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Affiliations: Foreign Law Firms' Path into India

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Affiliations: Foreign Law Firms' Path into India

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I. INTRODUCTION

Everyone seems to be in India. All but one of the top ten 2011 U.S. Fortune 500 companies have a presence in the Indian market.¹ The numbers continue to rise, fueled by India's economy, which is expected to grow eight percent in 2011.² In April 2010, U.S. Treasury Secretary Timothy Geithner sought to further strengthen the financial ties between India and the United States on a trip to India. He stressed that cooperation between the two nations was "critically important to the success of global efforts to create conditions for a more stable global financial system."³ Nonetheless, while many well-known American companies have made a name for themselves in India, including McDonald's, Ford Motor Co., and Chevron Corp., U.S.-based international law firms such as Cravath, Swain & Moore, Skadden, Arps, Slate, Meagher & Flom, and Jones Day do not have a formal presence in the country. This is because foreign law firms⁴ are banned from the practice of law in India.

In 2009, in the long-awaited *Lawyers Collective v. Indian Bar Council* case, the Bombay High Court reaffirmed that foreign law firms are not allowed to practice law in India.⁵ The court held that both litigation and corporate advisory work

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1. See *About Us*, BERKSHIRE HATHAWAY, <http://www.berkshireinsurance.com/about-us/> (last visited Dec. 20, 2011) (Berkshire India is a majority-owned non-direct subsidiary of Berkshire Hathaway Inc. incorporated in India); *About Us: India*, WALMART STORES, <http://walmartstores.com/AboutUs/276.aspx> (last visited Dec. 20, 2011) (Walmart India has seven stores as of August 31, 2011, and a joint venture with Bharti Enterprises operating as Bharti Walmart Pvt. Ltd.); CONOCO PHILLIPS, <http://www.conocophillipslubricants.com/marketers-distributors/Default.aspx> (last visited Dec. 20, 2011); *Contact Us—Asia Pacific*, CHEVRON, <http://www.aronite.com/contact/asia.asp> (last visited Dec. 20, 2011) (Chevron maintains a manufacturing plant and sales office in India); FORD MOTOR COMPANY, <http://www.india.ford.com/servlet/Satellite?pagename=DFY/IN> (last visited Dec. 20, 2011) (Ford operates in India via Ford India Private Limited); *GE in India*, GENERAL ELECTRIC, http://www.ge.com/in/company/factsheet_in.html (last visited Dec. 20, 2011) (GE has over 13,000 employees in India); *General Motors India Strengthens Its Network in Tamil Nadu*, GENERAL MOTORS, http://media.gm.com/content/media/in/en/news.detail.html/content/Pages/news/in/en/2011/0721_GM_India_strengthens_Network_in_Tamil_Nadu (last visited Dec. 20, 2011) (General Motors operates in India as General Motors India); *India*, BANK OF AMERICA, <http://corp.bankofamerica.com/business/bi/india> (last visited Dec. 20, 2011) (Bank of America operates five branch offices throughout India); Emily Wax, *GM Doing Booming Business in India*, WASH. POST (Oct. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/14/AR2010051405371.html>; *Where We Work*, EXXONMOBIL, http://www.exxonmobil.com/AP-English/about_where_india.aspx (last visited Dec. 20, 2011) (Exxon operates in India via three wholly owned Indian subsidiaries). Fannie Mae does not have any offices abroad. For the Fortune 500 list, see *Global 500 2011*, CNNMONEY, <http://money.cnn.com/magazines/fortune/global500/2011/countries/US.html> (last visited Dec. 20, 2011).
 2. India's GDP is expected to increase by 8% in 2011 and 8.4% in 2012. See *The Global Outlook in Summary, 2009–2013*, WORLD BANK, <http://web.worldbank.org/external/default/main?theSitePK=659149&pagePK=2470434&contentMDK=20370107&menuPK=659160&piPK=2470429>; see also Heather Timmons, *America and India Make a Pledge to Cooperate on Economic Issues*, N.Y. TIMES (Apr. 6, 2010), <http://www.nytimes.com/2010/04/07/business/global/07rupee.html?hpw>.
 3. See Timmons, *supra* note 2.
 4. For the purposes of this note, "foreign law firm" or "foreign firm" refers to U.S. or U.K. law firms.
 5. *Lawyers Collective v. Bar Council of India*, Writ Petition No. 1526/1995 (Bombay H.C. 2009), available at <http://barandbench.com/userfiles/files/File/LawyersCollectiveforeignfirmsBbayHC.pdf>.

constitute the practice of law and that India's Advocates Act⁶ limited such work to Indian citizens and, by extension, Indian law firms.⁷ Together, the Advocates Act and *Lawyers Collective* have created an unfair trade barrier between the United States and India regarding the practice of law. On the one hand, Indian-owned law firms may open offices in the United States and Indian-trained lawyers can be admitted to practice law in the United States.⁸ However, similar avenues are not open to U.S. law firms who desire to practice law in India.

Legal scholars and journalists have paid close attention to India's regulations against the foreign practice of law⁹ and the debate as to whether foreign firms should be formally permitted to practice law in India.¹⁰ They have emphasized the importance of a formal regulatory framework, as if a court's strict interpretation of the regulations will be directly reflected in the market. The market, however, has a mind of its own. Over the past fifteen years—as both the political debate and the *Lawyers Collective* decision have continued—foreign law firms have been busy forging informal paths into the Indian legal market by establishing strategic affiliations with Indian law firms. This “India boom”—guided by market forces and, as a practical matter, foreign law firms' efforts to better serve their corporate clients—has seen a number of foreign law firms build relationships with local Indian firms.¹¹ Though foreign law firms continue to formally do their work in India via branch offices in Singapore, London, or Hong Kong, forming affiliate relationships with Indian law firms has become increasingly popular. Thus, one might question whether India's formal regulatory framework is effectively keeping foreign law firms out of the Indian legal market.

There is no question that the Advocate's Act, as reinforced by the *Lawyers Collective* decision, presents foreign law firms with a legal and regulatory hurdle. However, this note argues, based on independent research, discussions with scholars,

The city Mumbai was formerly called Bombay, but the court still uses the prior name. See *infra* Part III for a discussion of the procedural developments in *Lawyers Collective*.

6. The Advocates Act, No. 25 of 1961, INDIA CODE [hereinafter *Advocates Act*], <http://www.sharmalawco.in/downloads/the%20advocates%20act%201961.pdf>.
7. See *Lawyers Collective* ¶¶ 45–49.
8. See, e.g., Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 85 (2010) (discussing an interview with an Indian attorney who, though already a licensed lawyer in India, was required to take a bar exam and receive an LL.M. from an American law school before practicing law in a U.S. firm).
9. “Foreign practice of law” refers to the practice of litigation and corporate advisory work by non-Indian law firms within India.
10. See, e.g., Krishnan, *supra* note 8 (discussing the liberalization debate); see also Jayanth K. Krishnan, *The Joint Law Venture: A Pilot Study*, 28 BERKELEY J. INT'L L. 431 (2010) (examining the joint venture as a model for foreign firms' entry and using Singapore as an example); Gitanjali Shankar & Amba Uttara Kak, *Litigation Versus Non-Litigation: 'Practice of Law' Under the Advocates Act*, 3 NAT'L U. JURID. SCI. L. REV. 299 (2010) (providing an analysis of the *Lawyers Collective* decision and arguing that the Bombay High Court misconstrued the Advocates Act). For journalist attention, see publications such as the *National Law Journal*, the *Wall Street Journal Law Blog*, and *Legally India*.
11. See *infra* Part IV.

