as defined in section 2 of the Trust Companies Act (Cap. 336);

(d) Any company secretarial services, including the establishment and incorporation of a company;

(e) Any service as a continuing sponsor company for an entity any shares of which are listed for quotation on the Singapore Exchange Catalist;

(f) Any administrative, management, property or other service provided exclusively to a law practice or to a business entity referred to in rule 34(3), (4) or (5);

(g) Any forensic investigation, document management or discovery service, or any other service relating to litigation support; and

(h) Any voluntary liquidation services.

(v) Is there any regulation of fees?

Currently, there is no regulation in the present legal framework in Singapore that governs the regulation of fees of the law firm. However, in the Legal Profession Act, the provision governing the relationship with the client also regulates certain aspects of fees for an advocate or a solicitor. Under Rule 17 of the Legal Profession (Professional Conduct) Rules, 2015 it is stipulated that a legal practitioner must not undertake work in a manner that unnecessarily or improperly increases the costs that are payable to the legal practitioner[207]. And a legal practitioner may also inform his or her client of the basis on which fees for professional services will be charged[208]and if when applicable shall inform the client of any other reasonably foreseeable payments that may arise.[209]

3.4 Malaysia

(i) Overview of the regulatory and statutory framework

The Malaysia LPA prescribes that the Bar council maintain a register of firm names under which advocates and solicitors practise. The Bar Council Rulings also provide guidelines on the firm name and restricts using a firm name or part thereof, a variant spelling of his/her own name that does not appear in his/her identity card. Moreover, the Bar council ruling requires a prior approval to use a vernacular language to name a firm. On 30 June 2018, the Legal Profession (Group Law Practice) Rules 2018 ("**Malaysia Law Practice Rules**") drafted by the Bar Council was approved.[210] The Malaysia Law Practice Rules relating to fee regulation and publicity are dealt by the Bar council rulings and the Legal Professional Publicity Rules, 2001 ("**Malaysia Publicity Rules**"). It is also pertinent to note that under the Practice Rule 44 (b), an advocate and solicitor shall not be a full-time salaried employee of any person, firm (other than advocate and solicitor or firm of advocates and solicitors) or corporation and have to cease to practise as an advocate and solicitor so long as he continues in such employment.[211] Nevertheless, such a person can act as an advocate and solicitor under Section 38 of the Malaysian LPA.

(ii) Prohibitions on publicity and advertisement

The Malaysia Publicity Rules prohibits advertisements containing any direct or indirect reference to the number or proportion of cases that have been successfully undertaken by their firm, any statement relating to the rates charged by him or his firm, or to his firm's methods of charging, stating anything that would be construed as offering any inducement to, or imposing any duress, upon any person as a means of obtaining professional business for himself or his firm, etc. within Malaysia.[212] They are also not allowed to publicize through any person who is the firm's client. Nevertheless, the firm of advocate and solicitor may publicize their practice by inserting an advertisement in legal and non-legal directory including to practice area they are engaged in.[213] However, no letterhead or stationery used by the firm for professional purposes shall contain any information pertaining to firm, except approved information.[214] They are allowed to distribute their business card having approved information only on occasions at which it is proper for the Advocate and Solicitor to establish his professional identity. An Advocate and Solicitor may give public lectures or participate in seminars, conferences or forums and on such occasions he shall not say or do anything or cause anything to be done which will reasonably give rise, in the opinion of the Bar Council, to an inference that he is attempting, through the public lecture, seminar, conference or forum to publicize his practice or the practice of his firm in a manner inconsistent with these Rules.

(iii) Rules on conflict of interest

The rules for conflict of interest in relation to law firms are similar to the rules for conflict of interest in relation to in-house counsel.

(iv) Regulatory structure relating to multi-disciplinary practices

In Malaysia, multi-disciplinary practices are prohibited by Rule 52 of the Legal Profession (Practice & Etiquette) Rules 1978 which states that "it is unprofessional and improper conduct to divide costs and profits with unqualified person."[215] There are many concerns with regard to MDPs, the main problems revolving around client's right to privilege and confidentiality and conflicts of interests.[216]

(v) Is there any regulation of fees?

The Bar council rulings provide certain factors like time, labour, skill, the novelty and difficulty of the question involved, the amount in controversy, the special position or seniority of the particular advocate and solicitor, etc. in determining the amount of fee for litigious or contentious matters involving representation of a client in Court.[217]

4. Action Points in relation to Regulatory regime for Law-Firms

4.1 Substantial re-drafting of BCI Rules to govern Law Firms

A cursory reading of the professional ethics regulations set out in the BCI Rules makes it clear that it has been drafted in the context of litigious services. While it is not advisable to create separate classes of advocates with distinct rights, it is essential to prescribe how different professional regulations apply to law firms. As discussed in the section relating to conflict of interest above (See section 2.3(i) above), given the size of corporate law firms and the range of clients being serviced from different offices, law firms grapple with conflict of interest issues often. To that extent, a separate code of conduct needs to be drafted wherein the lawyers have a duty of loyalty to the client and a duty to provide services competently. Further, any matters where there is a conflict of interest should not be acted upon without the consent of the clients. The NY Rules also make a distinction between conflicts of interest that can be waived and those that cannot, however, that class of conflicts is only related to directly conflicting claims in a litigation. Further, provisions relating to imputation of conflict of interest need to be introduced so that the "Chinese wall" imposed between different teams of law firms has a real and substantial meaning. A robust set of ethics tailored to the realities of non-litigious services will inculcate discipline in the conduct of firms and create a secure and reliable environment for clients. Further, once such rules are enforced, it will also act as a guarantee of a bare minimum level of professional ethics which may instil more confidence in smaller firms.

4.2 Deletion of Rule 49 from BCI Rules

Similar rationale as discussed in the section for in-house counsels.

4.3 Independent provisions for Attorney-Client Privilege

The BCI Rules need to have independent rules on confidentiality and attorney-client privilege. The rules in this regard will need to clarify whether there needs to be a nexus between a future litigation and legal advice for it to be subject to privilege. While the text of Section 126 and 129 of the Indian Evidence Act may cover non-litigious services, it will be ideal if there is an acknowledgment that attorney-client privilege applies to non-litigious services.

4.4 Expand the right to advertise and allow solicitation

Regulators in India need to recognize the existence of public policy benefits to advertisement by lawyers such as simplifying legal issues for the public and informing consumers of the services available at different price points. To this extent, the right to advertise should extend to currently prevailing practices which are unlikely to lead to widespread dissemination of deceptive information such as brochures, participation in conferences, publication in periodicals and listing in directories. To preserve the dignity of the profession, any information of likely outcome of litigations or comparison with other lawyers may be prohibited. In this regard, the publicity rules in Malaysia and Singapore may be taken as a starting a point.

The corporate legal sector currently services the cream of corporate India. This has led to a large portion of small and medium enterprises and start-ups being cut off from non-litigious services. This not only creates an artificial barrier for entrepreneurial lawyers but also increases the information asymmetry relating to legal services. In

such a situation, the prohibition on solicitation only exacerbates such negative public policy outcomes. As discussed above, web aggregator services for lawyers which were in their infancy are already under threat. Therefore, the ban on solicitation should be removed at the earliest. To avoid harassment of potential consumers and to protect the dignity of the profession, a general rule may be applied where solicitation of clients may be allowed with their consent. Accordingly, if a corporate client agrees to a presentation by a leading law firm or if an individual agrees to visit a website, lawyers should be able to solicit business from such persons.

4.5 Prohibition on multi-disciplinary practices

The current prohibition needs to be strictly enforced. While the outcome of the show-cause notice issued by the Bar Council of Delhi is not known, it is hoped that this ban is enforced strictly.

4.6 Compulsory registration and facilitation of LLP incorporation

The lack of a public record of law firms makes their regulation difficult and encourages an attitude of unaccountability. Mandatory registration of all law firms will ensure that the promoters of the law firms are known – this would also contribute to compliance in relation to funding of law firms and their relationship to non-legal practices. Further, as discussed above, the BCI should clarify if LLPs can render legal services under the Advocates Act. If this question is answered in the affirmative, law firms can be incorporated as LLPs which would usher in a regime of regular disclosures and increased transparency in the functioning of law firms.

PART IV: REGULATORY MODEL FOR LEGAL PROCESS OUTSOURCING FIRMS

1. LPOs: The Fledgling Sub-sector for Non-Litigious Services

Legal services often include processes and tasks that may not require any legal input. However, if a law firm has agreed to provide such a legal service, often associates work on such processes and tasks. This can lead to exorbitant legal fees in case the client has agreed to an hourly billing structure. However, it may also lead to inefficient utilisation of resources for the law firm if the client has agreed to a fixed fee structure. For instance, a due diligence requires downloading and collation of secretarial documents from the Ministry of Corporate Affairs website.

Accordingly, Legal Process Outsourcing ("**LPO**") firms fulfil a commercial need and perform specific legal tasks within a time-bound and cost-efficient manner. As one commentator states "many Indian attorneys only charge US$20 an hour for legal research. As the price of legal research at an American law firm is often around US$200 an hour, it is very easy to see why legal outsourcing is such a rapidly growing phenomenon".[218] One leading LPO firm lists services such as document review and management solutions, legal research, contract management, technology solutions and due diligence solutions.[219] Another LPO firm lists various other functions such as mergers and acquisitions, intellectual property management, compliance operations, anti-corruption screening, contract management services and eDiscovery managed services.[220] Electronic discovery (e-discovery) is one of the most important services provided by the LPO firms and it refers to the exchange of electronically stored information (ESI) as part of the discovery process in civil litigation. Pangea3, another legal process outsourcing firm, offers "eDiscovery Point" which is a proprietary software which provides an interface for efficient e-discovery of documents.[221]

From a preliminary examination of these services, it appears that LPO firms often provide end-to-end services similar to services that are provided by multi-disciplinary practices which involve collaboration and revenue sharing between lawyers and non-lawyers. For instance, a contract management lifecycle system may require combining legal and technical teams and have lawyers and engineers working side-by-side.[222]

LPO refers to a law firm or corporate legal department obtaining legal support services from an external law firm or legal support services firm. It is also commonplace for large LPO firms to have US and UK qualified lawyers as a part of their management which aids in business development and quality control.[223] India has become a prime location for outsourcing services of all types including legal services from the US, UK, Canada and others[224] due to certain factors like cost effectiveness, time difference, better access to talent and English language which easily reduce the operation cost of the outsourced work.[225] Accordingly, an LPO firm, much like any other outsourcing firm, involves lawyers working offshore (in a jurisdiction like India) and advising on laws of the client's jurisdiction. To that extent, an LPO may be impacted by laws the jurisdiction it is operating from as well as the jurisdiction of the client.

LPO firms claim to provide world-class infrastructure, high-quality working conditions and good perks which attracts lawyers working with LPO firms. LPO firms have been perceived as an alternative career option for lawyers in India with LPO firms employing undergraduates directly from campus.[226] Recently, India has witnessed an increase in the number of players in the LPO space. Firms like Pangea 3, Cobra legal Solutions, Bodhi Global Services, Clutch Group are some of the top key organisations providing legal outsourcing services. It is not clear if LPO firms offer services to their clients on Indian law and foreign law.

2. Current Flaws and Gaps in Regulation of LPOs

As discussed above in Section 2.1(i) above (*Textual Analysis of Chapter II, Part VI of the BCI Rules*),[227] the BCI Rules have not been drafted to regulate the non-litigious services offered today. The regulation of lawyers employed in LPO firms poses a unique problem due to two reasons: *first*, the legal characterisation of their services is unclear and *secondly*, lawyers engaged in LPO firms advise both on foreign and Indian law. The Madras High Court and the Supreme Court made certain observations on LPO firms in the context of the issues pertaining to "fly in and fly out of India on need basis to advise the clients on international transactions, to which there is an India component". This indicates that the LPOs analysis was never made in the context of an Indian lawyer/non-lawyer providing non-litigious services the LPO firms but pertained primarily to foreign lawyers advising on Indian law.

The Madras High Court made the following observation on LPOs:

> "*The B.P.O. Companies providing wide range of customised and integrated services and functions to its customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies.*"[228]

As discussed above, LPO firms provide end-to-end services which involve many legal functions such as contract review and drafting as well as mergers and acquisitions advisory. Accordingly, the Madras High Court seems to have mischaracterised the services offered by LPO firms. If the Court was informed of the services actually offered, its views on the issue would have been diametrically opposite.

The Supreme Court, after observing that the Government of India had commissioned a study on LPO firms, modified the observations of the Madras High Court by stating the following:

> "*We also modify the direction of the Madras High Court in Para 63(iv) that the B.P.O. Companies providing wide range of customized and integrated services and functions to its customers like word processing, secretarial support, transcription services, proof reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. We hold that mere label of such services cannot be treated as conclusive. If in pith and substance the services amount to practice of law, the provisions of the Advocates Act will apply and foreign law firms or foreign lawyers will not be allowed to do so.*"[229]

The fact that the Supreme Court called legal process outsourcing companies "BPOs" is disconcerting. The Supreme Court did not correct the mis-characterisation by the Madras High Court of the services offered by LPO firms. Further, in stating that "provisions of the Advocates Act will apply" the Supreme Court has clarified that if any advice on Indian law is being provided by the LPO firms, then the Advocates Act will apply.

Presumably, advice on foreign law being provided by the LPO firms would be outside the scope of the Advocates Act and regulated like any other (non-legal) service provided by Indian citizens. Therefore, much like other non-litigious services, LPO firms are operating in a legal vacuum. This is problematic because issues relating to confidentiality, data protection, malpractice liability and regulatory oversight are complicated by conflict of law issues which arise due to the multiplicity of jurisdictions involved. The following section will discuss the regulatory regime relating to LPO firms in USA, UK, Malaysia and Singapore.

3. Comparative Analysis of Regulatory Regimes for LPOs

3.1 United States of America

Given the high costs of legal services in the United States and the fact that most multinational clients are based out of the United States, the regulations relating to LPOs provide guidance on the responsibilities of lawyers looking to avail outsourcing services. To that extent, the experience of regulators in the United States is likely to be less relevant for India, which is a jurisdiction currently housing LPO service providers. Nonetheless, the Model Rules and the NY Rules provide key insights on liability apportionment between the lawyer who is seeking to avail LPO services and LPO service providers.

The chief regulatory concern in relation to outsourcing of legal services is the unauthorised practice of law. Rule 5.5(a) of the NY Rules states that "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." Accordingly, this rule would prohibit the outsourcing lawyer to hire an LPO in India if the provision of such services is not consistent with Indian law. Therefore, US lawyers and clients cannot turn a blind eye to the regulatory regime of India relating to LPOs. Further, in the context of Rule 5.5(a) the commentary notes that:

> "This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3."[230]

The NY Rules use the term "nonlawyers" to refer to any person not authorised to practice law under the NY Rules. Rule 5.3 provides the general rule regarding delegation of legal work by non-lawyers and states as follows:

"A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. *A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate*. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter (emphasis supplied)."

The extent of the reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; (f) whether the client will be supervising all or part of the nonlawyer's work.[231]

To provide clarity on the ethical ramifications of legal outsourcing, the American Bar Association issued a formal opinion in 2008.[232] The opinion clarifies that "there is nothing unethical about a lawyer outsourcing legal and non-legal services to the client" as long as the outsourcing lawyer is meeting her obligations to the client under the applicable professional rules. Salient features of the opinion are as follows:

(i) Rule 1.1 of the Model Rules does not require tasks to be accomplished in-house but only requires the tasks to be performed competently;
(ii) The outsourcing lawyer must exercise direct supervisory authority regardless of the remoteness of the location of the outsourcing lawyer, time difference and physical separation;
(iii) Lawyers outsourcing must conduct background checks, evaluate educational qualifications, analyze the legal education system, security of the service provider's premises and physically verify office premises (if necessary);
(iv) Legal landscape of the outsourcing country needs to be evaluated in terms of susceptibility of personal property to seizure and investigations;
(v) Disclosing outsourcing to a client may be necessary; and
(vi) Outsourced work must be billed with transparency.

The outsourcing of legal works may lead to a host of other ethical concerns such as avoiding conflicts of interest, malpractice insurance for LPO errors and data protection issues under laws of various jurisdictions.[233]

3.2 United Kingdom

The SRA has recently recognized the concept of LPO[234] by permitting the practice of legal outsourcing contingent on the outsourcing lawyer's compliance with his or her existing ethical obligations.[235] The SRA does not provide a definition of outsourcing but has indicated in its 'quick-guide', 'outcomes focused regulation at a glance' *that the provision are aimed at practices, in-house or solicitors, who use third parties to carry out work.*[236] Further, the introduction of the SRA Handbook states clearly that although practices have greater freedom in the way they offer services, for example, by outsourcing certain functions, practices, 'may not abrogate responsibility for compliance with regulatory requirements.'[237]

The rules impacting on outsourcing are detailed in Rules 1-5 of SRA Principles and deal with: acting in clients' best interests, providing a good standard of service, avoiding conflicts of interest and keeping client confidences and supervision. Like other jurisdictions, lawyers outsourcing services to LPOs need to ensure ultimate compliance with the applicable professional ethics i.e. the SRA Code of Conduct. For instance, Rule 4 of the SRA Code of Conduct's impose a duty of confidentiality and duty of disclosure. Therefore, it poses a duty not to put confidentiality at risk by acting.[238] Thus, if services such as word processing, telephone call handling or photocopying are outsourced the firm must be satisfied that the provider of those services is able to ensure the confidentiality of any information concerning clients.

Other legislations, specifically ones governing the export of certain services which require exchange of data are applicable to the export of legal work abroad. Therefore, if an UK or an EU firm is engaging an off-shore company for legal work then such arrangement shall be reviewed according to the

provisions and limitations imposed by UK Data Protection Act and EU Anti-Competition Legislation.[239] The most common approach taken in legal process outsourcing engagements that involve the potential export of personal data to India or the Philippines is to incorporate into the Master Services Agreement with the client what are termed the "Model Clauses" This approach is compliant with the UK Data Protection Act.