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and both in-person and telephone interviews with Indian and foreign law firm partners,¹² that *Lawyers Collective*, although hyped in the media, will not negatively impact the current trend toward affiliations between foreign and Indian law firms.¹³ Indeed, this note argues that, although *Lawyers Collective* may have the effect of subjecting such affiliations to stricter scrutiny by the Bar Council of India (BCI or the “Council”) and the Indian government,¹⁴ it will nevertheless cause foreign firms to not only reevaluate but further solidify their relationships with Indian firms in order to further demonstrate compliance with the Advocates Act. As one U.S. foreign firm partner explained before the *Lawyers Collective* decision, “[r]egardless of which model [of affiliation a foreign firm] go[es] with, at least they are starting to look at different variations intelligently,” and law firms are engaging in “a very high level of analysis . . . , and that’s a good thing.”¹⁵ This type of activity is likely to become more pronounced after *Lawyers Collective*¹⁶ because the opinion directed the government of India to take action and make an “appropriate decision on the matter as expeditiously as possible,”¹⁷ and due to a recent complaint filed in the Madras High Court against foreign law firms in India.¹⁸

Moreover, this note argues that those foreign law firms that have responded to India’s regulatory constraints by forming “best friends” affiliations with Indian law firms have identified the most effective solution to the problem. These “best friend” affiliations—which often involve joint training, practice area development, and

12. Discussions were conducted with two scholars via phone and e-mail on October 11 and November 13, 2009. Interviews with two international partners were conducted on November 23 and December 12, 2009. Interviews in India with two Indian partners were conducted on December 28 and 29, 2009. E-mail conversations were exchanged with one international partner on November 22, 2009, and January 12, 2010. I have granted confidentiality to the subjects, whose names have been omitted to preserve such confidentiality.

13. See Vinaya Natarajan, *Looking Past the Hype: Lawyers Collective v. Chadbourne, Ashurst, and White & Case*, BAR & BENCH (Dec. 17, 2009, 11:00 AM), <http://barandbench.com/brief/3/402/all/looking-past-the-hype-lawyers-collective-v-chadbourne-ashurst-and-white-case>.

It has moved neither forward nor backward, but has reiterated the existing status quo. By bringing non-litigious matters within the purview of the Advocates Act, the Court has not disturbed the functioning of any international firm—however, it may just end up as a thorn in the side of several Indian lawyers.

Id.

14. *Lawyers Collective* ¶ 59 (directing the Indian government to “take appropriate decision in the matter as expeditiously as possible”); see also Lance J. Rogers, *India Court Prohibits Foreign Law Firms from Establishing Branch Offices in India*, 26 *Laws. Man. on Prof. Conduct* (ABA/BNA) (Jan. 6, 2010).

15. Tom Young, *India’s Open Market*, INT’L FIN. L. REV., May 2007 (quoting London-based Nipun Gupta, a partner in White & Case’s India Practice), available at http://www.whitecase.com/news_05082007/.

16. In fact, Ashurst, which closed its India operations after *Lawyers Collective*, has recently announced a “best friends” affiliation with the firm India Law Partners. See Simon Peterson, *Ashurst Seals New Indian Alliance Agreement with Mumbai Firm*, LAW.COM (July 20, 2011), <http://www.law.com/jsp/article.jsp?id=1202503352254&slreturn=1>.

17. See *Lawyers Collective* ¶ 59.

18. See A.K. Balaji v. Gov’t of India, Writ Petition No. 5614/2010 (Madras H.C. 2010).

referral arrangements between an Indian law firm and a foreign law firm—best serve the client and do not violate the Advocates Act of 1961.

Part II of this note begins with a brief history of the growth and liberalization of India's economy. It also discusses the lack of liberalization in India's legal market and includes a survey of the current liberalization debate surrounding India's legal sector. Part III provides an introduction to both the Indian regulatory framework governing the foreign practice of law and relevant case law—including an overview of the Advocates Act of 1961 and the *Lawyers Collective* case, which together have prohibited foreign law firms from practicing law in India. Part IV then analyzes the different types of affiliate relationships that U.S. and other foreign law firms have formed with Indian law firms in light of the regulatory hurdles imposed by the Advocates Act and *Lawyers Collective*. Finally, Part V argues that, given the various affiliate relationships that foreign law firms have entered into, the *Lawyers Collective* decision and ongoing regulatory debate is somewhat moot. It concludes by suggesting that foreign law firms that have responded to regulatory conditions by forming “best friends” affiliate relationships with Indian law firms are in the best position to take advantage of the Indian legal market without violating Indian law.

II. LIBERALIZATION OF INDIA'S ECONOMY

A. Everyone but Lawyers?

India once had a completely closed economy. In 1991, India opened its borders to allow multinational corporations into the country through a number of financial and economic reforms.¹⁹ After these reforms, scores of Fortune 500 companies opened offices in India²⁰ and were, in fact, encouraged to do so by the Indian Government.²¹ This period has been referred to as India's time of economic “liberalization.”²² Foreign direct investment was “pouring in from companies such as Pepsi, General Motors, General Electric, IBM, Coca-Cola, [and] McDonald's.”²³ Although multinational corporations were warmly welcomed into India, the large U.S. and U.K. law firms that represented those corporations were not.²⁴ Instead, there has

19. See Surendra K. Kaushik, *India's Evolving Economic Model: A Perspective on Economic and Financial Reform*, 56 AM. J. ECON. & SOC. 69, 78 (1997), <http://webpage.pace.edu/skaushik/India'sEvolvingEconomicModel.pdf>; see also Shishir Sharma, *Issues Relevant for Foreign Companies Doing Business in India*, in DOING BUSINESS IN INDIA 275 (PLI Corp. Law and Practice, Course Handbook Ser. No. 11926, Feb.-Mar. 2007); Shardul Shroff, *An Overview of the Legal Regime Governing Capital Markets in India and Current Developments*, in DOING BUSINESS IN INDIA 55 (PLI Corp. Law and Practice, Course Handbook Ser. No. 18730, Feb.-Mar. 2009).

20. See *supra* note 1 and accompanying text.

21. See Sharma, *supra* note 19. For further discussion, see Krishnan, *supra* note 8, at 65 n.40 (citing, for example, ROB JENKINS, DEMOCRATIC POLITICS AND ECONOMIC REFORM IN INDIA (2000)).

22. See Sharma, *supra* note 19.

23. Kaushik, *supra* note 19, at 78–79.

24. Three foreign firms were, however, granted limited “liaison licenses” in 1994, though they became the subject of the *Lawyers Collective*. See *infra* Part III.

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been a significant increase in the number of Indian corporate law firms along with an internal movement to enforce regulations that keep foreign law firms out of India.²⁵

Despite India's economic growth and the increased demand for sophisticated corporate counsel in India, there is no question that foreign law firms seeking to assist their corporate clients face a number of legal and regulatory hurdles. Barriers include the Advocates Act of 1961, which banned the foreign practice of law, and the 2009 *Lawyers Collective* decision holding that litigation and non-courtroom corporate advisory work constitute the practice of law, and, therefore, are restricted to practice by Indian citizens. Alongside the imposition of these legal barriers, a policy debate has been raging as to whether foreign firms should be admitted into the country.

B. Debate For and Against Liberalization of the Legal Sector

Before *Lawyers Collective* called upon the Indian government to consider the issue of whether foreign law firms will be able to practice law in India (and, if so, in what capacity),²⁶ many interested parties actively lobbied for their respective sides by visiting and submitting comprehensive reports to the Indian Law Minister.²⁷ Australia lobbied the Indian government for change through the submission of one such report, which stated: "The Indian government is receptive to considering opening the market to foreign lawyers and easing restrictions on law firms in India. However, the [Indian] regulating body, the Bar Council of India, is opposed to attempts to liberalise the market for foreign lawyers."²⁸ The study further discussed the divide between the two regulatory bodies by noting that "[i]n 2007 the Indian Ministry of Law and Justice released a consultation paper proposing gradual liberalisation of the legal services sector," to which the BCI responded with a press release that reiterated "a previous resolution of the Council strongly opposing the entry of foreign lawyers and law firms."²⁹ Not surprisingly, the BCI has "refused to

25. See Krishnan, *supra* note 8, at 63–65. In fact, as corporate law practice in India has become lucrative, foreign consulting firms such as RSG Consulting have worked to capitalize on this growing market by preparing market studies of the Indian corporate legal sector for sale to interested firms and corporations for thousands of dollars. See RSG CONSULTING, <http://rsgconsulting.com/rsg-india> (last visited Dec. 24, 2011).

26. The *Lawyers Collective* decision asked the Indian government to resolve the matter. See *Lawyers Collective* ¶ 59. However, the Madras High Court will also consider the issue in the pending case *A.K. Balaji v. Ashurst*. See *A.K. Balaji v. Gov't of India*, Writ Petition No. 5614/2010 (Madras H.C. 2010).

27. As part of an overall lobbying effort, a number of GATS signatories have submitted reports to the Indian Government, Department of Commerce, and the BCI. See DEP'T OF COMMERCE, GOV'T OF INDIA, TRADE IN LEGAL SERVICES, http://commerce.nic.in/trade/consultation_paper_legal_services_GATS.pdf (summary of various countries' input).

28. INT'L LEGAL SERVS. ADVISORY COUNCIL, SUBMISSION ON LEGAL SERVS. TO DEP'T OF FOREIGN AFFAIRS AND TRADE IN RESPECT OF AUSTRALIA-INDIA FREE TRADE AGREEMENT FEASIBILITY STUDY 8 (June 2008) [hereinafter *ILSAC Submission*], <http://dfat.gov.au/fta/aifta/submissions/ILSAC/ILSAC.pdf>.

29. *Id.* (internal quotation marks omitted).

grant any foreign firm the right to practise” law in India, a power that the BCI retains under the Advocates Act.³⁰

The Law Society of England and Wales also lobbied the Indian government to ease restrictions on the foreign practice of law.³¹ In doing so, they joined forces with the India-U.K. Joint Economic Trade Committee (JETCO)³² to prepare a report that envisioned and advocated for a system that would “mirror[] the rights that Indian advocates enjoy in the United Kingdom.”³³ In the United Kingdom, unlike in the United States, local lawyers enjoy only a limited monopoly over legal services³⁴ and “[f]oreign lawyers may set up and operate as such with a minimum of formalities.”³⁵

In another lobbying effort, the U.K. Justice Secretary Kenneth Clarke recently visited India to meet with Indian Law Minister Salman Khurshid, the presidents of the BCI, and The Law Society of England and Wales to discuss the prospect of opening the Indian legal market to U.K. law firms.³⁶ Khurshid, like his Law Ministry predecessors, is amenable to liberalization, but the BCI officially continues to fight it.³⁷ Nonetheless, there have been reports that the BCI and the Law Society of England and Wales have been negotiating to see what the United Kingdom might provide in return if India were to grant entry to U.K. law firms.³⁸

Some of the arguments for and against the liberalization of India’s legal sector are summarized below.

30. *Id.*

31. Krishnan *supra* note 8, at 75–76.

32. JETCO is co-chaired by the Indian Minister of Commerce and Industry and the U.K. Secretary of State for Trade and Industry. *See* Press Release, Indian Ministry of Commerce & Indus., India-U.K. Joint Econ. and Trade Comm. Launched Historic Occasion (Jan. 13, 2005), http://commerce.nic.in/PressRelease/pressrelease_detail.asp?id=1558.

33. Ronald C. King, *Foreign Lawyers in Foreign Jurisdictions: Rights of Practice and Establishment Leveling the Playing Field*, 63 DEF. COUNS. J. 363, 366 (1996).

34. *Id.* at 364.

35. *Id.*

There are very few restrictions on the freedom of foreign lawyers to practice in England and Wales, although rights to conduct litigation or advocacy before U.K. courts generally are reserved to solicitors and barristers of the relevant U.K. jurisdiction, subject to exceptions under European Union law and Commonwealth custom.

Id. at 365.

36. *See* Ben Lewis, *A Breakthrough in India, or Another False Spring?*, LAW.COM (Oct. 6, 2011), http://www.law.com/jsp/article.jsp?id=1202517974087&A_Breakthrough_in_India_or_Another_False_Spring&slreturn=1.

37. *Govt Indicates It Will ‘Fast Track’ Decision on Foreign Law Firms*, ECON. TIMES (Sept. 26, 2011, 3:30 PM), http://articles.economictimes.indiatimes.com/2011-09-26/news/30204552_1_foreign-law-firms-legal-firms-indian-legal-fraternity.

38. *See id.*; *UK, India Agree on Law Firms*, HINDUSTAN TIMES (Sept. 27, 2011, 1:49 IST), <http://www.hindustantimes.com/UK-India-agree-on-law-firms/Article1-750523.aspx>; Brian Baxter, *India Leaves Door Ajar for U.K. Firms*, AM LAW DAILY (Sept. 29, 2011, 1:47 PM), <http://www.amlawdaily.typepad.com/amlawdaily/2011/09/india-foreign-firms.html>.

1. *Competition*

Those in favor of liberalization argue that the entry of foreign firms into the Indian legal market will raise competition and enhance the quality of transactional law in India—especially in terms of best practices, joint referrals, shared legal and technical knowledge, and improved professional norms.³⁹ Through various types of affiliation, discussed below, “[f]oreign law firms have already introduced higher standards and new techniques into the Indian market. Some Indian firms have quickly adopted them and this is expected to continue and should be encouraged.”⁴⁰ These affiliations bridge the gap in expertise between foreign and Indian firms in order to benefit the client. As one U.S. partner said, “We share . . . know how . . . [and] try to give the client the benefit of the expertise of our affiliate firm as well as our own.”⁴¹

Those Indian law firms against liberalization argue that they are “already globally competitive and need no support from foreign lawyers.”⁴² However, even firms that are against liberalization have nevertheless built strong working relationships with foreign law firms, perhaps to the discredit of the statement that the Indian firms are “already globally competitive.” For example, Indian law firm partner Lalit Bhasin⁴³, chairman of the Society of Indian Law Firms (SILF) and a vocal opponent of the entry of foreign firms, spoke of his referral network, which includes a number of foreign firms, as being essential to his practice, especially when working on multinational aviation transactions.⁴⁴

2. *Clients*

Those who want to formally open the Indian legal sector to foreign law firms argue that there is a lack of sophisticated Indian firms that can handle complex transactions for Indian clients.⁴⁵ RSG Consulting compiles a yearly “Top 40 Ranking” of Indian firms, which includes “capability” as one of its measures.⁴⁶ In 2011, only four Indian firms scored an eight or above out of ten in this category, which examines the size of the law firm, its capability by practice areas and locations,

39. Krishnan, *supra* note 10, at 433.

40. Murali Neelakatan, *Foreign Firms Raise Standards*, INDIA BUS. L.J., Nov. 2007, at 15, available at <http://www.indilaw.com/pdfs/Is%20India%20ready%20for%20foreign%20lawyers.pdf>.

41. Interview with U.S. lawfirm partner (Nov. 13, 2009).

42. Krishnan, *supra* note 8, at 81 (internal quotation mark omitted).

43. Lalit Bhasin is a partner at the Indian law firm Bhasin & Co.

44. Interview with Lalit Bhasin, Partner, Bhasin & Co. (Dec. 28, 2009).

45. This means that Indian clients with complex needs are forced to pay whatever the few sophisticated Indian firms charge. While the fees may ultimately be less than what foreign firms charge, there is an argument that clients are not even “getting what they pay for” based on the quality of Indian legal services. See Krishnan, *supra* note 8, at 76–78.

46. *Top 40 Indian Law Firms*, RSG INDIA LAW CENTRE (July 11, 2011), <http://rsg-india.com/rankings>.

and feedback from clients on the firm's ability to handle large-scale work.⁴⁷ This is not good news for Indian clients.

Advocates of liberalization also argue that allowing foreign lawyers into India would reduce the costs that some Indian clients "currently spen[d] working across international borders" and travelling to foreign firms' field offices.⁴⁸ As one U.K. partner who practices in Dubai explains, "Foreign law firms . . . are in India already. They may be based in the U.K. or New York . . . but they are already providing legal advice in India from afar and Indian clients—many of whom are increasingly global players—are already using their services on a regular basis."⁴⁹ Those against liberalization are skeptical of foreign attorneys' motivations and say that the U.S. market is already saturated so U.S. lawyers are looking for new employment opportunities, and Indian firms' rates are already affordable to their clients.⁵⁰

3. *The Fight for the Best New Indian Lawyers*

The disparity between the cost of living and salaries in India and abroad also informs the liberalization debate. Indian law firms against liberalization fear losing demand for the junior associate jobs available at their firms to a (perhaps higher-paying) foreign firm; whereas, firms in favor of liberalization argue that the best Indian students are already choosing to go work for elite foreign firms abroad and that liberalization of the legal sector would not significantly affect lower-paying Indian firms.⁵¹ Anti-liberalization firms respond that while Indian citizens could technically go abroad to study law and find work, it is, in practice, difficult because of high tuition, high cost of living, and the stressful nature of life abroad.⁵² Moreover, based on actual cost of living, local firms can, in fact, offer comparable salaries to foreign firms.⁵³

Multiple Indian law firm partners interviewed have pointed out that some family-run Indian law firms do not compensate their partners or associates at nearly comparable rates as foreign firms, and that there is a disconnect in the salaries paid to named family partners and salaries paid to the other partners and associates in such firms.⁵⁴ Additionally, one partner argues that the entry of foreign firms into the Indian market would force the family-run Indian firms to change their structure or their pay system or, alternatively, lose all of their best associates to better paying foreign firms.⁵⁵

47. *Id.*

48. Krishnan, *supra* note 8, at 78.

49. Nigel Thompson, *Indian Clients Will Benefit*, INDIA BUS. L.J., Nov. 2007, at 17.

50. Krishnan, *supra* note 8, at 82.

51. *Id.* at 79–80.