3.3 Singapore

There are no national laws specifically regulating legal process outsourcing transactions in Singapore.[240] Legal services that are commonly outsourced are agency work, document review, legal research and writing, drafting of pleadings and briefs and patent services. The majority of outsourcing transactions adopt the traditional supplier/customer services agreement model. The outsourcing transactions are based on a framework or master services agreement structure under which services are provided. This approach facilitates the addition of further services as well as being able to accommodate local service agreements where required under a multi-jurisdictional arrangement.[241]

4. Recommendation for Regulating LPOs in India

Given the rise of LPOs in India it recommended that this sector in broader spectrum of legal services should be regulated. Reasons for regulation stems from the fact that with mushrooming of LPOs in India, there are ethical breaches that need to be addressed. The five key issues here are conflict of interest, confidentiality, unauthorised practice of law, disclosure to clients and billing practices.[242] Further, LPO firms make special efforts to meet their client's conditions by signing service-level agreements, employ foreign-trained lawyers to oversee foreign legal work, strict recruitment policies and stringent implementation of IT software and lastly, inconsistent guarantees regarding data protection and security.[243]

4.1 Incorporation of LPOs

LPOs should be required to register itself with the BCI. Further, the registration with the BCI should include information relating to the promoters, the shareholding and the nature of the services being offered by the LPO. Traditionally LPOs had been engaged in non-legal work which included, e-discovery, customisation of software for discovery process, scheduling, vetting and review of documents, law office management, legal document management and litigation support for Indian and foreign laws.[244] But now their role has expanded to include, legal writing, legal summaries, legal research, legal research, e-discovery and all other ancillary administrative legal work.[245] Accordingly, if LPOs are not performing any legal functions, then they need not be specifically regulated. If LPOs are performing legal functions, it needs to be disclosed whether the LPO is advising on Indian law or foreign law. To the extent that LPOs are advising on Indian law, they would be treated at par with other non-litigious service providers in India.

4.2 Qualification of the persons employed in LPOs

Persons who are employed in LPOs shall be qualified as lawyers in India under the applicable governing rules and regulations. If such persons are providing legal services pertaining to foreign laws, then they should also be a qualified as a lawyer of that particular jurisdiction. While the qualification in a foreign jurisdiction is subject matter of that specific jurisdiction, clients of LPOs will have a cause of action in India which would lead to greater enforceability should there be a breach by the LPO of its obligations.

4.3 Mandatory clauses in Master Service Agreements

LPOs during the course of their functioning deal with sensitive and confidential information from foreign or domestic clients. Ordinarily, these LPOs enter into master service agreements with clients which incorporate prevalent legal provisions of the outsourcing jurisdiction. Stakeholder consultations should be held to arrive at a mandatory list of provisions which must be included in each and every master service agreement which could include confidentiality, data protection, mandatory checking for a conflict of interest and applicable law to determine the professional standards to be observed by LPO service providers. Matters which more commercial in nature, such as professional liability insurance, can be left to market forces to determine.

4.4 No surrogacy of Foreign Law Firms

Anti-circumvention provisions should be incorporated to avoid LPOs functioning as surrogate practices of foreign law firms. To that extent, regulations should provide that services should be provided at arm's length, that LPOs should service multiple clients at one time and

LPOs should always exercise independence in their outsourcing functions. In other words, LPOs should not act as extensions of foreign law firms.

Section II: The Regulatory Model to Make India an 'Arbitration Hub'

1. Introduction to Institutional Arbitration in India

The Arbitration and Conciliation Act, 1996 ("**ACA**") was initially enacted with a limited scope of introducing alternative dispute resolution in India. However, rapid commercial developments globally have given a new dimension to arbitration not just as a judicial alternative but also as a potential commercial venture. This is evidenced by the global mushrooming of institutional arbitration centres and the establishment of venues such as Singapore, Paris, London and Hong Kong as prominent dispute settlement locations.

In the last few years, the government of India has repeatedly expressed its commitment towards launching India as an international hub for arbitration.[246] However, given the still nascent stage of arbitration in India, there is a long way to go before the country can fulfil this ambitious goal.

India is no stranger to institutional arbitration and houses more than 35 arbitration centres (including international arbitral institutions), for example, the Indian Council of Arbitration ("**ICA**"), International Centre for Alternative Dispute Resolution and the Delhi International Arbitration Centre ("**DAC**"). Recently, the Mumbai Centre for International Arbitration ("**MCIA**") was established with the objective of offering highly competitive pricing structures involving payments in local currency and arbitration rules drafted to match international standards and best practices.[247]

The Mumbai Centre for International Arbitration, Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution ("**ICADR**") are some of the arbitration centres set up with the initiative of the government in order to provide for robust and time-bound institutional arbitration in India. However, setting up of arbitral institutions is only step one towards the goal of establishing India as a centre of arbitration. This is evident from the fact that these institutions are yet to see promising results.

An overwhelming majority of arbitrations conducted in India are still ad hoc in nature[248] and institutional arbitration is opted for in a minority of cases. In fact, the ICADR that was set up in 1995 as an autonomous institution under the aegis of the Central Government dealt with only 49 disputes in the year 2015-16.[249] Of these 49 disputes, only 4 constituted international commercial cases. In contrast, the Singapore International Arbitration Centre handled 343 disputes in the year 2016 and the London Court of International Arbitration received 303 disputes in the year 2016.[250]

It is a matter of concern, instead of attracting foreign parties to India, the Indian institutions seem to be unable to even attract Indian disputants. Indian parties were consistently ranked amongst the top five foreign users of Singapore International Arbitration Centre ("**SIAC**") in the last five years, and were the top foreign users of SIAC in 2013 and 2015.[251] In 2016, roughly 153 Indian parties submitted their disputes to SIAC out of a total of 343 disputes the Centre received that year.[252] Disputes involving Indian parties contributed to 4.4% of the LCIA's caseload in the year 2016.[253]

On the global stage, The International Chamber of Commerce ("**ICC**") Court, the London Court of International Arbitration ("**LCIA**"), the Hong Kong International Arbitration Centre ("**HKIAC**"), the SIAC and the Arbitration Institute of the Stockholm Chambers of Commerce ("**SCC**") are considered to be the five most preferred arbitral institutions worldwide.[254] The SIAC is globally the third most preferred seat of arbitration after London and Paris and the most preferred seat in Asia.[255]

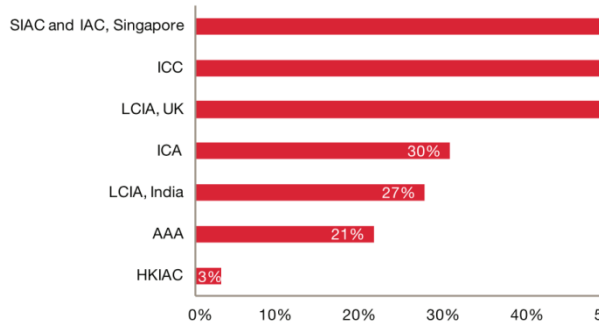
In 2017, the government expressed its commitment to ensure speedy resolution of commercial disputes and working towards making India an international hub for arbitration. In order to gauge the state of institutional arbitration in India and initiate the momentum towards competing at a global level, the Department of Legal Affairs under the Ministry of Law and Justice constituted a ten member High Level Committee ("**Committee**") to review the institutionalisation of arbitration and suggest reforms.[256] The Committee, headed under the chairmanship of Justice B.N. Srikrishna, former judge of the Supreme Court of India, submitted its report on 3 August 2017.[257] The report ("**Srikrishna Report**") provided a comprehensive analysis of institutional arbitration in India, the challenges faced in India, and recommendations towards establishing India as an arbitration hub.[258]

The present paper in Part B will examine the

challenges, including those fleshed out by the Committee, while Part C will detail the recommendations provided by the Committee as well as the current status of implementation of these recommendations. Part C will also examine other efforts taken by the government towards the promotion and development of arbitration in India.

2. Challenges faced by Institutional Arbitration in India

While various efforts have been made to strengthen institutional arbitration in India, it remains at a nascent stage. A survey conducted by PricewaterhouseCoopers (India) in 2013 showed that ad hoc arbitration continues to be preferred over institutional arbitration by Indian companies.[259]



Source: PwC, Corporate Attitudes & Practices Towards Arbitration in India (2013)

Fig A: Preferred arbitration institutions among Indian companies (2013)

The Committee in its report noted that even where an established international arbitration institution provided for an India presence, such as the India office maintained by the LCIA, it did not attract a sufficient pool of disputants. The LCIA which opened its India office in 2009 has closed down its services in 2016 presumably due to 'insufficient workload'.[260]

The Committee also noted that the absence of publicly available information in relation to the functioning of arbitral institutions in India coupled with the absence of sufficient online presence render the assessment of the failure of institutional arbitration in India very challenging.[261]

The preference to ad hoc arbitration is also reflected in institutional arbitration centres offering their venue to be used for ad hoc arbitration. The report found several factors were attributed to parties' preference for ad-hoc arbitration. Lack of credible arbitral institutions, limited use of and support for institutional arbitration by State agencies, and judicial intervention were cited as some of the factors.[262] The Srikrishna Report also noted that various stakeholders considered institutional arbitration in India as costly;[263] it was also felt that this constrained party autonomy.

Apart from reviewing the situation of arbitration in India, international practices, etc., the Committee also collected the opinions of persons managing the arbitral institutions as well as key stakeholders in arbitration such as lawyers, in-house counsels, parties and arbitrators.[264] The Committee noted the challenges below to successful institutional arbitration in India:

2.1 Lack of credible arbitral institutions

The Committee found that despite several attempts, arbitral institutions in India lack access to quality legal expertise and exposure to international best practices rendering the rules of these institutions obsolete and insufficient.[265] Furthermore, the Committee opined that these institutions are unable to provide quality support services due to the poor infrastructure in comparison to its foreign counterparts, and lack of knowledgeable and experienced personnel at these centres.[266] Furthermore, the review mechanism of existing rules and procedures is not periodic.

The Committee also noted that key stakeholders in the system such as lawyers, and parties to arbitration expressed their dissatisfaction at the manner in which arbitral institutions were managed and even went on to state that these institutions "exist to provide post-retirement employment to government officers."[267] This is particularly evidenced in arbitration centres attached to High Courts, which are very often headed by retired judges of the High Court or District Courts.[268] The stakeholders illustrated the poor management citing the lack of adherence to time lines, lack of review of arbitral awards and insufficient tracking of arbitrator performance.[269]

2.2 Quality of Arbitrators

The Committee expressed its dissatisfaction at the empanelment process of arbitrators and opined that "often, payment of a nominal fee leads to the empanelment of individuals on institutions' panels."[270] Moreover, Indian arbitral institutions do

not have arbitrators with sector-specific expertise – which further makes parties prefer ad hoc arbitration which permits them to choose arbitrators having the specific knowledge in the subject area of the dispute.[271] Therefore, current arbitral institutions are not enough to cater to the growing needs of Indian businesses and corporations.

2.3 Misconceptions relating to institutional arbitration

The Committee also observed the several prevalent misconceptions relating to institutional arbitration in India, particularly related to costs, which result in disputants preferring ad hoc arbitration.[272] Parties often perceive that in addition to paying the arbitrator's fee, they are also required to pay high administrative charges, although the Committee finds that several institutions in India price arbitration services at competitive rates and that in reality ad hoc arbitration may result in being a more expensive affair.[273] In addition, the Committee noted that parties perceive institutional arbitration as not just depriving them of their flexibility and autonomy, but also as more appropriate for big businesses where the amount under dispute is very high. The Committee further stated that it becomes the onus of the institutions to create more awareness on the role of institutional arbitration and dispel these myths.[274]

2.4 Limited use of institutional arbitration by the government

In India, the government is considered to be one of the biggest litigants[275] and, thus, is in a great position to encourage institutional arbitration. However, in various government contracts, arbitration clauses do not explicitly provide for institutional arbitration.[276]

2.5 Lack of statutory backing for institutional arbitration

The Committee noted that the provisions of ACA are completely silent on institutional arbitration.[277] On the contrary, Singapore's International Arbitration Act of 1994 defers to the SIAC as the default authority to appoint arbitrators.[278] Similarly, authority is vested with the HKIAC under Arbitration Ordinance, 2011 to appoint arbitrators when the parties are unable to come to an agreement on this issue.[279]

The lack of statutory deference given to arbitral institutions, there is also no mandatory minimum standards imposed upon arbitral institutions.[280] In the opinion of the Committee, the introduction of section 29A to the ACA via the 2015 Amendment further reflects a setback for institutional arbitration in India.[281] The stated clause introduced strict timeline mandates to be followed in respect of all arbitration cases in India.

2.6 Support from governments and business community

The Committee also identified support from the government and the business communities in the form of financial support, provision of infrastructure, and promotion of the arbitral centre at the international level to be a favourable factor in the success of arbitral institutions. The Committee illustrated this point by noting that both the Singapore government and Hong Kong government provided the SIAC and HKIAC with state-of-the-art infrastructure and a central commercial location respectively.[282]

Support from the business and legal communities is also critical where key players in the business field partner in the setting up of arbitral institutions. The Committee, in this regard provides the example of HKIAC being set up by the business community in Hong Kong specifically in response to the growing need for an effective dispute resolution mechanism. Further, the legal community provided great impetus to the success by promoting the centre.[283]

The Committee acknowledged that in the business community, associations in India such as the Federation of Indian Chambers of Commerce and Industry ("**FICCI**") and the Associated Chambers of Commerce and Industry of India ("**ASSOCAM**") have played an active role in the establishment the ICA and the ICADR, respectively.[284] In addition, it is worthwhile to note that the recently established MCIA was a joint initiative of both the government of Maharashtra as well as the business and legal community.[285]

2.7 Location in an arbitration-friendly jurisdiction

Location in an arbitrator friendly jurisdiction was also noted as a key factor in the success of an arbitral institution. In this regard, the Committee opined that "[t]he neutrality of the legal system, the local arbitration legislation, and a favourable record in enforcing arbitration agreements and arbitral awards, which form the key ingredients of a

supportive arbitration jurisdiction, therefore are critical to the success of an arbitral institution."[286] In particular the Committee noted that the courts in the countries housing the top arbitral institutions of the world were extremely pro-enforcement of arbitral awards.[287]

The Committee in this regard notes that:

> *[w]hile Indian courts are increasingly adopting a pro-arbitration stance, endemic delays and ambiguities in judicial precedent such as inconsistencies between different High Courts have prevented the Indian courts from being viewed as supportive of arbitration. This has certainly had an impact on the choice of India as an arbitral seat and consequently on the growth of arbitral institutions in India.*[288]

The enforceability of arbitral awards in court is no doubt a critical factor in determining the potential of India to become a preferred seat of international arbitration.

In furtherance of ensuring enforceability, India has signed and ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**").[289] The New York Convention obligates India to enforce foreign arbitral awards in the same manner it would enforce domestic arbitral awards. By way of section 44 of the ACA, India recognizes 'foreign awards' from only those countries that provide reciprocal treatment.[290] In addition, India is also a signatory to the Geneva Convention. The recent introduction of commercial courts and commercial division in High Courts via the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 is also a significant step towards expediting the hearing of cases in arbitration matters.[291]

A significant hurdle towards attracting foreign investors and disputants towards arbitration in India is the 'public policy' challenge in the ACA. This features twice in the ACA; first in section 34 of Part I of the Act wherein an arbitral award in conflict with the public policy of India may be set aside by a court, and secondly in section 48 of Part II of the Act wherein a foreign arbitral award may be refused by a court if the award is against the public policy of India. The generally interventionist nature of Indian courts posed a perceivable threat to the legitimacy of arbitration.

The Law Commission of India also noted the issue with respect to the interpretation of 'public policy' in the ACA and provided recommendations in its supplementary report to the 246th report.[292]

2.8 Geographic Location

Arbitral Institution	Benefits of geographical location
SIAC	SIAC is located at the crossroads of South East Asia, and in between the sea lanes of communication across China and India. Singapore's geography and trade links put it in a unique position to market itself as the arbitration hub for Asia.[293]
HKIAC	The HKIAC has benefited from Hong Kong's geographical and political proximity with China. The HKIAC is projected to have a prominent role as a dispute resolution hub in China's One Belt, One Road strategy. [294]
LCIA	The LCIA also benefits from its location in London as London is perceived as an unparalleled centre of financial and legal expertise and as a neutral venue for doing business.
SCC	The SCC gained importance on account of its status as a neutral centre for resolving 'East-West' disputes (i.e., disputes with the Union of Soviet Socialist Republics ("USSR") / Soviet Bloc / Chinese parties on one side and European / North American parties on the other side).[295]

2.9 Panel of Arbitrators

Most successful arbitral institutions maintain a panel of skilled and experienced arbitrators selected on the basis of fairness and professionalism.[296] For example, the SIAC's Code of Ethics requires arbitrators to submit an undertaking concerning their capacity to devote adequate time to the arbitration throughout the duration of the proceedings.[297] Additionally, a statement declaring their independence and impartiality has to be made by the arbitrators to these institutions.[298]

According to the Srikrishna Report, the successful arbitral institutions in the world have certain common features: (a) sufficient support from the government or the business community; (b) location in a seat of arbitration which has an arbitration-friendly legislative framework and judiciary; (c) advantages offered by the arbitral institution such as geographical positioning, party-friendly rules and an experienced and skilled cadre of arbitrators.[299]

3. Proposed Reforms to Encourage Institutional Arbitration & the Status of the Recommendations

The Arbitration and Conciliation (Amendment) Bill, 2018[300] ("**2018 Amendment Bill**") was introduced in the Lok Sabha, on July 18, 2018. The 2018 Amendment Bill contains provisions to deal with domestic and international arbitration, and defines the law for conducting conciliation proceedings.[301] Notably, it incorporates several recommendations put forth by the Srikrishna Report hoping to provide a fillip to institutional arbitration.