52. *Id.* at 79.

53. *Id.* at 83.

54. Interview on file with author (Dec. 29, 2009).

55. *Id.*

4. *Reciprocity*

Given the unclear reciprocity provisions of the Advocates Act,⁵⁶ confusion and debate remain. Specifically, the Act permits a non-Indian lawyer to practice law in India if the foreign lawyer's home country allows Indian citizens to practice law and does not subject Indian citizens to "unfair discrimination." Anti-liberalization proponents stress these reciprocity provisions and note that they do not want to open up the legal sector because foreign jurisdictions do not grant complete and immediate reciprocity.⁵⁷ For example, they note that the United States unfairly prevents Indian citizens from practicing law because of LL.M. and bar exam requirements, immigration issues, and the high costs associated with gaining a U.S. legal education. But those in favor of liberalization do not see things so simplistically. They say neither the United States nor the United Kingdom completely prohibits lawyers of Indian origin from practicing or studying law,⁵⁸ but simply requires that all foreign citizens pass a licensing exam and take some classes. They argue that India should adopt a similar admissions standard and that the Indian bar can be protected adequately by mandating tests, licensing, and other requirements.⁵⁹ When asked about the application of the reciprocity provisions in India, one interviewee said that the reciprocity provision is merely theoretical, and without teeth.⁶⁰

5. *Litigation v. Transactional Work*

Lawyers Collective held that both litigation and transactional work constitute the foreign practice of law and are therefore generally restricted to Indian citizens under the Advocates Act, as discussed below. However, some foreign firms argue that, if permitted, they would undertake only transactional work and would not disturb the majority of practicing Indian lawyers who are litigators.⁶¹ These firms see this as an acceptable alternative to total liberalization of the Indian legal sector. Opponents of liberalization, on the other hand, including smaller Indian firms and litigators, fear such a concession would be the beginning of a slippery slope that would end with foreign firms practicing in Indian courts.⁶²

56. See *Advocates Act* § 47.

57. See Krishnan, *supra* note 8, at 85.

58. *Id.* at 79. They also point to the fact that Indian law firms have opened offices in both the United States and the United Kingdom. *Id.* at 80.

59. This is a question often debated on blog discussion boards and comments to online articles on the matter.

60. See Interview, *supra* note 54.

61. Krishnan, *supra* note 8, at 90. Most of the over one million lawyers in India are solo practitioners who work as courtroom litigators. *Id.* at 64.

62. *Id.* at 90.

6. *Affiliations*

Affiliations between foreign and Indian law firms bridge the gap in the liberalization debate. Whether local Indian firms are for or against liberalization, no one denies the benefits and necessity of a foreign firm ally. Multinational deals are impossible without a foreign firm and, in an increasingly global business world, clients—whether Indian or foreign—will need both an Indian firm and a foreign firm contact.

Even anti-liberalization SILF firms say that they are engaged in ongoing working relationships with foreign firms through different types of affiliations.⁶³ While these SILF firms are largely against foreign firms opening offices in India directly, they are not against maintaining loose referral arrangements with a number of foreign firms based on the needs of the client and the nature of the transaction.⁶⁴ Such ad hoc referral arrangements are the predecessor to the current practice of forming “best friends” affiliations (discussed in more detail below), where a foreign and an Indian firm enter into a “non-exclusive” arrangement through which they refer clients to one another and help one another strengthen their practice areas.

III. THE REGULATORY HURDLE AND THE *LAWYERS COLLECTIVE CASE*

The Advocates Act of 1961 (the “Act” or “Advocates Act”) is the operative formal regulation, and was enacted in response to recommendations to the Indian government by the All India Bar Committee and the Report of the Law Commission regarding legal reform.⁶⁵ Prior to the Advocates Act, India had a legal system similar to the United Kingdom, which delineated between different “classes” of practitioners—those who practiced in court and those who did not.⁶⁶ The Act was part of a move toward uniformity in the legal profession.⁶⁷ Its purposes included: the creation of a single class of legal practitioners (advocates) and uniform qualifications for the admission of persons to be advocates; empowering advocates with the right to practice in any court; and the establishment of an All India Bar Council.⁶⁸

The key provision of the Act is section 29, which reads: “Subject to the provisions of this [A]ct, and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law [in India], namely, advocates.”⁶⁹ The Act has been interpreted as including a broad prohibition

63. Krishnan, *supra* note 8, at 82; *see infra* Part IV (providing an in-depth discussion and analysis concerning affiliations).

64. *See* Bhasin, *supra* note 44.

65. Shankar & Kak, *supra* note 10, at 306 (discussing the Advocates Act and India’s earlier regulations).

66. *See id.*

67. *See id.*

68. *Advocates Act*, Statement of Objects and Reasons; *see also* Shankar & Kak, *supra* note 10, at 306.

69. *Advocates Act* § 29; *see also* King, *supra* note 33, at 365.

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on the practice of law in India by anyone but an “advocate.”⁷⁰ Furthermore, the Act limits the practice of law to Indian citizens.⁷¹ The reasoning is that, to be an advocate, one must be a citizen of India.⁷² Accordingly, the Advocates Act has been interpreted as prohibiting the foreign practice of law in India, whether it involves corporate or litigation work or Indian law or non-Indian law, unless the foreign firm or its jurisdiction comes within one of the Act’s narrow exceptions.

The Act contains two exceptions that allow for non-Indian citizens (and, hence, foreign law firms generally) to be permitted to practice law in India: (1) if the non-Indian citizen’s jurisdiction grants Indian lawyers complete reciprocity⁷³ or (2) by permission of the Indian Bar Council of India.⁷⁴ However, foreign law firms in the United States and the United Kingdom, which have had their eyes on India since the liberalization of its economy, have been unable to take advantage of these exceptions. This is because neither country offers complete reciprocity to Indian lawyers (i.e., admittance without bar passage or other licensing requirements) and because the firms have not received permission to practice law from the Indian judiciary. Therefore, U.S. and U.K. law firms have had to seek entry into the Indian market through alternate means.

In 1994, just three years after non-legal multinational corporations were granted permission to open offices in India,⁷⁵ three foreign law firms applied to the Reserve

70. See *Lawyers Collective* ¶¶ 8, 32 (determining that section 29 of the Act “specifically provides is that from the appointed day, there shall be only one class of persons entitled to practise the profession of law, namely Advocates”).

71. *Advocates Act* § 24(a)(1).

72. Indian law firm Amarchand hired a non-Indian competition law specialist as a director. Though he has Indian parents, he was born in the United States then moved to Ireland, so he is not a citizen of India. Thus, based on “restrictions on foreign lawyers practising in India,” he has not been duly qualified as an Indian lawyer and “would not be able to sign off on opinions or give legal advice and would be supervised . . . throughout.” See Kian Ganz, *Amarchand Hires Irish Competition Law Expert*, LEGALLY INDIA (Nov. 9, 2009, 17:57), <http://www.legallyindia.com/20091109277/Job-moves/amarchand-hires-irish-competition-law-expert>.

73. “[A] national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country.” *Advocates Act* § 24(1)(a). Presumably, “if another country allowed Indian lawyers to practice in its jurisdiction, then lawyers from that country [should] be granted reciprocal privilege in India.” Krishnan, *supra* note 8, at 71. However, this reciprocity clause has been a source of much confusion within the modern-day liberalization debate and the lawyers interviewed could not give me a straightforward answer to whether this means that because an Indian citizen could get an LL.M. in the United States and sit for the bar exam a U.S. citizen should be able to sit for an Indian bar exam. It basically means that the India Bar Council could, theoretically, allow a non-Indian citizen to become an advocate if a country would allow Indian citizens to automatically practice law in their jurisdiction after being duly admitted in India.