The Report provides the following recommendations:

3.1 Establishment of a body for the grading of arbitral institutions in India

In light of the several arbitral institutions functioning in India at varied levels of sophistication, quality, and efficiency, one of the key recommendation of the Committee was the setting up of an independent body to assess the working of these arbitral institutions, grade them and set benchmarks for their functioning.[302] It is noteworthy to mention here that in the survey conducted by the Committee amongst both the authorities managing arbitral institutions as well as the functionaries in the system, a popular recommendation that emerged was the need for independent qualified accreditation of both arbitrators as well as of arbitral institutions.

In providing the recommendation, the Committee however warned that at no point should accreditation be compulsory or conditional for enforcement of arbitral awards, as this would completely cripple the Indian arbitration system whose success is completely dependent on easy enforceability of awards.[303] Furthermore, the Committee recommended that the body must not act as a regulating authority and stressed that governmental regulation of arbitral institutions or regulation through statutes would greatly harm the independence of these institutions and the very autonomous nature of arbitration. The body must act as a body for grading, assessment, creation of guidelines, and even for providing infrastructure and funding support to institutions through adequate representation from all stakeholders including the parties, lawyers, and the government.[304]

Towards this end, the Committee provided further detailed guidelines towards the setting up of an "Arbitration Promotion Council of India" ("**APCI**"). Further, the Committee provided detailed recommendations as to the composition of the Governing Board of the APCI, the term of the members, the powers and functions that may be vested with the APCI, and the funding of the APCI.

Status of the recommendation

This recommendation has been accepted seriously by the government of India and accordingly the 2018 Amendment Bill proposes to establish an ACI. The proposed mandate of the ACI includes:

> *(a) frame polices governing the grading of arbitral institutions;*
> *(b) recognise professional institutes providing accreditation of arbitrators;*
> *(c) review the grading of arbitral institutions and arbitrators;*
> *(d) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes;*
> *(e) set up, review and update norms and ensure satisfactory level of arbitration and conciliation;*
> *(f) act as a forum for exchange of reviews and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation;*
> *(g) make recommendations to the Central Government on various measures to be adopted to*

make provision for easy resolution of commercial disputes;
(h) promote institutional arbitration by strengthening arbitral institutions;
(i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof;
(j) establish and maintain depository of arbitral awards made both in India and overseas;
(k) make recommendations regarding personnel, training and infrastructure of arbitral institutions; and
(l) such other functions as may be decided by the Central Government.[305]

Arbitral institutions are to be graded on the basis of criteria related to infrastructure, quality and calibre of arbitrators and compliance with time-limits for disposal of cases. The establishment of the ACI is a laudable step. However, the ACI has to be constituted with the secretary to the Department of Legal Affairs and secretary to Department of Expenditure as members, which will ensure the involvement of the government in all decisions of the ACI. This may however be viewed negatively by the international arbitration community as the Government of India is involved in a large number of high-profile commercial disputes.[306]

3.2 Accreditation of arbitrators

Considering that the quality of arbitrators is one of the biggest challenges facing arbitration in India, the Committee felt that the best way to address this issue is through accreditation of arbitrators. This, the committee opined would "act as a reliable standard for parties wishing to appoint arbitrators."[307] Accreditation may be through a professional body of arbitrators or through membership/empanelment at an arbitral institution.

The Committee also noted that globally several bodies provided accreditation of arbitrators in order to encourage and develop alternative dispute resolution mechanisms.[308] Such institutions not only provide accreditation but some even provide gradation and help categorise arbitrators. Professional institutes provide accreditation on the basis of:[309]

a) professional education
b) attendance of arbitral hearings
c) qualifying examinations
d) Peer interviews / assessments by a panel of approved arbitrators
e) Continuing Professional Development (CPD) Requirements

Acknowledging the benefits of professional accreditation of arbitrators, the Committee recommended that the proposed APCI be vested with the authority to recognize professional institutes providing for accreditation of arbitrators on the basis of "method of accreditation, training provided before and after the accreditation of arbitrators, review of accreditation, membership, etc."[310] The Committee also provided that government (both state and central) may in its arbitration clauses and agreements stipulate that only accredited arbitrators from a specific institute be appointed as an arbitrator.[311]

The Committee further recommended that such accreditation may be preferable for international commercial arbitrations located in India, and for arbitrations where the claim is more than or equal to INR 5,00,00,000.[312]

Status of the recommendation

This recommendation has been duly incorporated in the Arbitration Amendment Bill, 2018 which provides for the setting up of the ACI. The proposed section 43D in the Bill vests the ACI with the power to "recognise professional institutes providing accreditation of arbitrators" and the power to "review the grading of arbitral institutions and arbitrators"[313]

The 2018 Amendment Bill also provides for the qualifications, experience and norms for accreditation of arbitrators as per a proposed Eighth Schedule. This Schedule provides that a person shall not be qualified to be an arbitrator unless he is "an advocate within the meaning of the Advocates Act, 1961 having ten years of practice as an advocate". While it is unclear whether accreditation is necessary to be appointed as an arbitrator by an arbitral institution,[314] it is highly likely that the arbitral institution would recommend only accredited arbitrators. Accordingly, this means that India has once again closed its doors to the participation by foreign qualified lawyers in international commercial arbitration. Further, under Rule 49 of the Bar Council of India Rules prohibits advocates who are not engaged in court practice and are employed full time as an employee from practicing in courts. Thus, legal academics and scholars and even arbitrators who are employed full time in arbitral institutions may come under this prohibition. This ambiguity requires to be addressed urgently by the government through legislative

means and the government must aim to cast the net widely and open its doors to well-qualified, knowledgeable and efficient members of the legal community irrespective of whether they have qualified within India or abroad.

The Supreme Court in the recent decision of *Bar Council of India vs. A.K. Balaji and Ors.*[315] looked into whether foreign law firms/lawyers are permitted to practice in India. The Supreme Court categorically held that foreign lawyers or foreign firms/companies cannot practice law in India or render legal services that are litigation related or non-litigation related. The Court also clearly emphasized that this includes the conducting of arbitral proceedings. The only narrow exception exists in respect of foreign lawyers who may advise their client, or foreign lawyers who may conduct arbitral proceedings in cases of international commercial arbitration. Even in such cases the said lawyers are required to submit to the code of conduct of the Bar Council of India. The Court however added that the Bar Council of India is free to set forth the rules removing the prohibition in this regard.[316]

The position in India is in sharp contrast to other Asian jurisdictions such as Hong Kong, which does not pose any restriction upon foreign trained lawyers and foreign law firms in the practice of arbitration.[317]

With regard to this particular concern, the Committee provided the following recommendations:

> *1. An amendment may be made to the Advocates Act clarifying that foreign lawyers advising on or appearing in arbitrations seated in India where the substantive law of the contract is foreign law are not practicing Indian law. The Committee recognises the need for the BCI to lay down the extent to which foreign lawyers are subject to regulation while granting foreign lawyers the right to advise on foreign law and to set up a place of business in India. This is necessary as a large number of Indian parties enter into contracts with foreign counterparties where the governing law of the contract is foreign law and consequently need foreign law advice in dispute resolution under those contracts. If foreign lawyers and law firms are prevented from advising or appearing in arbitrations in India, then India stands to lose a substantial share of arbitrations involving Indian parties to Singapore, Hong Kong and London.*
>
> *2. As far as the issue of foreign lawyers being permitted to appear before Indian courts is concerned, no view is offered on the same.*
>
> *3. A quick visa facilitation system and / or a special category of multiple-entry visas for the purpose of participating in an arbitration may be considered by the government to ensure that ease of entry to foreign lawyers and arbitrators.*
>
> *4. The government may also consider providing tax breaks on payments made to arbitrators / arbitration counsel who are not Indian nationals. This will increase India's attractiveness as a seat for arbitrations, particularly those involving Indian parties, and consequently lead to an increase in the caseload of Indian arbitral institutions. A similar practice has greatly enhanced the reputation of Singapore as a seat and venue for international commercial arbitrations.*
>
> *5. The provision of tax breaks on service tax imposed on the services of an Indian arbitral institution may also provide a major incentive for encouraging parties to resolve their disputes through arbitration administered by an Indian arbitral institution.*[318]

3.3 Creation of Specialist Arbitration bar

The goal of establishing India as a hub for arbitration is pre-conditioned upon the existence of a robust arbitration bar with highly qualified, well-trained and efficient arbitrators. The Committee acknowledged that towards this endeavour, initiatives were already being taken through the Indian Arbitration Forum, which promotes best practices in arbitration, and the Young MCIA, which provides a forum of young arbitrators and students of the MCIA.

The Committee however opined that a lot more is required to be done in this respect towards encouraging careers in arbitration and provision of training, networking and practicing opportunities.

The Committee in this regard provided the following recommendations:

> 1. *The APCI may be tasked with: (a) the holding of training workshops and courses aimed at advocates with an interest in arbitration, in collaboration with law firms, law schools and existing professional institutes for arbitrators such as the CIArb; and (b) the conduct of an examination upon completion of requisite training. While appearing for the examination may not be made mandatory for appearing in an arbitration*

matter, upon successful completion of the examination, the concerned advocate may be admitted to the roll of arbitration lawyers maintained by the APCI. This may serve as an indicator to the general public that the concerned advocate has certain minimum skills and knowledge in arbitration law and practice. The advocate may be required to satisfy CPD requirements in order to remain on the roll.

2. *The APCI may collaborate with law schools to provide the training referred to in (1) above as part of their curriculum in the final year of the law degree course.*

3. *The Central Government and state governments may be encouraged to appoint only advocates on the roll maintained by the APCI in (1) above as its counsel in arbitration matters.*

4. *Arbitral institutions may be encouraged through consultations held with them to form their own fora of young arbitration practitioners and students which provide training in arbitration procedure and practice, facilitate exchange of ideas on topical issues in arbitration practice nationally and internationally, and provide opportunities for networking with experienced arbitration practitioners. The ICADR, in particular, should establish such a forum of young arbitration practitioners.*

5. *Diploma courses and specialised LL.M. programmes in arbitration law and practice could be provided by premier law schools and universities in India. The Government and the legal community may provide funding and establish research chairs for promoting research and studies on developments in arbitration law in these law schools and universities.*

6. *The Government may also institute scholarships for students admitted for Master's level courses in international arbitration and investment treaty arbitration in universities abroad. The scholarship terms may include a bond that requires the student to come back and work for the government as an advocate practising arbitration law for a particular period of time.*[319]

Status of recommendation

A part of the recommendation is already included within the mandate of the proposed ACI which proposes the vesting of the power to "hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes", "act as a forum for exchange of reviews and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation" and "conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof"[320]

However, the rest of the recommendations such as the provision of scholarships, collaboration with law schools, promotion of research on arbitration, etc. are yet to be implemented and may possibly be implemented through the proposed ACI while discharging "such other functions as may be decided by the Central Government"[321] through a notification by the Central government.

3.4 Judicial support to Arbitration

The Committee observed that judicial support has been instrumental in the growth of arbitration and arbitral institutions in Singapore, Hong Kong and the UK.[322] Jurisdictions where the judiciary is not inclined to enforce arbitral awards disincentivise parties from choosing arbitral institutions in that territory and are more likely to choose countries with an arbitration-friendly judiciary.

The Committee noted that in this regard, India faces criticism that the judiciary treats challenges to an arbitral award as regular appeals under section 34 of the ACA.[323] A further impediment lies in the possibility of a challenge under the 'public policy' clause of section 34. Any ambiguity or uncertainty with respect to enforceability of arbitral awards act as deterrents to the success of arbitration.

In order to address this issue and make India an arbitration-friendly jurisdiction, the Committee recommended that:

1. *Arbitration challenges under section 34 may be heard only by district judges who have undergone refresher courses and / or training in arbitration law and practice in the National Judicial Academy or the respective state judicial academies. An endeavour shall be made to keep such judges on the roster for at least two years.*

2. *Commercial court, commercial division and commercial appellate division judges should be provided with refresher courses in arbitration law and practice before and after being appointed to such benches. These courses could be conducted annually by the National Judicial Academy and the respective state judicial academies.*

3. *The High Courts may be encouraged to maintain the commercial division and commercial appellate division roster for at least six months in order to encourage specialisation in arbitration.*

4. *Even judges not on the arbitration roster may*

have to deal with arbitration matters in the context of section 8 and section 45 applications / petitions. Therefore, judges who are not on the roster should be provided periodic training in developments in arbitration law and practice, both domestic and international. For this purpose, intensive courses may be conducted by the National Judicial Academy and state judicial academies for judges hearing arbitration matters.

5. *The Government may also collaborate with international organisations such as the International Council for Commercial Arbitration, the UNCITRAL Regional Asia-Pacific office, and Indian and international arbitral institutions to provide judicial training and to promote exchanges between judges from New York Convention countries.*[324]

3.5 Necessary Amendments to Arbitration and Conciliation Act

In addition to the above recommendations, the Committee also recommended several amendments to the ACA in order to remove ambiguities, bring in clarity, and provide for speedier and effective arbitrations. The proposed amendments and the status of their implementation is listed below:

(i) Clarifying the applicability of the 2015 Amendment

Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 provided that the amending Act would not apply to arbitral proceedings commenced prior to the coming into force of the Act (i.e., October 23, 2015) unless the parties agree otherwise. This clause however did not clarify whether the amendment will apply to court proceedings which are initiated on arbitral proceedings before October 23, 2015. Due to this ambiguity different High Courts have adopted different views.

The Committee opined that this ambiguity be addressed through a legislative amendment and recommended that the applicability of the 2015 amendment be made applicable only to arbitral proceedings and related court proceedings of arbitrations commenced after the said date.

Status of the Recommendation

This recommendation has been accepted by the government and accordingly clause 13 of the Arbitration Amendment Bill, 2018 has included this clarification.[325]

(ii) Amendment to section 2(2) of the ACA

The Committee also pointed out the obvious error in the 2015 Amendment Act wherein a proviso was inserted to section 2(2) of the ACA making sections 9, 27, 37(1)(a), and 37(3) applicable to international commercial arbitrations even where they are seated outside India. The Committee observed that it is evident that the Act intended to include section 37(1)(b) relating to interim measures and not section 37(1)(a) which deals with refusal to refer parties to arbitration.[326]

Accordingly, the Committee recommended that the government address this error through an amendment.

Status of the Amendment

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(iii) Amendment to section 17 of the ACA

The Srikrishna Committee took note that pursuant to the 2015 Amendment, section 17(1) of the ACA permits a party to apply to an arbitral tribunal for an interim measure at any time during the arbitral proceedings, or, after the award but before it is enforced as per section 36 of the ACA.

Keeping in view of the fact that after an arbitral award is given, the tribunal becomes *functus officio*, the Committee recommended that section 17(1) be amended to provide that interim measures can be sought only during the pendency of the arbitral proceedings.[327]

Status of the Recommendation

This recommendation has been accepted and accordingly clause 4 of the 2018 Amendment Bill seeks to omit the words "or at any time after the making of the arbitral award but before it is enforced in accordance with section 36" from section 17(1) of the ACA.

(iv) Amendment to section 29A of the ACA

The 2015 Amendment of the ACA included a time frame for arbitration providing that "[t]he award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference." This period may be extended for a maximum period of 6 months on the consent of the parties.[328] Where the arbitral proceedings have not

been concluded within the prescribed time limit, the mandate of the arbitral tribunal terminates subject to the right of the parties to approach a court for extension giving reasons for the delay.[329] Further, if the court finds that the delay was caused by the tribunal, it may even an order for reduction of their fees.

The Committee has criticized this addition to the ACA stating that such a mandate significantly affects the autonomy of the parties to structure their dispute resolution process depending upon the nature, size and complexity of the dispute.[330] Further, by requiring parties to approach the court for relief, the ACA "paves the way for more judicial involvement, contrary to the objective of the ACA of limiting judicial intervention."[331]

The Committee further observed that such time mandates are not present in the laws of in the jurisdictions of leading seats of arbitration such as London, Singapore, and Hong Kong. The Committee accordingly recommended that the following amendments be carried out:

> 1. *A new sub-section may be inserted in section 29A limiting the applicability of the section to domestic arbitrations only. International commercial arbitrations may be left outside the purview of the timelines provided in section 29A.*
> 2. *Section 29A(1) may be amended such that the time in section 29A(1) starts to run post-completion of pleadings. Further, a time period of 6 months may be provided for submission of pleadings.*
> 3. *Section 29A(4) may be amended to provide that if an application under section 29A(5) is filed before a court, the mandate of the arbitral tribunal continues till the application is disposed.*
> 4. *Section 29A(9) may be amended to add that if the application is not disposed of within the period mentioned therein, it is deemed to be granted.*
> 5. *A new sub-section should be inserted in section 29A providing that where the court seeks to reduce the fees of the arbitrator(s), sufficient opportunity should be given to such arbitrator(s) to be heard.*[332]

Status of the Recommendation

The recommendations with regard to Section 29A of the ACA have been incorporated in the 2018 Amendment Bill.[333] However, the recommendation corresponding to point 4 above has not been incorporated.

(v) *Amendment to section 34(2)(a) of the ACA*

Section 34 of the ACA provides the grounds based on which an arbitral award may be set aside. In this regard sub-section (2) of the section provides that a court may set aside an award only if the party making the application furnishes proof of the conditions set forth in the sub-section. The Committee noted that the drafting of the provision led to much confusion and led to several courts treating the case as a regular civil suit.

In this regard, the Committee recommended that an amendment may be made to the provision substituting the words "furnishes proof that" with the words "establishes on the basis of the arbitral tribunal's record that".[334]

Status of the Recommendation

The recommendation with regard to Section 34(2) of the ACA has been incorporated in the 2018 Amendment Bill.[335]

(vi) Amendment to section 34(6) of the ACA

The Committee opined that the one-year time limit stipulated in section 34(6) of the Act inserted by the 2015 amendment requiring all proceedings under section 34 of the ACA to be completed within one year, to be too restrictive. Further, the Committee stated that there was ambiguity on what would happen to the proceedings if the case does not complete within the time frame.