74. See *Advocates Act* § 47(2).

75. The Government of India’s Industrial Policy “liberalized the laws regulating domestic industry and took measures to promote foreign investment . . . and to provide free business environment.” *Foreign Collaboration & Investments in India*, INDIA JURIS 6 (June 1, 2006), <http://www.indiajuris.com/pdf/FC-India%20Juris.pdf>.

Bank of India (RBI) for special licenses to operate in India.⁷⁶ They were successful and were granted “liaison licenses,” which allowed them “to set-up branches in India for the restricted purposes of learning about the business environment, collecting investment information, serving as official representatives of the foreign firms to the Indian government and to Indian businesses, and promoting relationships and collaborations with those [Indian businesses] interested in such cooperative initiatives.”⁷⁷ The branch offices were to be “the eyes and ears” of the foreign firms in India.⁷⁸ However, the three firms and their special licenses became targets in *Lawyers Collective*.

Lawyers Collective, a group of Indian lawyers, opposed the “liaison licensing” of the three law firms and brought a lawsuit against the Bar Council of India, the RBI, and the liaison firms themselves—White & Case, Ashurst, Morris Crisp, and Chadbourne & Parke.⁷⁹ Lawyers Collective primarily alleged that the foreign firms exceeded the terms of their licenses by working on transactions out of hotels. It also alleged that RBI did not have the authority to grant liaison licenses under the Act and that the BCI failed to ensure “the dignity and purity of the noble profession of law,” as so charged under the Act, by not revoking the illegally granted licenses.⁸⁰

At trial before the Bombay High Court, the parties primarily disputed the meaning of the Advocates Act with respect to its limitation on the practices of foreign law firms. Lawyers Collective claimed the Act created a monopoly for Indian lawyers with respect to all legal work in India, including advising Indian clients on foreign (non-Indian) law and transactional work.⁸¹ The Bombay High Court agreed with Lawyers Collective, holding that even the “render[ing] [of] legal assistance . . . by drafting documents, advising clients, [and] giving opinions” amounted to the practice of law and could not be performed by foreign firms within India pursuant to the Act.⁸² Thereafter, the foreign firms timely appealed to the India Supreme Court, which ultimately sent the matter back to the Bombay High Court for further consideration.⁸³

76. The three law firms were White & Case, Chadbourne & Park, and Ashurst Morris Crisp. *See* Krishnan, *supra* note 8, at 65–66.

77. *See id.* at 66.

78. *Id.*

79. *Lawyers Collective v. Bar Council of India*, Writ Petition No. 1526/1995 (Bombay H.C. 2009).

80. *See id.*

81. *See id.* ¶ 8.

82. *See id.* ¶ 3; *see also* Krishnan, *supra* note 8, at 68. King’s article states:

In a preliminary ruling in October 1995, the Bombay High Court indicated support for the petitioners’ claims and stated that in its view Indian advocates are the only people entitled to “practise in courts, and . . . to practise the profession of law outside the court by giving legal advice as attorney and counsel-at-law or by drafting or drawing legal documents or advising clients on international standards and customary practise relating to clients’ transactions, broadly referred to as non-contentious matters.”

King, *supra* note 33, at 365.

83. *See* Krishnan, *supra* note 8, at 68–69. The court is also the appellate court of the state of Maharashtra. *See id.* at 68 n.60. Bombay is located in Maharashtra.

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Upon reconsideration, the *Lawyers Collective* decision was affirmed by the Bombay High Court. The court considered “whether the foreign law firms[,] . . . by opening liaison offices in India[,] could carry on the practise [of law] in non litigious matters without being enrolled as Advocates under the 1961 Act.”⁸⁴ As before, Lawyers Collective maintained that advocates retained a complete monopoly on legal services, both litigation and advisory, and that this work was reserved for Indian citizens under the Advocates Act, which was circumvented by the granting of “liaison licenses.” The Bar Council of India adopted the same arguments as the petitioner, as they too were against the foreign firms.⁸⁵ In response, the RBI argued that they did not in fact breach the Act because the “liaison licenses” did not grant a license to practice law. Rather, RBI contended that the “liaison licenses”⁸⁶ were granted pursuant to the power vested in them under the Foreign Exchange Regulation Act of 1973 and that they only permitted foreign firms “to establish a liaison/representative office to act as a communication channel between the overseas principal and parties in India.”⁸⁷ Further, counsel to the foreign firms argued that the Advocates Act did not cover non-litigious matters because the source of the power granted by the 1961 Act relates only to those who practice before the Supreme Court and the High Court.⁸⁸

The Bombay High Court ultimately resolved the question of the liaison licenses’ validity by looking to the purposes of the Advocates Act,⁸⁹ i.e., to establish the India Bar Council and create a common roll of advocates all having the “right to practise in any part of the country and in any Court, including the Supreme Court.”⁹⁰ The court determined that the Act was “intended to apply” to both those who practice the profession of law “in the country” and “in any Court,” including both litigation and non-litigation matters.⁹¹ The court further supported its conclusion by noting that section 29 of the Act mandated that there “shall be only one class of persons” practicing law in India: advocates.⁹² Accordingly, it determined that the RBI had no authority to grant the three foreign firms liaison licenses under the Act.⁹³

In addition to deciding the case at hand, the Bombay High Court went beyond the issues and referred the matter to the Indian government, directing it to “take

84. *Lawyers Collective* ¶ 45.

85. *Id.* ¶¶ 13–14.

86. For a description of the authority granted to firms under a “liaison license,” see Krishnan, *supra* note 8, at 66.

87. *Lawyers Collective* ¶ 22.

88. *Id.* ¶ 24.

89. *See Advocates Act*, Statement of Objects and Reasons.

90. *Lawyers Collective* ¶ 48.

91. *Id.*

92. *Id.* ¶ 49.

93. *Id.* ¶ 60. (“[W]e hold that . . . the RBI was not justified in granting permission to the foreign law firms to open liaison offices in India . . .”).

appropriate decision in the matter as expeditiously as possible.”⁹⁴ It called upon the Law Ministry to ultimately decide whether foreign law firms shall be permitted to enter India and, if so, to what extent.⁹⁵ Thus, although *Lawyers Collective* was expected to “formally decide” whether foreign law firms, as non-citizens and non-advocates, would be able to practice corporate advisory law in India,⁹⁶ the final resolution of the matter is likely dependent on the results of foreign governments’ lobbying efforts of the Indian parliament and Law Ministry.⁹⁷

Meanwhile, foreign law firms have strategized to get around the restrictions imposed by the Advocates Act in order to serve both Indian corporations and non-Indian clients doing business in India. These firms offer “India practices” out of branch offices in Singapore and/or London, and they have been forming affiliate relationships with Indian law firms. Most recently, these various strategies have come under attack from an Indian attorney named A.K. Balaji. In 2010, another lawsuit was filed naming a list of thirty-one foreign firms and legal process outsourcing (LPO) firms that are alleged to be illegally “practicing law” in India.⁹⁸ As an article on the recent complaint put it, “the boundaries of what constitutes the practice of Indian law need to be clearly delineated.”⁹⁹

IV. AFFILIATIONS AS VIABLE ENTRY POINT

Three U.S. law firms were granted liaison licenses by the RBI in 1994: Ashurst Morris Crisp, White & Case, and Chadbourne & Parke. Of these three firms, Ashurst was the last to maintain an office in India.¹⁰⁰ It closed its doors after the

94. *Id.* ¶ 59; see also Rogers, *supra* note 14.

95. *Lawyers Collective* ¶ 59. The matter has been pending before the Central Government for more than fifteen years.

96. *Id.* ¶¶ 1, 60. Essentially, the court had to answer whether what the foreign firms were accused of doing was “the practice of law.” The court held that “even the rendering [of] legal assistance and/or . . . executing [of] documents, negotiations, and settlements of documents would certainly amount to [the] practice of law.” Krishnan, *supra* note 8, at 68 (alterations in original) (internal quotation mark omitted).

97. See *supra* Part II.B (discussing lobbying efforts).

98. A.K. Balaji v. India (*complaint filed in Madras H.C. Mar. 10, 2010*). The complaint is available online at [http://apps.americanbar.org/intlaw/spring2010/materials/HotTransborderLawPracticeIssuesIndia-US/MadrasHCWritPetition\(2\).pdf](http://apps.americanbar.org/intlaw/spring2010/materials/HotTransborderLawPracticeIssuesIndia-US/MadrasHCWritPetition(2).pdf). Since the complaint was filed, the Bar Council of India has formed a committee to further consider “permitting foreign law firms to practice in India and the consequent amendment to the Advocates Act.” A. Shankar, *BCI Sets Up Committee on Issue of Foreign Law Firms Entry*, LAWETAL.NEWS.COM (Nov. 25, 2010, 01:43 EDT), <http://www.lawetalmedia.com/NewsDetail.asp?newsid=2852>.

99. *No Foreign Relations?* AK Balaji v. Ashurst et al., BAR & BENCH (Mar. 24, 2010), <http://barandbench.com/brief/3/606/no-foreign-relations-ak-balaji-v-ashurst-et-al>.

100. See *ILSAC Submission*, *supra* note 28; Douglas Wong, *India’s ‘Not for Sale’ Legal Market Draws U.S., U.K. Law Firms*, BLOOMBERG (June 15, 2009, 14:30 EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHz8zYy8.Vdg>. The office, which was located in New Delhi, did not practice law, but advised on government matters.

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most recent *Lawyers Collective* decision in 2009.¹⁰¹ At that time, Richard Gubbins, head of Ashurst's India group, said, "I came to the conclusion . . . that we have a naturally successful India platform outside the confines of the liaison office."¹⁰² However, Ashurst recently announced a new affiliation with Mumbai law firm Indian Law Partners (ILP).¹⁰³ White & Case, on the other hand, closed its liaison office in 1995 when it was first named as a defendant in *Lawyers Collective*, though it subsequently entered into a non-exclusive affiliation with India Law Services from 2005 to 2008.¹⁰⁴ Currently, White & Case's India group works out of its Singapore office and, according to one of the firm's partners, it is "fully prepared" to take advantage of liberalization if and when it occurs.¹⁰⁵ Finally, Chadbourne & Parke closed its liaison office after the initial *Lawyers Collective* decision in 1995. Though these three firms have closed their "liaison" offices, many other U.S. and U.K. firms have recently formed various types of "affiliate" relationships with Indian firms.

The *Lawyers Collective* decision provides an opportunity for evaluating the current state of foreign firm involvement in India's legal sector. This involvement is likely to become subject to closer scrutiny because of the latest complaint against foreign firms offering "India practices" in non-Indian jurisdictions and potential government involvement based on the directive of the Bombay High Court. The government may come to the Indian firms involved in affiliate relationships and ask for copies of any affiliation agreement and for details on any money that may have been received.¹⁰⁶ Thus, the existing relationships between foreign and Indian firms warrant a closer look. While legal scholarship and media reports often discuss issues such as legal outsourcing¹⁰⁷ (including the ethical issues involved), globalization and the law,¹⁰⁸ and the history of the practice of law in India,¹⁰⁹ there is a gap in the literature concerning the current practices of foreign firms in building relationships with Indian firms.

Developing strong relationships and generating greater brand awareness are key to entering the legal market, and foreign law firms aim to do so in the increasingly popular practice of establishing formal relationships, or "affiliations," with Indian law firms. According to my research, discussions, and interviews on the matter,

101. See *Ashurst Shuts Down Delhi Branch in Wake of Lawyers Collective Judgment*, *LAWYER* (Feb. 19, 2010), <http://www.thelawyer.com/1003508.article>.

102. *Id.*

103. See Peterson, *supra* note 16.

104. See Wong, *supra* note 100 (internal quotation mark omitted).

105. *Id.*

106. See Bhasin, *supra* note 44.

107. Often referred to as LPO, legal process outsourcing. Cynthia Cotts & Liane Kufchock, *U.S. Firms Outsource Legal Services to India*, *N.Y. TIMES* (August 21, 2007), <http://www.nytimes.com/2007/08/21/business/worldbusiness/21iht-law.4.7199252.html> (reporting that firms such as Kirkland & Ellis and Jones Day outsource legal services).

108. *Id.*

109. See, e.g., Krishnan, *supra* note 8.

“affiliations” can be grouped into three broad categories: ad hoc, surrogate, and best friends. A study of these affiliations raises a number of interesting questions regarding the efficacy of India’s regulations against the foreign practice of law, the scope of *Lawyers Collective*, and the impact the liberalization debate has had on the ways in which foreign firms structure relationships in India. According to at least one commentator, “The real-time impact of the [*Lawyers Collective*] decision on these firms appears to be negligible.”¹¹⁰

A. *Who Affiliates?*

A preliminary search on U.S. and U.K. law firms’ websites provides some interesting but abstract insights into the scope of their work in India.¹¹¹ At first glance, it may be unclear whether a foreign (i.e., U.S.- or U.K.-based) firm actually maintains an office *in* India, works via an “India practice” (e.g., in Singapore, London, Hong Kong, or another jurisdiction), has a referral relationship with a number of local Indian firms, or works with just one Indian “affiliate.”¹¹² For example, White & Case states that it “work[s] in close cooperation with Indian firms to represent [capital markets clients in various offerings] around the world”¹¹³—a rather vague statement. Latham & Watkins, on the other hand, provides what is probably a more accurate picture: “*While primarily based out of the firm’s Singapore and London offices, the [India] team is comprised of more than 50 lawyers across all locations—a number of [our] lawyers are fluent in Hindi, Gujarati, Punjabi and Tamil.*”¹¹⁴

Still other firms, such as Baker & McKenzie, explicitly state that they do not have an office in India, but instead work with “carefully selected local firms” to provide clients with direct Indian representation.¹¹⁵ Baker & McKenzie also has an India Focus Group, which helps companies navigate Indian markets and works

closely with India’s most highly regarded law firms to bring the right team to every transaction, regardless of location . . . Our strong working relationships with leading Indian law firms means we are able to recommend, and work with, the best local counsel available and ensure that our clients benefit from both the right local talent and our unique global perspective.¹¹⁶

110. Natarajan, *supra* note 13.

111. This discussion only contains information about a few of the named defendants in *Lawyers Collective* and some randomly selected firms based on a web search for “law firm and India office.”

112. Firms vary the term they use to describe their affiliations. Some foreign firms (e.g., Linklaters) use the term “best friends” to describe their affiliate relationship with local Indian firms; others (e.g., Clifford Chance) use the term “affiliate” itself (e.g., Kelley Drye); and still others describe their affiliate relationships as “alliances” (e.g., Clifford Chance).

113. *India*, WHITE & CASE, <http://www.whitecase.com/india/> (last visited Nov. 7, 2011).

114. *India Practice*, LATHAM & WATKINS, <http://www.lw.com/practices.aspx?page=practicedetail&practice=249> (last visited Nov. 7, 2011) (emphasis added).

115. *Locations*, BAKER & MCKENZIE, <http://www.bakermckenzie.com> (last visited Nov. 7, 2011).

116. *Global Emerging Markets—India*, BAKER & MCKENZIE, <http://www.bakermckenzie.com/globalemergingmarketsindia> (last visited Nov. 7, 2011).