The Committee recommended that this stipulation be made directory instead of mandatory.[336]

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(vii) Amendment to section 45 of the ACA

The Committee observed that the current legal framework under the ACA permits a court to refer to arbitration those parties who have entered into an agreement to which the New York Convention applies unless the agreement is "null and void, inoperative or incapable of being performed." A question of law arose in courts as to whether such review constituted a prima facie review or a final determination. The Supreme Court in this regard found that the review was a final determination and could not be re-examined by an arbitral tribunal.[337]

The Committee found such determination contrary to the position of the ACA in section 8 of the Act, which pursuant to the 2015 Amendment, provides that such a review of the validity of an arbitration agreement (in Part I of the Act) constituted a prima facie review only. The Committee opined that although section 8 and section 45 are the corresponding provisions for Part I and Part II of the Act respectively, they present a contradiction within the legal framework.[338]

Accordingly, the Committee recommended that section 45 of the ACA be amended on the same lines as section 8.[339]

Status of the Recommendation

The 2018 Amendment Bill has accepted this recommendation of the Committee and accordingly provides for the said amendments to section 45 of the ACA.[340]

(viii) Amendment to section 48 of the ACA

The Committee noted that while clause (6) was added to section 34 via the 2015 Amendment in order to cap the time that could be taken by a court under a section 34 challenge. A similar provision was not made in respect of enforcement of foreign awards in section 48 of the ACA.

The Committee thus recommended the addition of a similar provision in section 48 of the Act requiring the court to endeavour to dispose applications under section 47 of the Act within a period of one year. The Committee stressed that this must be made directory and not mandatory in nature (in accordance with a similar recommendation provided in respect of Section 34(6).

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(ix)Amendments to sections 37 and 50 of the ACA

The Committee took note that section 37 in Part I of the ACA provides for appeals against orders of the court in relation to arbitral proceedings and orders of an arbitral tribunal under certain conditions.[341] In similar vein, section 50 in Part II of the ACA, provides for appeals in certain conditions.[342]

In a contradiction to these provisions, the Committee noted that the recently enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act, 2015) provided for a general right to appeal against a decision of a Commercial Court of Commercial Division of a High Court.

The Committee recommended that the right to appeal must be limited to the conditions under section 37 and 50 of the ACA and thus recommended that:

> *1. In sub-section (1) of section 37 of the ACA, the words "Notwithstanding anything contained in any other law" shall be added before the words "An appeal shall lie".*
> *2. Similarly, in sub-section (1) of section 50 of the ACA, the words "Notwithstanding anything contained in any other law" shall be added before the words "An appeal shall lie".*[343]

Status of the Recommendation

The 2018 Amendment Bill has accepted this recommendation of the Committee and accordingly provides for the said amendments to section 37 and section 50 of the ACA.[344]

(x) Costs in proceedings under Part II of the ACA

The Committee duly noted that 2015 Amendment Act inserted section 31A in Part I of the ACA which provides for costs that may be imposed by arbitral tribunals and/or courts in relation arbitral/court proceedings. However, a similar costs regime is missing in respect of arbitrations conducted under Part II of the Act.

The Committee thus recommended that a similar provision should be incorporated under Part II of the Act.

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(xi)Amendment to the Fourth Schedule to the ACA

The Committee noted that in the Fourth Schedule of the ACA providing a model fee structure for arbitration, a small typographical error requires to be corrected. In the row providing for disputes where the sum is above INR 10,00,00,000 (10 crores) but less than 25,00,00,000 (25 crores), the

model fee stipulated is INR 12,37,500 plus 0.75% of the claim amount above INR 1,00,00,000 (1 crore). Whereas the stipulated fee should logically read INR 12,37,500 plus 0.75% of the claim amount above INR 10,00,00,000 (10 crores). The Committee recommended that this error be fixed through an amendment.

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(xii) Immunity to arbitrators

The Committee noted that the provision of immunity to arbitrators from any liability for discharge of their functions was an accepted global practice and a necessity to ensure the independence of the arbitrators. However, this aspect has been completely overlooked by the ACA although some arbitral institutions have included this within their rules. However, this completely excludes arbitrators to ad hoc arbitration (unless specifically agreed between the parties) and arbitrators in institutions that have not recognized these rules.

The Committee accordingly recommended that:

> *The following provision, based on section 29 of the AA (UK), may be inserted in the ACA to provide for immunity of arbitrators:*
> *"An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith."*[345]

Status of the Recommendation

This has been accepted by the government, and the 2018 Amendment Bill accordingly provides legal immunity against any suits or actions to arbitrators for acts done in good faith.[346]

(xiii) Confidentiality of arbitral proceedings

The Committee noted that the ACA has failed to provide a confidentiality clause within its statute and as a consequence this aspect is entirely dependent upon the agreement between the parties or the rules of the arbitral institution. The Committee recommended that a provision be inserted to Part I of the ACA providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority.[347]

Status of the Recommendation

This suggestion has been accepted and the 2018 Amendment Bill mandates that the arbitral institution and the parties to the arbitration agreement keep confidentiality of all arbitral proceedings "except the award where its disclosure is necessary for the purpose of implementation and enforcement of award".[348] The last phrase does not make it clear whether all awards have to be disclosed or whether awards only have to be disclosed where it is necessary to do for the purposes of enforcement. If one reads this provision with the repository to be maintained by ACI, the former interpretation may be favoured however, a literal interpretation would lead to the latter view.

(xiv) Model Rules for ad hoc arbitrations

The Committee noted that while ad hoc arbitration provides the much-needed flexibility in procedure that disputants prefer, it also acts as a pitfall as parties often have to approach courts to sort out matters of procedure amongst themselves. The Committee opined that model arbitration rules may be incorporated within the ACA which can act as default procedure unless parties agree to exclude it.

The Committee in its report framed and annexed model rules and recommended that:

> *1. Model arbitral rules of procedure as provided in Annexure 2 to this Report may be set out in the form of a Schedule to the ACA.*
> *2. The model arbitral rules may operate as the default rules of procedure applicable to arbitrations, unless parties exclude its operation by mutual consent at any time, either in whole or part.*
> *3. Section 19(3) of the ACA may be amended to provide that failing any agreement between the parties as referred to in section 19(2), the model arbitral rules shall apply.*
> *4. Section 19(4) of the ACA may accordingly be deleted.*[349]

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(xv) Amendments to section 11 of the ACA

The Committee took note of the fact that appointment of arbitrators under section 11 of the

ACA has been source of confusion and has been subject to judicial scrutiny. Before the 2015 Amendment to the Act, section 11 vested the power of appointment of arbitrator with the Chief Justice or any other person or institution designated by him in cases where:

(a) the parties have not been able to agree upon a procedure for appointment of arbitrator, and the default procedure under section 11(3) and 11(5) has failed, or
(b) the parties have agreed upon a procedure for appointment of arbitrator but have not followed it

The nature of such power has been contested in courts. While the Supreme Court in its pronouncements earlier maintained that this power was administrative in nature,[350] this position was overturned in 2005 and held to be judicial power.[351] The ramifications of this judgment resulted in the Chief Justice being able to vest this authority only in a judicial authority (i.e., a judge) and prohibited him/her from vesting this authority in an arbitral institution.

In order to reverse the effects of this pronouncement, several amendments were carried out through the 2015 Amendment Act whereby arbitral institutions may be vested with the power to appoint arbitrators.[352] The Committee, however noted that while this was a laudable step, the current scenario still excessively involved the judiciary who by virtue of Section 6A, while considering any application under Section 11(4) is required to examine the existence of an arbitration agreement.

The Committee opined that this mandatory court procedure results in avoidable delays and such default procedures are not required in other jurisdictions.[353] In fact, the Committee noted that the arbitration legislations in Singapore and Hong Kong directly vest such power with the SIAC and HKIAC respectively.[354] The Committee recommended that a similar approach be adopted in India. Towards this end, the Committee recommended:

> *1. In order to ensure speedy appointment of arbitrators, section 11 may be amended to provide that the appointment of arbitrator(s) under the section shall only be done by arbitral institution(s) designated by the Supreme Court (in case of international commercial arbitrations) or the High Court (in case of all other arbitrations) for such purpose, without the Supreme Court or High Courts being required to determine the existence of an arbitration agreement.*
> *2. The institutions which may act as appointing authorities under section 11 may be designated by the Supreme Court and the High Courts. Only those institutions which have been graded by the APCI may be eligible for such designation. In designating arbitral institutions, the Supreme Court and the High Courts shall consider the grading given to such institution by the APCI and ensure that only those institutions which receive a high grade from the APCI are designated as appointing authorities under section 11.*
> *3. In order to give time for institutions to be graded by the APCI and designated by the Supreme Court and the High Courts, the amendment to section 11 above may come into force at a later date.*
> *4. The Central Government may notify uniform rules for payment of fees to the arbitral tribunal under section 11(14).*[355]

Status of the Recommendation

The Recommendation of the Committee has been accepted and accordingly the 2018 Amendment Bill make a comprehensive amendment to section 11. The proposed amendment, *inter alia*, provides that the Supreme Court and High Court shall have to power to designate arbitral institutions from time to time, which have been graded by the ACI. Further, in jurisdiction of High Courts where no graded arbitral institutions are available, then the Chief Justice may maintain a Panel of arbitrators for this purpose. This proposed amendment will expedite the institution of arbitral proceedings as no court intervention will be required at the initial stages of arbitration. Further, the parties will be able to benefit from this provision even if they have not chosen the institutional rules in the arbitration clause.[356]

(xvi) Enforcement of emergency awards

The Committee noted that India falls far behind in recognizing emergency arbitral awards although leading arbitration jurisdictions have recognized this emerging trend and provided for it.

Section 2(d) of the ACA does not recognize emergency arbitrators and further a Delhi High Court decision held that an emergency arbitral award in an arbitration proceeding outside India is not enforceable within India.

The Committee made the following recommendation in accordance with the suggestion

stipulated by the Law Commission of India in its 246th report:[357]

> 1. *Clause (c) of sub-section (1) of section 2 of the ACA may be amended to add the words "an emergency award" after the words "an interim award".*
> 2. *Clause (d) of sub-section (1) of section 2 of the ACA may be amended to add the words "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;" after the words "...panel of arbitrators".*
> 3. *An emergency award may be defined as "an award made by an emergency arbitrator".*

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

(xvii) Insertion of a separate chapter establishing the APCI

The Committee recommended that a separate chapter be inserted in respect of the establishment and powers of the body set up to grade arbitral institutions and promote arbitration in India.

Status of the Recommendation

In accordance with the recommendation, the Arbitration Amendment Bill, 2018 seeks to insert 'Part IA' after 'Part I' dealing with the establishment and powers of the 'Arbitration Council of India'.[358]

(xviii) Amendment for creating a depository of arbitral awards

The Committee made note of the fact that it was in some instances very difficult for courts to obtain an authentic copy of the arbitral award, particularly in cases of ad hoc arbitration where there is no case management system. The Committee opined that this could only be remedied through a centralized depository of all arbitral awards and recommended that the proposed APCI maintain such a depository. The Committee however added that in order to maintain confidentiality, the court may only access it in instances where the award was being challenged.[359] The specific recommendations of the Committee in this regard are:

> 1. *A provision may be inserted in the proposed Part IA of the ACA, requiring the APCI to maintain an electronic depository of all arbitral awards made in India and such other records as may be specified by the APCI.*
> 2. *Parties to an arbitration seated in India may be required to file such arbitral awards and such other records as may be specified by the APCI with the APCI within 45 days of the award being given.*
> 3. *Courts may access the depository for obtaining a copy of the arbitral award certified by the APCI.*[360]

Status of the Recommendation

The 2018 Amendment Bill has accepted this recommendation of the Committee and accordingly provides for the ACI to maintain a depository of arbitral awards made in India.[361] The additional conditions recommended by the Committee requiring parties to mandatorily file the award with the ACI and the conditions of access have not been included under the proposed Bill. However, these may possibly be covered in future by 'regulations' under the Act.

This depository may be useful to practitioners who wish to analyse how the jurisprudence has evolved and is in consonance with practices of international institutions which publish yearbooks which enables the development of jurisprudence.[362]

(xix) Incorporation of arbitral institutions

The Committee opined that there are several bodies styled as 'arbitral institutions' that simply provide venues for conduction of arbitration proceedings without performing any functions of an institution such as appointment of arbitrators. This, the Committee opined lowered the overall quality of arbitral institutions in India and there was a need for accountability and transparency in the functioning of institutions. Thus, the Committee recommended that arbitral institutions be required to register themselves under section 8 of the Companies Act, 2013 or as 'societies' under the Societies Registration Act 1860.

Status of the Recommendation

The Arbitration Amendment Bill, 2018 has not included this within its scope.

3.6 Recommendations for the government and legislature to effectively promote institutional arbitration

After a detailed analysis of international practices and global arbitration regimes, the Committee provided the below recommendations regarding the role the government and legislature can play to promote institutional arbitration in India:

> *1. A standing committee may be constituted under the aegis of the APCI to review developments in Indian arbitration law and practice, consult with stakeholders, and recommend timely legislative or other changes to the government. This standing committee may be composed of leading arbitrators, arbitration practitioners, arbitral institutions, judges, representatives from industry bodies and experts from foreign jurisdictions. The remit of this committee must be to:*
> *a. to review the government's arbitration policy and suggest necessary changes to the Ministry of Law and Justice;*
> *b. to promote international dispute resolution services in India and work with arbitration-related institutions and bodies, and law firms for this purpose;*
> *c. to monitor the operation of the ACA and to collect data from the High Courts and the Supreme Court for this purpose;*
> *d. to maintain a depository of all awards challenged in courts for purposes of research;*
> *e. to liaise with international and local arbitral institutions in holding events to assist in the interpretation of the provisions of the ACA;*
> *f. to stay abreast of the latest arbitration trends and practice, prepare annual reports analysing the march of arbitration law, and assist the legislature in introducing timely amendments to the ACA;*
> *g. to organise arbitration-related conferences and events;*
> *h. to liaise with relevant government departments and arbitral and other professional bodies to conduct activities to promote India as an arbitration hub and to promote institutional arbitration in India both within and outside India; and*
> *i. to do any other activities that may be necessary or incidental to the performance of the above functions.*
> *2. Instead of waiting for courts to clear ambiguities in legislation through case law, where appropriate, the legislature can be proactive to ensure that the ACA keeps pace with developments in international arbitration law and practice. For this purpose, the proposed standing committee may be tasked with monitoring the operation of the ACA and recommending amendments to the ACA in a timely fashion.*
> *3. The Government may promote institutional arbitration by facilitating the building of physical infrastructure. The government, may, after consultations with arbitral institutions and industry bodies like CII, FICCI and ASSOCHAM, which represent users of arbitration, take steps to build integrated infrastructure for arbitration on the lines of Maxwell Chambers in major commercial hubs like Mumbai and Delhi. In particular, in Delhi, the ICADR building complex may be developed as an integrated arbitration facility.*
> *4. The Central Government and state governments can proactively encourage institutional arbitration by adopting arbitration policies on the lines of the Maharashtra Arbitration Policy. Such policies may provide that all commercial contracts exceeding a specified value entered into by the appropriate government and its agencies should contain an institutional arbitration clause. This will be a positive vote of confidence in favour of institutional arbitration and could act as a catalyst for the accelerated growth of institutional arbitration in India.*
> 5. *The Government may amend Schedule VII to the Companies Act to add "contributions or funds provided to arbitral institutions" as an activity which may be included by companies in their Corporate Social Responsibility Policies. This will give impetus to the growth of arbitral institutions and provide them with capital for the development of necessary infrastructure.* [363]

3.7 Recommendations in respect of the ICADR

The Committee devoted an entire chapter towards looking into the working of the ICADR, since it was set up under the aegis of the Ministry or Law and Justice to promote arbitration in India and has received substantial funding from the government. The Committee also provided detailed recommendations in respect of its functioning.

While the Committee found that the ICADR benefits from being centrally located, being supported by the government, and having low fee structure; it has suffered through the following setbacks:

(i) The ICADR has failed to keep pace with the global trends in arbitration. In particular it has not marketed itself to prospective parties at the stage of making contracts, and has failed to strive to achieve excellence and obtain a good reputation. Further, "[t]o date, the ICADR has not been specified as the institution of choice for administering arbitrations in a significant number of government / PSU contracts."
(ii) The present Governing Council of the ICADR

is too large leading to ineffective coordination.

(iii) The ICADR Rules are obsolete and are not in par with global practices.

(iv) The ICADR has not evolved with arbitration and its rooms still resemble a court.[364]

Keeping in mind the above drawbacks, the Committee recommended that government take drastic action in respect of the ICADR, and develop it as a flagship arbitral institution and revamp its image entirely.[365] The Committee stated that this would involve several steps including enacting a statute to regulate its functioning.

Status of the Recommendation

Based upon the recommendations of the Srikrishna report, the Central Government has decided to introduce the New Delhi International Arbitration Centre Bill in 2018 ("**NDIAC Bill**") which provides for the setting up of an independent and credible arbitration centre.

The Bill in its preamble acknowledges the failure of the ICADR and proposes to set up the NDIAC as a flagship arbitral institution. The ICADR (which was registered as a society) would instead be transferred to the Central Government, which will in turn transfer all the rights and interest to the new NDIAC. In a much-needed move, the NDIAC will also be entrusted with promoting the study of ADR through an Arbitration Academy to be set up by the NDIAC.[366]

4. CONCLUSION

The goal of putting India prominently on the map as a destination for arbitration is still a distant vision. But it is undeniable that the government has given great momentum to this effort by setting the High-level Committee and pushing for the 2018 Amendment Bill very soon after the report.