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One Indian firm that receives referrals from Baker & McKenzie and other foreign firms is Bhasin & Co. In return, Bhasin & Co. refers its Indian clients to a number of those same foreign firms based on the nature of the matter involved and the foreign firms' areas of expertise.¹¹⁷

Recently, foreign firms have started to form more formal "affiliations" (which include reciprocal referral arrangements) with a single Indian law firm. Jones Day, for example, does its cross-border work with an "associated [law] firm in India, P&A Law Offices."¹¹⁸ Allen & Overy maintains a similar relationship with another Indian firm, and its website makes clear that it does not have its own Indian office: "We do not practise Indian law or have an office in India, as this is not permitted under local rules, but having worked closely with Trilegal for many years, Allen & Overy has established a non-exclusive referral arrangement with them in India."¹¹⁹ Other foreign firms that have affiliated include: Clifford Chance (with AZB and Partners from 2009 to early 2011),¹²⁰ Linklaters (with Talwar Thakore and Associates since 2007),¹²¹ and Kelley Drye & Warren (with Wakhariya & Wakharyia since 1998).¹²² Freshfields Bruckhaus Deringer also works non-exclusively with three or four Indian firms, as well as through its "India practice" in London.¹²³

How does a foreign firm choose a local Indian affiliate? According to reports by consultant Reena Sengupta,¹²⁴ there are only "15 or so Indian firms worth partnering with."¹²⁵ This small number of sophisticated firms is also discussed in Krishnan's article, wherein he notes that the Society of Indian Law Firms (SILF) is comprised of only about "four dozen elite law firms."¹²⁶ These firms have seen an "increase in

117. See Bhasin, *supra* note 44.

118. See JONES DAY, http://www.jonesdaycareers.com/offices/office_landing.aspx?office=3 (last visited Nov. 7, 2011).

119. See *People & Offices: India Group*, ALLEN & OVERY, <http://www.allenoverly.com/AOWEB/PeopleOffices/Country.aspx?countryID=18853&prefLangID=410> (last visited Nov. 7, 2011).

120. See Anthony Lin, *Clifford Chance and AZB Call It Off*, AM LAW DAILY (Jan. 21, 2011), <http://amlawdaily.typepad.com/amlawdaily/2011/01/cliffordazb.html>.

121. *Outsourcing*, LINKLATERS, <http://www.linklaters.com/WhatWeDo/Practices/Technology/Pages/Outsourcing.aspx> (last visited Nov. 7, 2011).

122. *Practices: India*, KELLEY DRYE, <http://www.kelleydrye.com/practices/international/india/12> (last visited Nov. 7, 2011).

123. See Wong, *supra* note 100. This was verified by my research on individual firm websites, though not all lists the affiliate firm name.

124. Reena Sengupta founded U.K.-based consulting firm RSG consulting in 2001 and provides research and consultancy to law firms and in-house counsel. See RSG CONSULTING, <http://rsgconsulting.com/team/reena-sengupta> (last visited Nov. 3, 2011).

125. See Wong, *supra* note 100.

126. See Krishnan, *supra* note 8, at 63 (internal quotation marks omitted).

lucrative business” in transactional matters in the last twenty years and the “liberalization of the Indian economy has been an economic boon for [the] group.”¹²⁷

When a U.K. partner was asked how his firm decided which Indian firm to affiliate with, he said that, in his opinion, there were only three good Indian firms from which to choose.¹²⁸ His firm had worked with all of the major India firms in the past, but the process was still very analytical. “We sat down and worked through what we knew of [the various Indian firms’] practices, clients, and people, looking for the closest alliance with ours,” the partner explained.¹²⁹ After speaking informally to a number of firms, it became clear to the partner’s firm that two Indian firms had similar practice areas and goals to his firm and were interested in affiliating.¹³⁰ However, in the time the partner’s firm was looking to affiliate, one of its two remaining choices affiliated with another foreign firm, so the U.K. partner’s firm decided to affiliate with the other remaining Indian firm, which was the “better of the two.”¹³¹ A partner at another international firm, when asked how his firm chose its affiliate, said that it was a natural progression based on a longstanding prior relationship it had with an Indian firm.¹³²

Even many firms that oppose liberalization have found that some manner of affiliation is necessary in an increasingly globalized world. For example, when Bhasin & Co. represented Air India in an aviation deal to acquire an Airbus aircraft, the laws of three different jurisdictions were involved: Germany, the United States, and the United Kingdom.¹³³ Thus, the firm found it extremely helpful to consult with foreign firms regarding the law of their jurisdiction.

Indian regulations also make it difficult for Indian firms to expand their business without the help of foreign firms. Take, for example, the Indian law against legal advertising, which prohibits, among other things, Indian firms from having websites, something that is common for U.S. and U.K. law firms.¹³⁴ This puts Indian firms at a disadvantage in an increasingly globalized legal market and deprives them of the ability to market themselves to foreign law firms or corporations in need of counsel in India. One Indian partner calls regulations such as the ban on advertising and marketing “a product of the 1960s, with nationalistic overtones,” and mentioned that he is concerned about what potential clients think when they cannot find his firm’s

127. *Id.* at 64–65. (“[L]ess than fifty elite firms—or about 2,500 lawyers total—are receiving a relatively enormous amount of wealth as a result of providing transactional legal services to a diverse, prosperous client base.”).

128. Interview on file with author (Dec. 22, 2009).

129. *Id.*

130. Apparently, the third Indian firm was not interested in affiliating, so, in reality, it was a choice between two Indian firms. *Id.*

131. *Id.*

132. Interview on file with author (Nov. 23, 2009).

133. See Bhasin, *supra* note 44.

134. Ben Frumin, *Lowering the Bar*, INDIA BUS. L.J., Nov. 2007, at 13, 16.

website.¹³⁵ “Clients go on the Internet and cannot find you, then they think, ‘who is this guy?’ . . . This makes no sense; why would someone not have a web site?”¹³⁶ Outdated legislation forces Indian firms to partner with some outside firm to make the firm legitimate. “International law firms can have marketing material and a massive web site. It is not a level playing field on account of an old regulatory bottleneck.”¹³⁷ In this view, Indian firms against advertising are only hurting themselves, making themselves uncompetitive in a global market.

B. Three Models of Affiliation

The various modes of “affiliation” have distinct characteristics and can be classified according to three basic models: ad hoc, surrogate, and best friends affiliations.¹³⁸ Models of globalization of law firms and their approaches to establishing offices abroad have been discussed elsewhere, but not with a particular focus on India.¹³⁹

1. Ad Hoc Referrals

A traditional way for firms, such as those based in the United States or the United Kingdom, to operate in countries or jurisdictions where they either cannot or do not have an office has been through ad hoc referral systems. Firms keep informal “correspondent” law firms in their Rolodex, to whom they refer clients in need of legal help in a particular country. These ad hoc relationships are initially built from individual attorney acquaintances, networking through international bar associations, or simply from having been on opposite sides of a table in a prior international deal or litigation matter. They are also particularly common for U.S.-based Wall Street law firms that do not intend to ever open an office abroad, and have been preferred by foreign firms practicing in South Africa.¹⁴⁰

135. Interview, *supra* note 54.

136. *Id.*

137. *Id.*

138. The categories are not my own creation. They are derived from conversations with law firm partners and common language in literature on the topic. They are not intended to be terms of art beyond the descriptions I give in this note.

139. *See, e.g.,* Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Glocal*, 22 GEO. J. LEGAL ETHICS 1431 (2009). Carole Silver has categorized law firm approaches to globalization into three models: diffusion, local, and glocal. These models align with the three models of affiliation discussed in this note. The diffusion model reproduces abroad what is already in the United States, similar to the surrogate model of law firm affiliations. *See id.* at 1438. Silver’s local model specializes by office, maintaining local autonomy, similar to the ad hoc referral system, in which a foreign firm will associate with a different local firm for each deal, depending on the nature of the transaction and the expertise of its local affiliate. *See id.* at 1435–36. Finally, Silver’s glocal model integrates characteristics of both firms, blurring the foreign and local boundaries. It is most analogous to the “best friends” model. *See id.* at 1433.

140. Interview, *supra* note 128.

Ad hoc relationships have also become common for Indian firms who do not want a single U.S. or U.K. foreign firm affiliate. From an Indian law firm's point of view:

[I]f our client needs some expert advice on a joint venture or IPO in Europe or in the United States, we would, depending on the expertise of the U.S. law firm, approach the law firm with our client to discuss issues with them. Similarly, if the U.S. counterparts need information from an Indian legal point of view, say for taxation or a joint venture, they will refer the matter to certain Indian firms with the requisite expertise. This has been going on for many decades without any formal relationships.¹⁴¹

Inside India, the ad hoc referral model is the most likely affiliate arrangement for Indian firms that oppose liberalization. These Indian firms work with different foreign firms depending on the matter at hand, rather than being "connected to one firm that may or may not have the expertise" needed at any particular time.¹⁴²

The billing methods of those engaged in ad hoc referral relationships vary greatly. According to Mr. Bhasin, if a foreign firm refers a matter to an Indian firm, the foreign firm might say, "I'm sending you these clients, please fix the terms [of engagement] and deal with the client."¹⁴³ At other times, however, the Indian firm will send invoices directly to the foreign firm, which will then bill the client itself.