The legislative measures suggested by the Srikrishna Committee are absolutely necessary and unavoidable towards opening up India's arbitration centres to the global business community. The next steps for the government are to utilize the ongoing momentum and address the remaining obstacles in the ACA in an urgent manner. The one-year time line has not been corrected in the 2018 Bill which also spells a disaster to the flexibility and independence of the arbitration system. While speedy resolution is no doubt critical to the success of ADR, "a short and inflexible timeline for international commercial arbitration, coupled with knocking judicial doors for extension, would dissuade parties from selecting India as the seat."[367]

India must also shed its interventionist reputation and provide a high level of deference for arbitration proceedings conducted in India and abroad and win the trust of foreign investors and disputants.

Section III: The Regulatory Model for the Entry of Foreign Law Firms in India

1. INTRODUCTION

There are few topics which evoke stronger reactions from different interest groups in the legal fraternity than the debate on liberalisation on legal services. As one commentator notes, "the current debate on entry of foreign law firms has unnecessarily generated more heat than light".[368] This debate has evolved over the years. From empty Victorian declarations that "legal profession is not a business and it is not up for sale"[369], today the discourse is on the methodology of entry of foreign law firms into India. This is not to say that all concerns raised by domestic law firms have been addressed or were insubstantial to begin with. After all the most critical *dramatis personae* in this saga, the Bar Council of India, has been in absentia. For instance, many Indian corporate law firms correctly argue that Indian law firms operate under severe restrictions compared with their foreign counterparts.[370] While advertisement and restriction on number of partners are often cited as key regulatory flaws in regulation of legal services, the prevailing rules for professional ethics are fundamentally unsuited to the rendering of non-litigious services. Due to the presence of such constraints, the ministries within the Government of India had allegedly agreed to a "phased" opening up of the sector.[371] The process of consultation on the details of this process have been long drawn out and involved several interest groups, including the Bar Council of India itself, the Society for Indian Law Firms ("**SILF**"), the Indian National Bar Association ("**INBA**")– both being organisations that claim to represent small and large law firms and lastly, the Indian Corporate Counsel Association ("**ICCA**") which is an organisation that voices concerns of in-house counsels.

On 24 June, 2016, the Bar Council of India released the draft Registration and Regulation of Foreign Lawyers in India, 2016 ("**Draft BCI Regulations**").[372] This was the first draft regulation released by the BCI in relation to entry of foreign law firms. The foreword to the Draft BCI Regulations boldly stated that:

> "Time has come to take a call on the issue. Bar Council of India is of the view that opening up of law practice in India in the field of practice of foreign law; diverse international legal issues in non-litigious matters and in international arbitration cases would go a long way in helping legal services grow in India to the benefit of lawyers both from India and abroad"[373]

Surprisingly, since the release of the Draft BCI Regulations, there has not been any other draft which has been released by any government body. Nonetheless, the discourse has been kept alive by detailed proposals tabled by the INBA, SILF and the ICCA. Liberalisation of legal services has also received a shot in the arm due to the Ministry of Commerce viewing legal services as one of [twelve] "champion sectors". The Government of India views "Champion sectors" as those services sectors which need to be rapidly developed to realise potential.[374]

Part I of this section will provide a brief overview of the provisions of the Draft BCI Regulations. Part II of this section will give a brief description of the existing alternatives and critiques of the Draft BCI Regulations which have been provided by the INBA, ICCA and the SILF. Part III of this section will provide a consolidated and detailed critique of the Draft BCI Regulations with appropriate references to the suggestions put forth by the INBA, ICCA and SILF.

This Report does not seek to comprehensively re-write the provisions of the Draft BCI Regulations. It seeks to recognize the key pillars of the regulatory regime which will govern the entry of foreign law firms in India and opines on the suitability of the existing proposals with respect to these issues.

2. OVERVIEW OF THE DRAFT BCI REGULATIONS

2.1 SIGNIFICANT DEFINITIONS

(i) Foreign Lawyer

Section 2(iii) defines "Foreign Lawyer" as a person, including a law firm, limited liability partnership, company or a corporation, who / which is entitled to practice law in a foreign country.

(ii) International arbitration case

Sec 2(ix) defines "international arbitration case" as an arbitration case concerning a commercial or a monetary matter which is conducted in India where all or any of the parties are persons who have an address or principal office or head office in a foreign

country.

2.2 REGISTRATION AND QUALIFICATION OF FOREIGN LAWYERS

(i) Registration and Qualification

Section 3 of the Draft BCI Regulations creates two categories of foreign lawyers who are entitled to render specific type of legal services in India.
The first category is the foreign lawyer who requires a registration with Bar Council of India to practice law in India under Sec. 3(1) ("**Registered Foreign Lawyer**"). This right to practice law in India is contingent upon the 'primary qualification to practice law in the foreign country'[375] and is limited in its scope.

The second category is the foreign lawyer advising on a 'fly in fly out' basis ("**Unregistered Foreign Lawyer**"). This class of foreign lawyer is not required to be subject to registration with Bar Council of India. The Unregistered Foreign Lawyer is exempted from registration as long as the following conditions are met:

(a) Legal advice is regarding foreign law and on diverse international legal issues;
(b) Services of such lawyer has been procured in a foreign country;
(c) No office is maintained in India for this purpose; and
(d) Practice in India does not exceed an aggregate of 60 days in any period of 12 months.

(ii) Procedural Aspects related to registration of Foreign lawyers and law firms

Chapter III of the Draft BCI regulations govern the procedural aspects of the registration of the foreign lawyers and law firms in India. 'FORM A' appended to the rules is prescribed template under which application for such registration is made and also prescribes the fee for registration. For registration, the foreign lawyer or law firm needs:

(a) certification from concerned authority in Union of Government that an effective legal system exists in their country of primary qualification;
(b) Certificate from competent authority in country of primary qualification that the advocate is entitled to practice in that country;
(c) Certificate from the competent authority in country of primary qualification clarifying that Indian lawyers enrolled under the Advocates Act are permitted to practice law in that country comparable to the law practice permitted under the Draft BCI Regulations ("**Reciprocity Requirement**");
(d) Certificate from any bar association they have been member of it in their country of primary qualification;
(e) No objection certificate from the competent authority in the country of primary qualification;
(f) Declaration to the effect that no previous criminal record exists and the foreign lawyer/law firm consents to disciplinary actions by Bar Council of India, during the course of verification of such application of registration;
(g) Restriction on practice of Indian law by Foreign lawyers: An undertaking by the foreign lawyer that he/she shall not be entitled to practice Indian law in any form before the any court of law, Tribunal or board or any other authority legally entitled to record evidence on oath; and
(h) Declaration to the effect that upon registration under the Draft BCI Regulation, the Advocates Act and the rules made thereunder shall apply *mutatis mutandis* to her and she is subject to the jurisdiction of the courts of law in India and to the jurisdiction of the Bar Council of India ("**Identical Regulation Requirement**"). The registration made by foreign lawyers under Section 7 of the Draft BCI Regulations shall be valid till 5 years, subject to renewal within 6 months of the expiry of such registration.

(iii) Inquiry procedure

Section 6(A) prescribes that each application will be subject to an enquiry of the genuineness of the contents and an "examination of the reciprocity of the concerned foreign country" ("**Reciprocity Requirement**"). Further, Section 6(c) states that "in the matter of Registration the Designated Advocates (or whatever name they are known in the concerned foreign country) are to be given preference as the rights and privileges of such senior advocates are prescribed under Section 23 of the Advocates Act.

(iv) Registration, Renewal and Guarantee Amount

Section 6(D) prescribes the following fee structure:

S. No.	Purpose of fee	Amount (in USD)
1.	Registration fee for individual lawyers	25,000
2.	Registration fee for incorporated entities / law firms	50,000
3.	Renewal fee for foreign lawyers	10,000
4.	Renewal fee for incorporated entities / law firms	20,000
5.	Security deposit to be provided by individuals	15,000
6.	Security deposit to be provided by incorporated entities / law firms	40,000

(v) Restriction on practice of Registered Foreign Lawyers

Section 8 prescribes that Registered Foreign Lawyers under the Draft BCI Regulations can practice law in India only in non-litigious matters which includes the following:

(a) the practice of law by foreign lawyers shall include conveyancing, transaction of business and legal advice regarding to the law of country of the primary qualification;[376]
(b) providing legal services and appearing as a lawyer for an incorporated entity which is having an address or principal office or head office in a foreign country in an international arbitration case which is conducted in India and in such arbitration case 'foreign law' may or may not be involved;
(c) providing legal services and appearing as a lawyer for a foreign client before bodies other than courts, tribunals, boards and statutory bodies not entitled to take evidence on oath; and
(d) providing legal services concerning the laws of the country of primary qualification and other diverse international legal issues provided that such legal services will not involve representation before courts, tribunals or any other authority competent to take evidence on oath.[377]

(vi) Rights of Registered Foreign Lawyers

A foreign lawyer can open law office or offices in India subject to the condition that Bar Council of India shall be kept informed of the particulars of such office or offices, its postal addresses, name of the owner or lessee and documents entitling such occupation.[378]

A foreign lawyer can procure services of Indian lawyers[379], Indian registered foreign lawyers[380] and enter into partnerships with both mentioned lawyers.[381] Lastly, they are entitled to work for both an advocate enrolled under Advocate Act or Indian law firm[382] or a Indian-registered foreign lawyer (collectively, the "**Partnership Rights**").[383] The Partnership Rights sought to be given to Registered Foreign Lawyers have been the subject of controversy and this aspect has been criticized by both SILF and ICCA.

(vii) Code of Conduct and Ethics

Foreign lawyers registered in India shall be subject to the same ethical and practice standards laid down under the Advocates Act, 1961 and the rules made there under.[384]In case of professional misconduct in connection with law practice in India, the foreign lawyers shall be subjected to disciplinary committee under Section 36 of the Advocates Act, 1961.[385]

3. BRIEF OVERVIEW OF PROPOSALS BY INBA, ICCA AND SILF

3.1 PROPOSED CHANGES IN THE DRAFT BCI REGULATIONS BY INBA

In its comments on the Draft BCI Regulations, the INBA has requested the BCI to consider the following changes:[386]

(i) *Limited Liability Partnership*: Since at present under the Indian legal regime, only partnership up to 20 partners in permitted, it has been suggested that BCI may consider making suitable amendments to the Advocate's Act in order to provide a level playing field with respect to the choice of business vehicle.

(ii) It has been proposed that when handling international arbitration case, it should be made mandatory for foreign law firms to train, prepare and engage Indian lawyers while practising in the area of International arbitration. This will prepare Indian lawyers to professionalise themselves and get trained in multi-jurisdictional transactions.

(iii) Relaxation in rules regarding registration and qualification of foreign lawyers. BCI may also consider simplifying the documentation process as to ensure no prohibitive barriers are for the entry of foreign lawyers or law firm emerge.

(iv) Foreign lawyers should be limited to practising

foreign laws and amendments to this effect should be introduced.

(v) To ensure proper code of conduct and ethics being practising by both Indian and foreign lawyers and law firms there should be harmonisation of rules according to global standards.

(vi) *Phased entry proposed by INBA*

(a) The first phase would be to allow foreign lawyers to practice in the areas covered in the Draft BCI Rules;

(b) The second phase would be to bring out amendments in applicable laws such as Advocates Act, 1961 and Limited Liability Partnership Act, 2008 which would create provision for more partners in a law firms, remove advertising restrictions and shall initiate reforms in legal education to produce good talent pool of young legal professionals to accommodate the increase in demand of legal professionals due to liberalisation; and

(c) Policy changes shall be adopted for the expansion of the practice of foreign firm by allowing foreign lawyers to practice law in India including by forming joint ventures and in collaborations with Indian lawyers. In future, foreign law firms should be allowed to set up own firms or acquire 100% of Indian law first in accordance with applicable laws and FDI policy.

3.2 PROPOSED CHANGES IN THE DRAFT BCI REGULATIONS BY ICCA

The ICCA, an association of in-house counsels working in both public and private sectors has provided a comprehensive set of comments following extensive engagement with the multi-national corporations, foreign law firms and members of the Ministry of Commerce.[387] The ICCA has proposed the following changes to the Draft BCI Regulations:

(i) Since matter of reciprocity of legal services is covered under various ministries of the Government, the Bar Council of India should not be the sole authority to ensure reciprocity;

(ii) Law firms work in multiple jurisdictions and the BCI Draft Regulations need to acknowledge and provide for this scenario when considering reciprocity;

(iii) A phased entry is necessary similar to the FDI conditionalities imposed on other sectors: The ICCA proposal on phasing in foreign lawyers and law firms is as follows:

(a) Phase I: In the first two years, the foreign law firm:[388]

(I) Shall not be allowed to set up an office in territory of India;
(II) may work in conjunction with an Advocate in so far as they are not in violation with any provision of the proposed ICCA draft bill; and
(III) may advise on 'fly-in, fly-out' basis providing legal advice on the law of the jurisdiction in which they are qualified, represent its clients during and post the initiation of the arbitration proceedings, represent its clients in conciliation and mediation and provide legal advice on public and private international law.

(b) Phase II: After the completion of two years, the foreign law firm:[389]

(I) may operate as a Foreign Law Firm Established in India, where it holds not more than 26% equity along with an Indian Advocate(s) who has been practicing law in India for a minimum period of 5 years;
(II) shall set up a registered office within the territory of India upon commencement of operations as a Foreign Law Firms Established in India; and
(III) shall not restrict Indian Advocates associated with the firm from the practice of law as permitted under the Advocates Act.

(c) Phase III: After the completion of three years from entering into an LLP, the foreign law firm:[390]

(I) may hold not more than 49% equity along with an Indian Advocate(s) or a firm of Advocates who have been practicing law in India for a minimum period of 5 years.
(II) may provide advisory, transactional and contractual services to both Indian and foreign clients. Provided, any advice given with respect to Indian

law, shall only be given by an Advocate.

(iv) Clarity is required in relation practice of Indian advocates with foreign firms and scope of non-litigious services;

(v) 100% foreign ownership should not be allowed from the first day as it may have a 'Big 4' impact on existing Indian practitioners;

(vi) Foreign lawyers should be regulated through a regulatory body which is separate from the BCI;

(vii) A separate regulatory board should be instituted for regulation of foreign lawyers;

(viii) A professionally managed secretariat / facilitation centre to ensure compliance and assist in registration;

(ix) Unregistered foreign lawyers also need to be regulated; and

(x) Foreign lawyers and foreign law firms need to be separately regulated.

The ICCA has also drafted the Foreign Legal Practitioners' (Regulation of Practice) Bill, 2016 which encapsulates all the above changes.

3.3 Proposed changes in the Draft BCI Regulations by SILF

The SILF has been the most active public voice against the immediate liberalisation of legal services in India.[391] The SILF, heading by Mr. Lalit Bhasin, the founder of Bhasin & Co, has been a proponent for the phased and gradual opening of the legal services market primarily due to regulatory restrictions on domestic law firms which do not allow domestic law firms to function on a "level playing field". In SILF's comments on the Draft BCI Regulations, SILF has not only provided drafting changes to each regulation of the Draft BCI Regulations but also touched upon aspects on reciprocity and the consistency of the Draft BCI Regulations with the Advocates Act.[392] SILF's proposal is driven by its view that liberalisation should take place in a phased and gradual manner. A broad overview of its proposal[393] is set out below:

(i) *Phase 1*: Reforming the domestic sector to bring about a "level playing field":

(a) Removal of difficulties relating to practice in LLP format: This would include issuance of clarification from the BCI that this is permissible under the Advocates Act, 1961 and the clarification from Central Board of Direct Taxes that this is not a taxable event;[394]

(b) Recognition and registration of law firms by BCI;

(c) Amendment to BCI Rules to permit firm brochures, removal of content regulations for firm websites and directory listings, ceasing of all "surrogate practice" by foreign law firms inside and outside India and capacity building measures for domestic law firms; and

(d) Reform of legal education to, amongst others, create quality standards for legal education and improvement in pedagogy.

The rationale for this phased approach is manifold. *First*, it is stated that even though Indian lawyers may be comparable with international standards, Indian corporate law firms are of a miniscule size compared to their international counterparts.[395] *Secondly*, the experience of other jurisdictions like Singapore and People's Republic of China demonstrates that a phased approach provides adequate opportunity for domestic lawyers to protect themselves.[396] *Thirdly*, the presence of structural and operational weaknesses in the domestic legal profession offsets the pockets of strength and such weaknesses need to be addressed before liberalisation.[397]

(ii) *Phase II*: Foreign legal consultants (who are only permitted to advice on foreign law) are permitted to have presence in India under controlled conditions such as restriction on hiring or other relationship with the local bar. In fact, SILF has provided its comments assuming that the Draft BCI Regulations are a part of Phase II of this phrased approach.[398]

(iii) *Phase III*: Foreign law firm / lawyers permitted to undertake practice in certain areas of law of the host country commencing with joint ventures with local bar under controlled conditions.

Apart from the proposal on phased entry, SILF has also provided an analysis relating to the vires of the Draft BCI Regulations,[399] interpretation of "reciprocity" to determine applicability of Draft BCI Regulations[400] and comments on each section of the Draft BCI Regulations.[401]

4. CONSOLIDATED CRITIQUE AND ANALYSIS OF THE BCI DRAFT REGULATIONS

The debate on the suitability and methodology of the entry of foreign law firms in India has been characterised by various interest groups putting forth proposals to cater to their own interests. While this does not mean that such proposals are necessary antithetical to the national economic interest, a bipartisan analysis of each of these proposals is required before concluding on the optimal approach. This part puts forth our views on the optimal regulatory model for entry of foreign law firms in India:

4.1 A WELL-DEFINED AND TIME-BOUND PHASED ENTRY PLAN IS ESSENTIAL

(i) Insufficiency of current proposals

While all three proposals state phased entry as an essential part of the regulatory regime governing the entry of foreign law firms in India neither of these proposals put forth a proposal which is workable.

(a) The proposal by INBA posits that Phase I should allow foreign lawyers to practice in the areas covered in the Draft BCI Regulations. However, the INBA proposal does not acknowledge that Registered Foreign Lawyers have Partnership Rights which would entitle them into enter into partnerships with Indian advocates. Effectively, this would enable them to work in Indian law firms from Day 1 in direct competition with Indian advocates. Further, the ground reality today is that the Bar Council of India exercises no regulatory oversight over the activities of Indian law firms. This regulatory blind-spot is exacerbated by the fact that the division of work between two lawyers is anyway impossible to regulate for any regulator. Accordingly, any proposal relating to phased entry which allows direct or indirect collaboration between Indian and foreign lawyers from the first day will be unworkable.

(b) While the ICCA proposal acknowledges the importance of a phased entry, the draft bill prepared by the ICCA allows a law firm to work in conjunction with an Indian advocate or a corporate law firm, "in so far as they are not in violation of any provision" of the bill or "the spirit in which they have been enacted". While it is understandable that such collaboration rights are essential to attract foreign lawyers to India, any collaboration would lead to integration between Indian and foreign lawyers. In fact, many Indian and foreign law firms are already functioning through "best-friend" relationships and many foreign law firms have "India desks" which advise their clients on Indian law. Therefore, any workable plan for phased entry must strictly prohibit any form of collaboration between Indian firms and Unregistered / Registered Foreign Lawyers in the phase where entry of foreign lawyers is first envisaged.

(c) The proposal by SILF in relation to phased entry is most closely aligned to a regulatory model which can prove workable. To its credit, the SILF proposal correctly proposes that Phase I should necessarily occur before Phase II (and the entry of foreign lawyers). However, even though SILF goes into great depth to analyse the "structural and operational weaknesses in the domestic legal profession", its critique barely scratches the surface. As has been set out in detail in our report on the regulatory model for non-litigious services, the professional ethics regulations catered to litigious services but also contain certain draconian provisions (such as Rule 49) which technically require every salaried lawyer not regularly litigating to cease their practice. Further, the ban on multi-disciplinary practices exists merely on paper and has not been implemented strictly. Lastly, even in this day and age, corporate law firms are not allowed to give pitches for their services and make presentations to potential clients. These are not technical issues which have been relegated to the academic realm by regulatory inaction but are issues that plague the day-to-day functioning of Indian law firms. It is unreasonable to expect Indian lawyers to compete with foreign lawyers before the suggestions set out in our report are carried out.

Nonetheless, neither does SILF set a time-frame for reforms to be carried out to create a "level playing field" nor can SILF's demands for Phase 1 be realistically completed any time soon. For instance, reforms in legal education such as change in curriculum and "improvements in pedagogy" are systemic changes even if initiated will take

a minimum of 3-5 years to implement and verify.

To be fair, SILF has recognized this critique and stated that with the correct intent, reforms in Phase 1 "will not even take a month".[402] Therefore, a sensible list of reforms for Phase 1 are required to be implemented. Further, any realistic assessment of the ground realities needs to recognize the pathetic track record of the Bar Council of India in bringing about reforms. To have any expectations from the Bar Council of India would be naïve. The Central Government needs to be open to exercise its rule-making powers under Section 49A of the Advocates Act, 1961 if the Bar Council of India does not decide to play an active role in the liberalisation of legal services. As per the status quo, far from actively opposing such liberalisation, the Bar Council of India is completely aloof from the discourse while it is being driven forth by select private interest groups and the Ministry of Commerce.

(ii) Our proposal

For the reasons stated above, a phased entry is essential. Phase I should include the following reforms:

(a) *Substantial re-drafting of the BCI Rules to govern law-firms, in-house counsels and LPOs*: As explained in detail in our report on regulatory model of non-litigious services, Rule 49 needs to be scrapped to allow salaried employment for lawyers and to address basic issues relating to confidentiality, attorney-client privilege, conflict of interest, allowing advertisement and solicitation etc.

(b) *Regulatory clarity on LLP structure for law firms:* While law firms have demanded a clarification from the BCI on whether LLP incorporation is permitted for a firm of advocates,[403] it is not clear whether such a clarification is actually required since the Advocates Act, 1961 does not restrict the business vehicle to partnerships under the Partnership Act, 1932. Nonetheless, if there are any issues relating to incidence of capital gains upon conversion of partnership to LLP such issues should be addressed at the earliest by way of abundant caution. This would pave the way for a regime of compulsory registration of law firms and increased disclosures.

(c) *Expansion of right to advertising and allowing solicitation:* The right to advertise should extend to currently prevailing practices which are unlikely to lead to widespread dissemination of deceptive information such as brochures, participation in conferences, publication in periodicals and listing in directories. To preserve the dignity of the profession, any information of likely outcome of litigations or comparison with other lawyers may be prohibited. In this regard, the publicity rules in Malaysia and Singapore may be taken as a starting a point. Further, advocates must be allowed to solicit clients through presentations and advertisements provided that such materials abide by the regulations in this regard.

If these reforms seem impractical, this list may be watered down depending on the exact scope of permitted activities of foreign lawyers in Phase II. If Phase II only involves strict "foreign legal consultants" with no association and collaboration rights with Indian advocates then the pre-conditions to Phase II may be minimal as such "foreign legal consultants" will never directly compete with Indian advocates.

4.2 No Partnership Rights for Registered Foreign Lawyers and no right to render representation services

(i) Partnership Rights depend on scope of Registered Foreign Lawyers' role

As stated above, a Registered Foreign Lawyer can procure services of Indian lawyers[404], and enter into partnerships with them.[405] Further, they are entitled to work for both an advocate enrolled under Advocate Act or Indian law firm[406] or an Indian-registered foreign lawyer. SILF has criticized this section and ICCA has suggested a stricter wording of this provision. Whether Partnership Rights should be provided to Registered Foreign Lawyers depends largely on the legal functions that they are allowed to perform – there is substantial divergence

between the different proposals and the Draft BCI Regulations on this aspect.

(ii) Section 8 allows Registered Foreign Lawyers to opine on Indian law

Section 8 of the Draft BCI Regulations empowers the Registered Foreign Lawyer to perform the most functions including appearing in an international arbitration case, appearing for clients before regulatory authorities. This is problematic as it may allow Registered Foreign Lawyers to practice Indian law. For instance, if the substantive law of contract is Indian law, Section 8 may be relied upon for the Registered Foreign Lawyer to argue issues of Indian contract law. Similarly, if a Registered Foreign Lawyer has been empowered to represent clients before Indian regulatory authorities such as the Insurance Regulatory and Development Authority and the Foreign Investment Facilitation Portal, this would necessarily entail them providing substantive legal analysis on Indian insurance and foreign investment law.

(iii)ICCA and SILF correctly restrict roles to foreign law and international arbitration

The ICCA and SILF have both correctly restricted the roles of Registered Foreign Lawyers through differing formulations. The ICCA broadly restricts these functions to providing advice on jurisdiction of primary qualification, representing clients in international arbitration, conciliation and mediation and provide legal advice on public and private international law.[407] The SILF's conception of the legal functions of a Registered Foreign Lawyers is captured in its comments to Section 8(2):

> "The scope of activities of foreign legal consultants and registered foreign law firms is the following:
> (i) doing work, transacting business, giving advice and opinion concerning the laws of the country of the primary qualification including (a) preparation of instruments and rendition of legal advice with respect to investments in and establishment and operation of business in concerned foreign country by any resident of India; and (b) preparation of documents and rendition of legal advice with respect to commercial transactions where the governing law is expressly stated to be the foreign law and the transaction is a cross border transaction in which at least one party is from the foreign country.
>
> (ii) providing legal services and appearing as a lawyer for a person, firm, company, corporation, trust, society etc. who/ which is having an address or principal office or head office in a foreign country in an international arbitration case which is conducted in India, which (i) is not governed by Indian Law; and (ii) arises out of or is reasonably related to the country of primary qualification of the foreign legal consultant conducting such arbitration;
> (iii) providing legal services and appearing as a lawyer for a resident of India in proceedings before any Courts, Tribunals. Boards, statutory authorities in the foreign country in respect of matters concerning foreign law of the country of the primary qualification; and
>
> (iv) providing legal services concerning the laws of the Country of primary qualification and on diverse international legal issues (other than concerning Indian Law), provided that such legal services, unless otherwise provided for in these Rules, shall not include representation or the preparation of documents regarding procedures before a Court of Law, Tribunal or any Governmental Authority in India."

(iv) Our proposal

The SILF proposal clarifies that the "international arbitration case" should "not be governed by Indian law" which clarifies that neither the substantive, curial or law of arbitration can be Indian law. This would exclude many high value commercial contracts where the law of contract will necessarily be Indian law as the physical assets of the commercial operation would be in India. The aim to attract foreign legal talent as a stepping stone to making India an arbitration hub needs to be balanced against the protection of the domestic legal industry which is currently not at a 'level playing field'. Accordingly, whether Registered Foreign Lawyers can participate in international arbitration cases where Indian law is involved is a difficult decision that needs to be taken. While there are cogent reasons to do either, it may be beneficial to prohibit participation in international arbitration cases to the extent that it involves aspects of Indian law. If the response to this liberalisation in Phase I is underwhelming, this position may be reconsidered. Accordingly, please see below our proposal which makes drafting changes over the text proposed by SILF and incorporates elements

from the ICCA draft as well:

"Foreign legal consultants and registered foreign law firms shall be permitted to engage only in the following:

(i) giving legal advice, drafting opinions and preparing legal instruments and contracts concerning the laws of the country of the primary qualification;

CTIL Comment: These changes have been carried out as the language following "including" in the SILF draft is not required. Registered foreign lawyers should have the right to advise on the whole gamut of issues which can arise under the laws of the country of primary qualification

(ii) representing clients, during and post the initiation of the arbitration proceedings, in an international arbitration case which is conducted in India and is not governed by Indian law;

CTIL Comment: The SILF draft included restriction in relation to the client of the Registered Foreign Lawyer. It mandates that Registered Foreign Lawyers should only be allowed to represent foreign clients. This is unnecessary as it lowers the options with an Indian client when it may be choosing a counsel in a high-stakes matter. Further, as correctly pointed by ICCA, the insertion of "during and post the initiation of arbitration proceedings" is required to obviate the possibility that Registered Foreign Lawyers may start contract advisory/review/diligence in relation to contracts which have clauses mandating international arbitration. This may be done by arguing that all such services are to prepare for an anticipated arbitration proceeding or are relevant to an anticipated arbitration proceeding.

CTIL Comment: Clause (iii) in the SILF proposal is unnecessary as all such services would be subsumed in (i) and it has accordingly been deleted.

(iii) providing legal services concerning the laws of the Country of primary qualification and on issues of public and private international law (other than concerning Indian Law), provided that such legal services, unless otherwise provided for in these Rules, shall not include representation or the preparation of documents regarding procedures before a Court of Law, Tribunal or any Governmental Authority in India."

***CTIL Comment**: As correctly pointed out by ICCA, issues of "public and private international law" is a clearer way of expressing the intent rather than using the phrase diverse international legal issues.*

In addition to the above provision, we are of the opinion, a section in the nature of Section 8(3) titled "No practice of Indian law" should be included to reiterate a negative list of what the Registered Foreign Lawyer cannot do.[408]

4.3 Unregistered Foreign Lawyers operating on a fly-in-fly-out basis should be subject to certain basic intimation requirements

We agree with ICCA that even Unregistered Foreign Lawyers should be subject to certain minimum registration requirements. However, the ICCA draft removes the separate categorisation provided for foreign lawyers operating on a fly-in-fly-out basis by making this a part of Phase I. A consequence of this is that such Unregistered Foreign Lawyers also have to comply with the strict documentation and registration process requirements. In our opinion, the status of Unregistered Foreign Lawyers and Registered Foreign Lawyers need not be conflated as the practice of Unregistered Foreign Lawyers is already subject to the upper limit of 60 days in a year. Therefore, a basic intimation requirement can be instituted whereby Unregistered Foreign Lawyers are required to intimate the appropriate wing of the Bar Council of India with basic details such as the name, age, qualification, bar registration identification number and details of the client which is being represented.

4.4 A separate code of conduct needs to be drafted for Registered Foreign Lawyers

Section 8(1) of the Draft BCI Regulations states that Registered Foreign Lawyers shall be deemed to be "Advocates" under the Advocates Act, 1960. This may lead to confusion over the rights and duties of Registered Foreign Lawyers as it may be argued that they are also entitled to certain rights under the Advocates Act, 1961 due to this "deeming" fiction. A separate comprehensive code of conduct needs to be drafted for Registered Foreign Lawyers and foreign law firms.

4.5 Definition of "International

ARBITRATION CASE" NEEDS TO BE AMENDED

Section 2(ix) of the Draft BCI Regulations defines "international arbitration case" as "an arbitration case concerning a commercial or monetary matter which is conducted in India in which all or any of the parties are persons who have an address or principal office or head office in a foreign country". If the intent is to let Registered Foreign Lawyers participate in "international commercial arbitrations" then a mere reference to the definition under the Arbitration and Conciliation Act, 1996 could have been incorporated. The SILF proposal has incorporated a simplified version of this definition with the addition that the "dispute is not governed by foreign law". This addition is not sufficient to clarify that neither the substantive, curial or law of arbitration should be Indian law. Accordingly, we propose that the definition from the Arbitration and Conciliation Act, 1996 be incorporated with the clarification in relation to no aspect of the dispute being governed by Indian law:

> ""international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, where no aspect of the arbitration, whether substantive or otherwise, is governed by Indian law and where at least one of the parties is— (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) 1 [***]an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country;"

4.6 SEPARATE REGULATORY REGIMES FOR FOREIGN LAWYERS AND FOREIGN LAW FIRMS

As correctly pointed out by both ICCA and SILF, the provisions governing Registered Foreign Lawyers need to be different than the provisions governing foreign law firms. This becomes all the more evident when we consider conditions that cannot be imposed on a law firm in the same way as an individual, for instance, the 60-day limit for fly-in-fly-out lawyers. The ICCA draft bill may be referred, to see how regulatory regimes would differ for firms and individual lawyers.

4.7 SYSTEMATIC AND HOLISTIC DETERMINATION OF RECIPROCITY

Section 4(iii) of the Draft BCI Regulations provides that an application for registration as a Registered Foreign Lawyer requires a certificate from the government of the country of primary qualification or from a competent authority certifying that advocates under the Advocates Act, 1961 "*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 Rules along with copies of the relevant Laws and Rules*." Further, the Bar Council of India is obligated to carry out this evaluation before granting a certificate under Section 7.

As pointed out by SILF in their note on reciprocity, the Advocates Act, 1961 prescribes a different conception of "reciprocity" under Section 24(1)(a)[409] and 47.[410] SILF has primarily raised three critiques relating to the conception of reciprocity in the Draft BCI Regulations: *first*, that the standards set out in Section 4(iii) of the Draft BCI Regulations do not match up to those set out in Section 47, Advocates Act, 1961; *secondly*, there is lack of clarity on how reciprocity would work in the context of multi-national / multi-state law firms; *thirdly*, that any notion of reciprocity must also take into account factors affecting movement of natural persons such as immigration laws etc.[411]

The ICCA proposal deals with this complex issue by prescribing a schedule wherein the Central Government can notify countries with which India shares implicit or explicit reciprocity.

Any determination of reciprocity will require a multi-level analysis of the prevailing regulations governing the legal profession as well as the immigration rules and work permits. Further, it is foreseeable that a majority of Registered Foreign Lawyers will hail from the largest legal service exporters such as the United Kingdom, the United States of America, Australia, Canada, Singapore and Hong Kong. Therefore, if India has to truly implement a system where Registered Foreign Lawyers can provide services to their clients, it is advisable to start this consultative process in advance. In this backdrop, following are our recommendations in relation to reciprocity:

(i) Any analysis in relation to reciprocity must be holistic and consider all aspects which may practically impact an Indian "foreign legal

consultant". For instance, if a lawyer enrolled in the New York bar can be a Registered Foreign Lawyer and be granted a work permit for 9 months, can an Indian counterpart do the same as a "foreign legal consultant" in New York? Such a determination will need to be an inter-ministerial consultative process and it seems unlikely that the Bar Council of India will be able to carry out this intensive determination on its own. As members of the Trade Policy Division in the Ministry of Commerce may already know, India often faces situations while negotiating services agreements for regional trade agreements where countries often draft rules on 'entry' to negate the obligations that they have in relation to 'presence' of natural persons. It is highly likely that a similar situation may arise if a careful analysis is not undertaken to determine reciprocity.

(ii) It is advisable that this determination be carried out prior to the notification of the Draft BCI Regulations. An application for registration should not be the starting point of this process.

(iii) Further, the determination of reciprocity cannot be a purely "legal" determination which is amenable to judicial review. As is commonplace with most regulatory regimes which involve issuance of registration certificates – aggrieved applicants often seek a judicial review of the registration process. This would be counter-productive to ongoing trade negotiations which may involve conceding "Reciprocity" to a country instead of other valuable concessions, such as increased market access in a sector which is of strategic importance to India. Therefore, the determination of reciprocity needs to be a composite analysis comprised on legal, strategic and economic factors. This would be easier to do if the ultimate onus of determining "reciprocity" is with the Central Government which can notify countries from time to time. Such a position will also be easier to reconcile with Section 47 of the Advocates Act, 1961.

Endnotes

1 *Future Trends for Legal Studies: Global Research Study,* DELOITTE, p.3 (Jun. 2016), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-future-trends-for-legal-services.pdf. [hereinafter 'Deloitte Report'].

2 Lawyers Collective v. Bar Council of India & Ors., 2010 (112) Bombay Law Reporter 3 (India).

3 Ernesto Noronha, *LPO: A complicated career alternative for lawyers,* LIVEMINT (Oct. 11, 2015) https://www.livemint.com/Opinion/RfcsRjJHs66v3VdPyG4yZI/LPO-A-complicated-career-alternative-for-lawyers.html (last visited Oct. 4, 2018).

4 S. 29, Indian Advocates Act, No. 25 of 1961 INDIA CODE (1961) [hereinafter 'Advocates Act'].

5 *Ibid*., s. 2(a).

6 Advocates Act, *Supra* Note 4, s. 16(1).

7 Bar Council of India, Rule 2(xx), in Chapter I, Part IV of the Bar Council defines "practice of law" to include "giving legal advice either individually or from a law firm either orally or in writing" (Apr. 30, 2008), http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf (last visited Oct. 4, 2018) [hereinafter the 'BCI Rules'].

8 Rishabh Chopra and Nakul Bhatnagar, *How much is legal talent worth? Corporate and firm pay, notice & demand across practice areas*, Legally India (Sep. 20, 2017), https://www.legallyindia.com/home/how-much-is-legal-talent-worth-corporate-and-firm-pay-notice-demand-across-practice-areas-20170920-8778 (last visited Oct. 4, 2018).

9 Maulik Vyas, MV Ramsurya and Kala Vijayraghavan, *India Inc in favour of setting up in-house legal teams,* ECONOMIC TIMES (Feb. 10, 2012), https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-in-favour-of-setting-up-in-house-legal-teams/articleshow/11829809.cms (last visited Oct. 4, 2018).

10 *Ibid.*

11 *Rise of the GCs: An overview of the General Counsel Benchmarking Survey 2018,* LAWLEX.ORG (Apr. 30, 2018), https://lawlex.org/lex-pedia/the-rise-of-the-gcs-an-overview-of-the-general-counsel-benchmarking-survey-2018/16223 (last visited Oct. 4, 2018).

12 *Ibid.*

13 Arundathi Ramanathan, *E-Commerce firms expand their legal teams,* LIVEMINT (Jan. 13, 2016), https://www.livemint.com/Companies/C3v458HaVasN3nlr9mG2lM/Ecommerce-firms-expand-their-legal-teams.html (last visited Oct. 5, 2018).

14 Jennifer J. Salopek, *Mahindra's General Counsel embraces the evolving role of in-house counsel in India,* LEXOLOGY (Mar. 24, 2016) https://www.lexology.com/library/detail.aspx?g=3c6b7b5e-0247-4f8b-afdd-0f0aa704892d (last visited Oct. 5, 2018).

15 BCI Rules, Rule 49, Section II, Chapter II, Part VI, *Supra* Note 7.

16 *Ibid.*

17 The seven sections of Chapter II are as follows: Section I (Duty to the Court), Section II (Duty to the Client), Section III (Duty to Opponent), Section IV (Duty to Colleagues), Section V (Duty in imparting training), Section VI (Duty to Render Legal Aid) and Section VII (Restriction on other Employments).

18 BCI Rules, Rule 11, Section II, Chapter II, Part VI, *Supra* Note 7.

19 Sushma Suri v Government of NCT of Delhi, (1999) 1 SCC 330 (Supreme Court); Satish Kumar Sharma v Bar Council of HP, (2001) 2 SCC 365 (Supreme Court); Oma Shanker Sharma v Delhi Administration (1988) SCCOnline Del 19 (Delhi HC); Maliraddi H Itagi v High Court of Karnataka (2013) 5 SCC 332 (Supreme Court of India); Brihanmumbai Nagarpalika v Secretary, Bar Council of Maharashtra, 2012 SCC Online Bom 1567 (Bombay HC); Bhimrao Chaware v Registrar, Bombay HC, 2011 SCCOnline Bom 714 (Bombay High Court); Anees Ahmed v Delhi University 2002 SCCOnline Del 504 (Delhi High Court).

20 Deepak Aggarwal v Keshav Kaushik, (2013) 5 SCC 277 [Hereinafter 'Deepak Aggarwal'].

21 The three-judge bench in Deepak Aggarwal, has analyzed all the judgments on the scope of Rule 49 and is the latest judgment of the Supreme Court on this question of law.

22 Article 233(2) of the Constitution of India provides as follows:
"233. Appointment of district judges
(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years *an advocate or a pleader* and is recommended by the High Court for appointment".

23 A similar question of law was also analysed in Maliraddi H Itagi v High Court of Karnataka (2013) 5 SCC 332 (Supreme Court of India) and Satish Kumar Sharma v Bar Council of HP, (2001) 2 SCC 365 (Supreme Court).

24 Deepak Aggarwal, ¶ 2, *Supra* Note 20.

25 Deepak Aggarwal, ¶ 7, *Supra* Note 20.

26 Deepak Aggarwal, ¶ 21, *Supra* Note 20.

27 Deepak Aggarwal, ¶ 52, *Supra* Note 20.

28 Sushma Suri v Government of NCT of Delhi, (1999) 1 SCC 330 (Supreme Court).

29 Deepak Aggarwal, ¶ 91, *Supra* Note 20.

30 Deepak Aggarwal, ¶ 96, *Supra* Note 20.

31 Deepak Aggarwal, ¶ 99, *Supra* Note 20.

32 Jalpa Pradeepbhai Desai v Bar Council of India, AIR 2017 Guj 134 (Gujarat HC).

33 *Id.* at ¶ 5.1.

34 Ashwini Kumar Upadhyay v Union of India, 2018 SCC Online SC 1644 [hereinafter 'Ashwani Kumar'].

35 Ashwani Kumar, ¶ 1, *Supra* Note 34.

36 Ashwani Kumar, ¶ 16, *Supra* Note 34.

37 Despite the decision of the Supreme Court in Ashwani Kumar being the latest interpretation by the Supreme Court of Rule 49, the Supreme Court's decision in Deepak Aggarwal should be the prevailing decision as it deals with the subject matter closely i.e. in-house counsel.

38 BCI Rules, Rule 17, Section II, Chapter II, *supra* Note 7.

39 Judicial decisions interpreting Section 126 and 129 of the Evidence Act have arisen not only in the context of attorney-client privilege but also in the context of Section 8(1)(e) of Right to Information Act, 2005. For the purposes of this report, we will not be focusing on any jurisprudence relating to the Right to Information Act,

2005.

40 Municipal Corporation of Greater Bombay v Vijay Metal Works, MANU/MH/0282/1982 [hereinafter 'Vijay Metal Works'].

41 Vijay Metal Works, ¶ 1, *Supra* Note 40.

42 Vijay Metal Works, ¶ 3, *Supra* Note 40.

43 Vijay Metal Works, ¶ 4, *Supra* Note 40.

44 Larsen & Toubro Limited v Prime Displays (P) Ltd. and Ors, MANU/MH/0425/2002 (Bombay High Court) [hereinafter 'Larsen & Toubro'].

45 Larsen & Toubro, ¶ 4, *Supra* Note 44.

46 Larsen & Toubro, ¶ 5, *Supra* Note 44.

47 Larsen & Toubro, ¶ 5, *Supra* Note 44.

48 Larsen & Toubro, ¶ 8, *Supra* Note 44.

49 Larsen & Toubro, ¶ 24, *Supra* Note 44.

50 Larsen & Toubro, ¶ 16.4, *Supra* Note 44.

51 Opinion by Justice BN Srikrishna, available at https://docs.google.com/file/d/0Bxi2TzVXul5ZV2FJRXVvbFAxb2c/edit (Dec. 17, 2012)

52 Satish Kumar Sharma v Himachal Pradesh Bar Council, (2001) 2 SCC 365.

53 Sushma Suri v Government of NCT of Delhi, 1999 SCC (L&S) 208.

54 *See generally* MODEL RULES FOR PROF'L CONDUCT (AM. BAR ASS'N 2018), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Oct. 11, 2018).

55 *See generally* NY RULES OF PROF'L CONDUCT (NY BAR ASS'N 2017), available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671 (last visited Oct. 11, 2018) [Hereinafter 'NY Rules'].

56 *See generally* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers,* 70 OHIO ST. L J 73-139 (2009).

57 NY Rules, R. 1.13, 2.1, 5.1 and 6.1, *Supra* Note 55.

58 NY Rules, R. 1.6, 1.10-1.12, *Supra* Note 55.

59 NY Rules, R. 1.0(h), *Supra* Note 55.

60 Upjohn Co. v United States, 449 US 383 (1981) [Hereinafter '*Upjohn Co.*'].

61 Upjohn Co., Id. at 390-392.

62 Philadelphia v Westinghouse Electric Corp., 210 F. Supp. 483, 485 ("the most satisfactory solution, I think, is that, if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer, and the privilege would apply"). Also *see generally* Robert LoBue, *Is it Privileged? Privilege Issues for In-House Counsel* , 30 SPECIAL ISSUE: WHAT'S NEW IN ETHICS AND PRIVILEGE (1) Spring / Summer 2012, https://www.pbwt.com/content/uploads/2015/07/Is-It-Privileged-Privilege-Issues-for-In-House-Counsel.pdf (last accessed Oct. 12, 2018).

63 Upjohn Co., 394-395, *Supra* Note 60.

64 Upjohn Co. has been relied upon in *In re General Motors Ignition Switch Litigation,* 2015 WL 221057 (SDNY Jan. 15, 2015) and Wultz v Bank of China Limited, 2015 WL 362667 (SDNY Jan. 21, 2015).

65 *In re Sealed Case,* 737 F.2d 94, 99 (DC Cir. 1984).

66 NY Rules, R. 1.0(f), *Supra* Note 55.

67 NY Rules, Comment [7], [21] to R. 1.7, *Supra* Note 55.

68 NY Rules, Comment [34] to R. 1.7, *Supra* Note 55.

69 NY Rules, Comment [35] to R. 1.7, *Supra* Note 55.

70 For an instance of a Court directing an inquiry on whether it was reasonable for an in-house counsel to rely upon the explanation given by the CEO in relation to a fraud, *see* Federal Deposit Insurance Corporation v Clark, 978 F. 2d 1541 (10th Cir. 1992).

71 Legal Services Act, 2007 (Chapter 29), (United Kingdom) [hereinafter 'LSA']. LSA, s. 12 (1) states that in this Act "reserved legal activity" means: the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.

72 LSA, *Supra* Note 71, S. 12 (3) (LSA)- In this Act "legal activity" means— a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and (b) any other activity which consists of one or both of the following—(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

73 Solicitors Regulation Authority, SRA Handbook, https://www.sra.org.uk/solicitors/handbook/welcome.page (last accessed Nov. 23, 2018) [hereinafter 'SRA Handbook']. The SRA Handbook includes ten mandatory principles; an "outcomes-focused" Code of Conduct; bright-line rules governing a wide range of areas, including solicitors' accounts, authorisation requirements, practising requirements and the framework of practice; and separate Overseas Rules governing practice outside England and Wales.

74 Solicitors Regulation Authority, SRA Practice Framework Rules, 2011, https://www.sra.org.uk/solicitors/handbook/practising/content.page (last accessed Nov. 23, 2018) [hereinafter 'SRA Practice Framework Rules']. Rule 4 provides that in-house lawyers practising in England and Wales may only advise: their employer; a related body of their employer; a work colleague; and subject to certain restrictions, members of the public on a pro bono basis.

75 Solicitors Regulation Authority, SRA Principles 2011, https://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page (last accessed Nov. 23, 2018) [hereinafter 'SRA Principles']. The SRA Principles are mandatory and set out the fundamental ethical and professional standards to which all solicitors, including those who are in-house lawyers, must adhere. They stand alone, separate from the Code of Conduct, and so assume a greater importance.

76 Solicitors Regulation Authority, SRA Code of Conduct 2011, https://www.sra.org.uk/solicitors/handbook/code/content.page (last accessed Nov. 23, 2018) [hereinafter 'SRA Code of Conduct']. The Code of Conduct is divided into five sections: You and your client; You and your business; You and your regulator; You and others; Application waivers and interpretation.

77 SRA Practice Framework Rules, *Supra* Note 74.

78 SRA Practice Framework Rules, Rule 4, *Supra* Note 74 ("In-house lawyers practising in England and Wales may only advise: their employer; a related body of their employer; a work colleague; and subject to certain restrictions, members of the public on a pro bono basis.")

79 *Ibid.*

80 (1776) 20 St Tr 355.

81 *See* generally SRA Handbook, *Supra* Note 73 ("Act in the best interests of each client (Principle 4); act with integrity (Principle 2) − act in the best interests of each client (Principle 4); act with integrity (Principle 2); not act where

there is a conflict of interest (Chapter 3, Code of Conduct); and keep client information confidential and disclose any material relevant information of which they are personally aware (Chapter 4, Code of Conduct).")

82 SRA Practice Framework Rules, *Supra* Note 74.

83 SRA Practice Framework Rules, *Supra* Note 74. The relevant Outcomes are as follows: you do not attempt to deceive or knowingly or recklessly mislead the court (Outcome 5.1); you are not complicit in another person deceiving or misleading the court (Outcome 5.2); you comply with court orders which place obligations on you (Outcome 5.3); you do not place yourself in contempt of court (Outcome 5.4); where relevant, clients are informed of the circumstances in which your duties to the court outweigh your obligations to your client (Outcome 5.5); you comply with your duties to the court (Outcome 5.6); you ensure that evidence relating to 2. sensitive issues is not misused (Outcome 5.7); and you do not make or offer to make payments to witnesses dependent upon their evidence or the Outcome of the case (Outcome 5.8).

84 Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Communications (No. 2) [1972] 2 QB 129.

85 SRA Practice Framework Rules, Rule 4, *Supra* Note 74.

86 Three Rivers District Council v Governor & Company of the Bank of England (No 5) [2002] EWHC 2730 (Comm).

87 Three Rivers District Council v Governor & Company of the Bank of England (No 6) [2004] UKHL 48; [2005] 1 AC 624.

88 In re RBS Rights Issue Litigation [2016] EWHC 3161 (Ch).

89 Handy Client Guide to privilege, Herbert smith Freehills, March 2017.

90 Balabel v Air India [1988] Ch 317 Taylor LJ said, at p 331.

91 (1876) 2 Ch D 644.

92 (Case T-253/3 - Akzo Nobel Chemicals and Akcros Chemicals Ltd v Commission; and Case C- 550/07P - Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission).

93 SRA Practice Framework Rules, Rule 4, *Supra* Note 74.

94 SRA Handbook, Chapter 3, *Supra* Note 73.

95 SRA Practice Framework Rules, Outcome 3.5, *Supra* Note 74.

96 SRA Practice Framework Rules, Outcome 3.4, *Supra* Note 74.

97 Bristol and West Building Society v Mothew (t/a Stapley & CO) [1998] Ch. 1.

98 [2005] UKHL 8, [2005] 1 W.L.R. 567.

99 *Ibid.*

100 SRA Practice Framework Rules, Outcomes 3.1, 3.2 and 3.3*, Supra* Note 74.

101 SRA Practice Framework Rules, Outcome 3.2 and 3.3, *Supra* Note 74.

102 Apart from the Legal Professional Act, 1966, the following laws govern legal services in Singapore: Legal Profession (Qualified Persons) Rules 2015, Legal Profession (Professional Conduct) Rules, 2015, Legal Profession (Naming of Law Firms) Rules, Business Registration Act (for law practices that are self-proprietorships or partnerships), Part VIA of the Legal Profession Act, Legal Profession (Law Corporation) Rules and Companies Act (for law corporations), Legal Profession Act (Part VIB), Legal Profession (Limited Liability Law Partnership) Rules and Limited Liability Partnerships Act (for limited liability law of partnerships)

103 Singapore Corporate Counsel Association, (Oct. 13, 2018, 10:04 AM), https://www.scca.org.sg/faq (last accessed Oct. 26, 2018).

104 SCCA, Code of Ethics Standards of Professional Conduct for In-House Counsel, (Oct. 10, 2018, 11:24 PM), https://www.scca.org.sg/our-code-ethics.

105 In May 2017, the senior Minister of State for Law Mrs. Indranee Rajah, during her speech in Committee of Supply Debate 2017 said that Ministry is monitoring closely the progress and adoption of SCCA's competency framework which may be made mandatory in the future after considering the developments in the in-house counsel space. Indranee Rajah, Minister of State for Law, Speech during the Committee of Supply Debate 2017, (Oct. 10, 2018, 11:25 PM) https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/speech-by-senior-minister-of-state-for-law--indranee-rajah--duri0.html.

106 SCCA, Code of Ethics Standards of Professional Conduct for In-House Counsel – Definitions, (Oct. 10, 2018, 11:24 PM), https://www.scca.org.sg/our-code-ethics.

107 S. 2(1) Interpretation Clause, Legal Professional Act (Cap 161) [Ordinance 56/1966]; [hereinafter "Legal Professional Act"].

108 *Ibid.*.

109 SCCA, Code of Ethics Standards of Professional Conduct for In-House Counsel –Confidentiality, https://www.scca.org.sg/our-code-ethics (Oct. 10, 2018, 11:24 PM).

110 Gelatissimo Ventures (S) Pte Ltd & Ors v. Singapore Flyer Pte Ltd [2010] 1 SLR 833 [hereinafter referred Gelatissimo].

111 Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Brewries (Singapore) Pte Ltd and Other Appeals [2007] 2 SLR (R) 367 [hereinafter referred 'Skandinaviska'].

112 Singapore Evidence Act [Ordinance 3/1893].

113 ARX v. Comptroller of Income Tax [2016] SGCA 56 (Sing.) [hereinafter referred "ARX Case"].

114 Section 128(1),The Evidence Act (Ordinance 3/1893) ("A legal counsel in an entity shall not at any time be permitted, except with the entity's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal counsel, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his employment as such legal counsel, or to disclose any legal advice given by him to the entity, or to any officer or employee of the entity, in the course and for the purpose of such employment.")

115 *Ibid.* ("Where a corporation — (a) is the holding company of another corporation; (b) is a subsidiary of another corporation; or (c) is a subsidiary of the holding company of another corporation.*)*

116 Singapore Evidence Act [Ordinance 3/1893].

117 Section 128A, Singapore Evidence Act [Ordinance 3/1893] ("(a) any communication made in furtherance of any illegal purpose; (b) any fact observed by any legal counsel in an entity in the course of his employment as such legal counsel showing that any crime or fraud has been committed since the commencement of his employment as such legal counsel; (c) any communication made to the legal counsel which was not made for the purpose of seeking his legal advice; and (d) any document which the legal counsel was made acquainted with otherwise than in the course of and for the purpose of seeking his legal advice.")

118 Three Rivers District Council v. Bank of England (No 5) [2003] EWHC 2565 (Comm) (Gr. Brit.) [hereinafter

Three Rivers No.5].

119 Pratt Holdings Pty Ltd v. Commissioner of Taxation [2004] FCAFC 122 (Aus.) [hereinafter "Pratt Holdings"].

120 *In Re* The RBS Rights Issue Litigation [2017] EWHC 1217 (CH) (Gr. Brit.).

121 ARX Case *Supra* note 113.

122 The Legal Professional Act, 1976 (Malaysia) as available at http://www.malaysianbar.org.my/laws/LPA.pdf (last accessed Oct. 25, 2018) [hereinafter "Malaysian LPA"]

123 *Id.*, Malaysian LPA, Section 3.

124 Malaysian LPA, Section 3, *Supra* Note 122. Under Section 3 of the act, "advocate and solicitor", and "solicitor" where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.

125 Malaysian LPA, Section 35(1), *Supra* Note 122.

126 Legal Profession (Publicity) Rules, 2001, http://www.malaysianbar.org.my/legal_profession_publicity_rules_2001/ [hereinafter "Publicity Rules"].

127 Malaysian LPA, Section 38, *Supra* Note 122.

128 Rayuan Sivil No W-02-345-1999 (24 March 2006) (Abdul Kadir Bin Sulaiman, Tengku Baharuddin Shah Bin Tengku Mahmud JJCA & Azmel Bin Haji Maamor J).

129 Section 129 of the Evidence Act, 1950 ("No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.").

130 Legal (Practice and Etiquette) Rules 1978, Rule 44(b) http://www.malaysianbar.org.my/legal_profession_practice_etiquette_rules_1978/rule_44._advocate_and_solicitor_not_to_actively_carry_on_any_trade.html (last accessed Nov. 23, 2018).

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137 *A Balancing Act: Cost-Benefit Analysis of Reforming India's Legal Services Market,* Nathan Associates**,** p.15 (May 2016) https://www.nathaninc.com/wp-content/uploads/2017/10/Legal-Services-in-India.pdf [hereinafter Nathan Report].

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139 Deloitte Report, *Supra* Note 1.

140 *See* Ashish Nanda, David B. Wong & Bryon Fong, *Mapping India's Corporate Law Firm Sector in* DAVID B. WILKINS, VIKRAMADITYA S. KHANNA & DAVID M. TRUBEK (ED.), THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALISATION 69-114 (2018) for an in-depth analysis of the founders of each of these law firms.

141 *Bloomberg v Reuters M&A '17 league table special: AZB gains on S&R, SAM, CAM,* LEGALLYINDIA (Jan. 4, 2018) https://www.legallyindia.com/corporatemna/azb-tops-all-charts-in-bloomberg-and-tr-s-value-volume-and-growth-rankings-cam-khaitan-jsa-shrink-00011130-8969 (last accessed Oct. 25, 2018).

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143 *Cyril Amarchand Mangaldas retracts clean chit given to Chandna Kocchar*, THE HINDU BUSINESSLINE (Oct. 23, 2018) https://www.thehindubusinessline.com/money-and-banking/law-firm-cyril-amarchand-mangaldas-withdraws-report-that-gave-clean-chit-to-kochhar/article25301232.ece (last accessed Oct. 26, 2018).

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146 *See* Judicial Analysis of Rule 43 and 49 of Chapter II in Deepak Agarwal, *Infra* p. 3-5.

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148 Jalpa Pradeepbhai Desai v Bar Council of India, AIR 2017 Guj 134 (Gujarat HC).

149 *Ibid.*

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153 Umakanth Varottil, *The Impact of Globalisation and Cross-Border Mergers & Acquisitions in the Legal Profession in India* in DAVID B. WILKINS, VIKRAMADITYA S. KHANNA & DAVID M. TRUBEK (ED.), THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALISATION 519-548 (2018).

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165 *Law firms cant agree on LLP conversion as Trilegal waits for BCI clarification,* LEGALLYINDIA (Aug. 6, 2010) https://www.legallyindia.com/law-firms/law-firms-cant-agree-on-llp-conversion-as-trilegal-waits-for-bci-clarification-20100806-1179 (last accessed Oct. 26, 2010).

166 *Ibid.*

167 NY Rules, [3] to R. 7.1, *supra* Note 55.

168 NY Rules, R. 7.3, *supra* Note 55. Solicitation is defined as any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or target at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

169 Florida Bar v Went for It, Inc., 515 US 618 (1995) (US Supreme Court); Shapero v Kentucky Bar Association, 486 US 466 (1988).

170 Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millenium with Disparate Standards*, 75 WASH. L. REV. 785 (2000).

171 NY Rules, R. 1.0(f), *supra* Note 55.

172 LSA, *Supra* Note 71.

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174 SRA Code of Conduct, Rule 7.01, *Supra* Note 76 ("Misleading or inaccurate publicity- Publicity must not be misleading or inaccurate; Rule 7.02: Clarity as to charges- Any publicity relating to your, or your firm's, charges must be clearly expressed. In relation to practice from an office in England and Wales it must be clear whether disbursements and VAT are included; Rule 7.03: Unsolicited approaches in person or by telephone- (1) You must not publicise your firm or practice by making unsolicited approaches in person or by telephone to a member of the public; (2)"Member of the public" does not include: (a) a current or former client; (b) another firm or its manager; (c) an existing or potential professional or business connection; or (d) a commercial organisation or public body")

175 SRA Code of Conduct, Rule 7.03(1), *Supra* Note 76. ("Rule 7.03(1) prohibits you from making unsolicited approaches, either in person or by telephone, to a "member of the public". This is intended to protect the public from the intrusiveness and pressure of unsolicited telephone calls and approaches in person. This rule, therefore, bans what is often termed "cold calling" and prohibits, for example, knocking on doors, approaching people newly arrived at ports of entry, approaching someone in the street, in a hospital or at the scene of an accident, or handing out leaflets in the street. The rule also prohibits approaching a member of the public (either in person, e.g. in the street or by telephone) to conduct a survey which involves the collection of contact details of potential clients, or otherwise promotes your firm's practice. See also Rules 7.03, 7.05 and 9.02.

176 SRA Handbook, Chapter 3, *Supra* Note 73.

177 SRA Practice Framework Rules, Outcome 3.5, Chapter 3, *Supra* Note 74.

178 *See Infra* Page 12.

179 SRA Handbook, Chapter 3, *Supra* Note 73. ("Where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if: (a) you have explained the relevant issues and risks to the clients and

you have a reasonable belief that they understand those issues and risks; (b) all the clients have given informed consent in writing to you acting; (c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and (d) you are satisfied that the benefits to the clients of you doing so outweigh the risks. where there is a client conflict and the clients are competing for the same objective, you only act if: (a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks; (b) the clients have confirmed in writing that they want you to act, in the knowledge that you act, or may act, for one or more other clients who are competing for the same objective; (c) there is no other client conflict in relation to that matter; (d) unless the clients specifically agree, no individual acts for, or is responsible for the supervision of work done for, more than one of the clients in that matter; and (e) you are satisfied that it is reasonable for you to act for all the clients and that the benefits to the clients of you doing so outweigh the risks.")

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181 *Costs and Legal Aid,* SOLICITORS REGULATION AUTHORITY http://www.sra.org.uk/consumers/using-solicitor/costs-legal-aid.page (last accessed Oct. 26, 2018).

182 S. 131(1)(a), Legal Profession Act (Cap. 161), Ordinance 57 of 1966. [Hereinafter referred "Legal Profession Act"].

183 *Ibid.*

184 Legal Profession (Law Practice Entities) Rules, 2015 (G.N. No. S 699/2015) R.17 [Hereinafter referred "Legal Entities Rule"].

185 Legal Profession Act, S. 138(1), *Supra* Note 182.

186 Legal Profession Act, S. 140, *Supra* Note 182.

187 Legal Profession Act, S. 136, *Supra* Note 182. ("Section 136: (1)The Minister may make rules for the purposes of this Division. (2)Without prejudice to the generality of subsection (1), any rules made under that subsection may — (a)prescribe anything which may be prescribed under this Division; (b)provide for restrictions to be imposed on persons or classes of persons who may be partners in a law firm; (c)provide for the payment of fees (including administrative fees and processing fees) and other charges for applications made under this Division or any rules made under this Division, and for related matters; (d)provide for the suspension, revocation or lapsing of any law firm licence; (e)provide for the keeping of accounts by a law firm and for the matters set out in section 72; (f)exempt any person or entity or any class of persons or entities from, or modify the application in relation to any person or entity or any class of persons or entities of, any provision of this Division; and (g)prescribe such transitional, savings, incidental, consequential or supplementary provisions as may be necessary or expedient.")

188 Legal Entities Rules, R. 6(1)(b), *Supra* Note 184.

189 *Ibid.*

190 Legal Entities Rules, R. 7, *Supra* Note 184.

191 The firm can have name of two more partners also. And with the approval of Director of Legal services can consist of wholly or partly of the name or part of the name of any former sole proprietor or former partner of the law firm.

192 Legal Entities Rules, R. 10(1), *supra* note 184.

193 Legal Profession (Publicity Rules), 1998 (G.N. No. S 533/1998) R. 2 [Hereinafter referred 'Publicity Rules'].

194 *Id* at R. 6(2); *Also See* Legal Profession (Professional Conduct) Rules, 2015 (G.N. No. S 706/2015) r.43 "Responsibilities relating to publicity within Singapore" [Hereinafter referred 'Professional Conduct Rules'].

195 Publicity Rules, R. 8(2)(a), *Supra* Note 193.

196 Publicity Rules, R. 10(2), *Supra* Note 193.

197 Publicity Rules, R. 11, *Supra* Note 193.

198 Publicity Rules, R. 7(1)(a), *Supra* Note 193.

199 Publicity Rules, R. 7(2): Publicity Rules, R. 7(2), *Supra* Note 193. ("For the purpose of these Rules, publicity shall be considered to be misleading, deceptive, inaccurate or false if — (a)it contains a material misrepresentation; (b)it omits to state a material fact; (c) it contains any information which cannot be verified; or (d)it is likely to create an unjustified expectation about the results that can be achieved by the advocate and solicitor or his firm.")

200 Professional Conduct Rules, R. 44, *Supra* Note 194.

201 Publicity Rules, R. 7(1)(b), *Supra* Note 193.

202 Professional Conduct Rules, R. 20(1), *Supra* Note 194.

203 Professional Conduct Rules, R. 21, *Supra* Note 194.

204 Professional Conduct Rules, R. 22, *Supra* Note 194.

205 Legal Entities Rules, R. 24, *Supra* note 184.

206 Professional Conduct Rules, R. 2 and Schedule 3, *Supra* Note 194.

207 Professional Conduct Rules, R. 17(2)(a), *Supra* Note 194.

208 Professional Conduct Rules, R. 17(3)(a), *Supra* Note 194.

209 Professional Conduct Rules, R. 17(3)(b), *Supra* Note 194.

210 Legal Profession (Group Law Practice) Rules, 2018, http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=7045&Itemid=332 (last accessed Oct. 26, 2018)

211 Rule 44 (b) of (Practice and Etiquette) Rules, 1978. http://www.malaysianbar.org.my/legal_profession_practice_etiquette_rules_1978/rule_44._advocate_and_solicitor_not_to_actively_carry_on_any_trade.html (last accessed Oct. 26, 2018).

212 Legal Profession (Publicity) Rules, 2001, Rule 5, http://www.malaysianbar.org.my/legal_profession_publicity_rules_2001/ (last accessed Nov. 23, 2018) (" Rule 5 Publicity within Malaysia- 1) An Advocate and Solicitor who publicizes his practice or the practice of his firm within Malaysia-(a) shall not do so- (i) in a manner as will be likely to diminish public confidence in the legal profession or to otherwise bring the legal profession into disrepute; or (ii) in a manner as may reasonably be regarded as being ostentatious, in bad taste, misleading, deceptive, inaccurate, false, sensational, intrusive, offensive or in any other way unbefitting the dignity of the legal profession; (b) shall not in the publicity- (i) make any claim that he or any other Advocate and Solicitor practising in his firm is a specialist or expert in any area of practice; (ii) make any direct or indirect reference to the number or proportion of cases that have been successfully undertaken by him or his firm, or to his earnings or the earnings of any other Advocate and Solicitor practising in his firm; (iv) state anything that would be construed as offering any inducement to, or imposing any duress, upon any person as a means of obtaining professional business for himself or his firm; (v) make any statement relating to the rates charged by him or his firm, or to his or his firm's methods of charging; (vi) make any laudatory references to himself or his firm, or directly or indirectly extol the quality of the professional services provided by him or his firm; (vii) make any comparison with, or criticism in relation to, the

charges for, or the quality of, services provided by any other Advocate and Solicitor or firm; (viii) incorporate the armorial bearings of the Malaysian Bar and Bar Council; or (ix) refer to the appointment of an Advocate and Solicitor currently or previously practising in his firm to a judicial office. (2) Without prejudice to subparagraph 5(1)(b)(ix), an Advocate and Solicitor who publicizes the practice of his firm may, in the publicity, include in the name of his firm the name of an Advocate and Solicitor who had been previously practising in his firm and who has been appointed to a judicial office, where prior to that appointment such name was part of the name of the firm. (3) For the purposes of subparagraph (1)(a)(ii), a publicity is misleading, deceptive, inaccurate or false if- (a) it contains a material misrepresentation of fact; (b) it omits to state a material fact; (c) it contains any information which cannot be reasonably verified; or (d) it is likely to create an unjustified expectation about the results that can be achieved by the Advocate and Solicitor or his firm.)

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227 *Supra* Page 9.

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238 SRA Code of Conduct, R. 4.03, *Supra* Note 74 ("Duty not to put confidentiality at risk by acting- If you are a lawyer or other fee earner and you personally hold, or your firm holds, confidential information in relation to a client or former client, you must not risk breaching confidentiality by acting, or continuing to act, for another client on a matter where: (a) that information might reasonably be expected to be material; and (b) that client has an interest adverse to the first-mentioned client or former client.")

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"87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—

(a) not apply to—

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.")

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341 Section 37, Arbitration and Conciliation Act, 1996.

37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:--

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

342 Section 50, Arbitration and Conciliation Act, 1996:
50. Appealable orders.—
(1) An appeal shall lie from the order refusing to—
(a) refer the parties to arbitration under section 45;
(b) enforce a foreign award under section 48, to the Court authorised by law to hear appeals from such order.
(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

343 Justice BN Srikrishna Report, *Supra* Note 260, p.69.

344 Arbitration Amendment Bill, Clause 8 and 12, *Supra* Note 325.

345 Justice BN Srikrishna Report, *Supra* Note 260, p.71.

346 Arbitration Amendment Bill, Clause 9, *Supra* Note 325.

347 Justice B.N. Srikrishna Report, *Supra* Note 260, p.72.

348 Arbitration Amendment Bill, Clause 9, *Supra* Note 325.

349 Justice B.N. Srikrishna Report, *Supra* Note 260, p.73.

350 *Konkan Railway Corporation Ltd & Ors v. Mehul Construction Co.,* (2000) 7 SCC 201; *Ador Samia (P) Ltd. v. Peekay Holdings Ltd.*, (1999) 8 SCC 572

351 *SBP & Co. v. Patel Engineering Ltd. and Another,* (2005) 8 SCC 618

352 Section 6B, Arbitration and Conciliation Act, 1996 reads: *The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court*

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354 *Ibid.*

355 *Ibid.*

356 Tejas Karia, Surjendu Sankar Das and Avlokita Rajvi, *Analysis of the Arbitration and Conciliation (Amendment) Bill, 2018,* Mondaq (Mar. 13, 2018) http://www.mondaq.com/india/x/682332/Arbitration+Dispute+Resolution/Analysis+Of+The+Arbitration+And+Conciliation+Amendment+Bill+2018 (last accessed Aug. 24, 2018) [hereinafter 'Karia et. al.'].

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"A Foreign Qualified Independent Legal Practitioner, for the first two years from the Date of Commencement:

(a) Shall not be allowed to set up an office within the territory of India; (b) Shall not employ or retain any foreign lawyer or Advocate on a permanent basis, within the territory of India; (c) Shall not enter into any arrangement with an Indian law firm or Indian lawyers, which may be construed as a partnership in contravention of this Chapter or Chapter IV; (d) Shall register with the Foreign Practitioners' Registration Board and practice under the name mentioned in his/her Passport; (e) May be engaged by an Advocate or a firm of Advocates, to the extent that it is not in contravention of any provision of this Act; (f) May engage with corporations as their dedicated counsel on matters that they are permitted to advice on under this Act.27; (g) Subject to the provisions of this Act, may by 'fly-in, fly-out' after registration under this Act; (i) provide legal advice on the law of the jurisdiction in which he has qualified and holds a license to practice in; (ii) represent its clients in international arbitration during and post the initiation of the arbitration proceedings; (iii) represent its clients in conciliation and mediation; or (iv) provide legal advice on public and private international law.

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410 Section 47 of the Advocates Act, 1961 provides as follows:
"47. Reciprocity.—(1) Where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents citizens of India from practising the profession of law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practise the profession of law in India.
(2) Subject to the provisions of sub-section (1), the Bar Council of India may prescribed the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognised for the purpose of admission as an advocate under this Act."

411 SILF Comments, Reciprocity, *Supra* Note 371.