One major benefit of ad hoc referral relationships is that they comply with the Advocates Act, as there are negligible concerns that they encourage the foreign practice of law. Since the law firms involved are not wedded to one another in an exclusive relationship, they are also less likely to be pressured to undeservingly promote each others' practices. Another benefit is that firms involved in ad hoc arrangements, which by their nature are non-exclusive, will be more likely to receive referrals from multiple foreign firms.

One partner at an Indian firm involved in an ad hoc relationship said his firm would not consider entering into a closer "best friends" affiliation with a foreign firm because "we think that would be counter-productive. We would not get work from other firms, and we would then be identified as the exclusive partner of [a particular] foreign firm. This is what we want to dispel."¹⁴⁴

However, from a foreign firm's perspective, a partner said a downside to sticking with loose ad hoc relationships is that a foreign firm "cannot afford to invest time and know-how supporting a large number of counterparts." A foreign firm may end up affiliating with some of the most reputable firms in a local market, but even a good local firm often lacks expertise in specialized areas clients would expect to be in place.¹⁴⁵ A foreign firm is not going to necessarily help an Indian firm build up the necessary practice areas with only an informal relationship.

141. See Bhasin, *supra* note 44.

142. *Id.*

143. *Id.*

144. *Id.*

145. Interview, *supra* note 128.

2. *Surrogates*

Foreign firms that have a more vested interest in India might choose the surrogate model of affiliation over an ad hoc arrangement. Using this approach, a foreign firm often helps a small team of Indian lawyers start up their own local firm, “which will informally be a local office of the foreign firm.”¹⁴⁶ Sharing of finances or shared “financial stakes” are prohibited between the Indian and foreign firm because, under the Advocates Act, a foreign firm funding an Indian firm amounts to the foreign practice of law.¹⁴⁷ Some say that “Linklaters and one or two U.S. firms” have entered into this type of surrogate arrangement in the past, whereby Indian affiliates informally act like a surrogate law firm built with joint IT systems, shared clients, practice groups, etc.¹⁴⁸

Another variation on the surrogate approach is for a foreign firm to take over an Indian firm from the inside.¹⁴⁹ A foreign firm essentially turns an Indian firm into an overseas office of the foreign firm, while the Indian firm continues to operate under its original Indian name.¹⁵⁰ This model was common in the late 1990s and early 2000s after liberalization of the Indian economy, especially around the time when the RBI granted the three “liaison licenses” at issue in the *Lawyers Collective* case. Nonetheless, this surrogate model has been strongly criticized because in effect the Indian firm is being owned and controlled by the foreign firm.¹⁵¹ For this reason, this model of affiliation could be in derogation of the Advocates Act because it can be viewed as a foreign firm effectively practicing in India under a different name. Even if done carefully, it is likely to be viewed as an end-run around the regulations.¹⁵² Based on such criticisms, this type of surrogate relationship has been largely discontinued, though some may still exist quietly.¹⁵³

The benefit of the surrogate model is the obvious control the foreign firm has over the process of either building or taking over the Indian firm. It is like a foreign firm is “creating a child in [its] own image.” However, it is quite difficult to “build from scratch where you are not present,” because there is no day to day oversight as a firm would have if it actually sent its own people to build its own office.¹⁵⁴

146. *Id.*

147. *See infra* note 164.

148. *See supra* notes 128, 132; *see also* Kian Ganz, *Breaking: AZB Clifford Chance End Best Friendship*, LEGALLY INDIA (Jan. 21, 2011, 19:30 PM), <http://www.legallyindia.com/201101211707/Law-firms/breaking-azb-clifford-chance-end-best-friendship>.

149. *See* Bhasin, *supra* note 44 (“For instance, they would take over my firm and continue to call it Bhasin & Co. but they would still hold all ownership rights.”).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (“There were so many objections. They thought it was so risky to do this; therefore, . . . [t]his surrogate practices, to a large extent, was discontinued.”).

154. Interview, *supra* note 128.

3. *Best Friends*

The “best friends” model of affiliation has become increasingly common since 2008 and 2009, and has become the most reported-on affiliate relationship. A “best friends” affiliation involves a foreign firm working in close cooperation with a single Indian firm. The foreign firm identifies a local “firm that has already been in the market and [is] functioning,”¹⁵⁵ and, over time, *both firms* take the steps needed to align their cultures and business structures.¹⁵⁶ This type of affiliation provides the most rooted relationship between a foreign and Indian firm and is most likely within the bounds of Indian regulatory law.

A “best friends” relationship has been described as “a close association” between a foreign and Indian firm, “whereby the Indian firm would . . . get work exclusively from [the] foreign firm.”¹⁵⁷ It entails active involvement by both the foreign and Indian firm, and is also more synergistic than the ad hoc and surrogate models of affiliation. Often, “best friend firms” have joint training programs and they concentrate all of their “nonfinancial health” and support to one another. That is, they will put training and other resources into the relationship and will implement changes in their business structures in order to better fit with each other. According to one U.K. partner, it is as close as firms are legally allowed to be without being jointly owned or in derogation of the Act.¹⁵⁸ As a result of “best friends” affiliations, partners at Linklaters have actually left the firm to work for the firm’s Indian affiliate.¹⁵⁹ Accordingly, “best friends” firms would arguably be in the best position to merge if India’s legal sector should open up to foreign firms.

One of the biggest advantages of a “best friends” affiliation to Indian firms is that foreign firms will often invest time and energy into strengthening its Indian affiliate’s areas of relative weakness.¹⁶⁰ Despite the investment of time and money, this arrangement ends up being advantageous to foreign firms as well because having a stronger Indian affiliate will help the foreign firm better serve its clients. In recent years, foreign firms have helped Indian “best friends” affiliates add practice areas, such as capital markets,¹⁶¹ and transform their business models. For example, Linklaters’s Indian affiliate “conver[ted] from a founder partner equity model to a lockstep-style model that is closely modeled on Linklaters’ own 10-year lockstep.”¹⁶²

155. *Id.*

156. *Id.*

157. Bhasin, *supra* note 44.

158. Interview on file with author (Nov. 13, 2009).

159. *See Two Linklaters Partners Defect to Indian Best Friend Talwar Thakore*, *LAWYER* (Nov. 6, 2009), <http://www.thelawyer.com/two-linklaters-partners-defect-to-indian-best-friend-talwar-thakore/1002511>. (reporting that two Linklaters partners left its Singapore office and joined Indian law firm Talwar Thakore & Associates).

160. Interview, *supra* note 128.

161. For example, one firm added a capital markets practice.

162. *See Two Linklaters Partners Defect to Indian Best Friend Talwar Thakore*, *supra* note 159.

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Because “best friends” are closely connected, they are often criticized as being “too close” and sometimes resemble the surrogate model. The affiliations are also likely to be the subject of government scrutiny in coming years to “see if there is something more than meets the eye” that might violate the Advocates Act.¹⁶³ However, “best friends” affiliations should not be in violation of the Advocates Act if the foreign firm remains a separate entity from its affiliate and is not itself actually practicing in India.¹⁶⁴

The downside to “best friends” affiliations is that some of the better Indian firms still have underdeveloped practice areas and require foreign firms’ expertise in certain areas, particularly tax practice.¹⁶⁵ Therefore, foreign firms may not be able to exclusively rely on and benefit from the expertise of a single Indian firm to the same extent that an Indian firm could benefit from affiliation with a large foreign firm. Foreign firms must be committed to finding an affiliate firm with well-rounded strengths, or be prepared to help build up areas of relative weakness. Additionally, once a foreign firm forms an exclusive “best friends” affiliation, it may find it difficult to send referrals to another Indian firm that may have a better-developed practice in a particular area.

Indian firms engaged in “best friends” relationships might also have trouble procuring referrals from other foreign firms, as “that would be competition”¹⁶⁶ and would violate the exclusivity of a “best friends” affiliation. It might also be difficult for an Indian firm to generate enough business simply through the referrals of one foreign firm, especially in light of the recent global financial crisis.¹⁶⁷ This is one reason Clifford Chance cited for recently ending its “best friends” affiliation with Indian firm AZB.¹⁶⁸ In addition to liberalization being less likely to materialize in the near future, the slump in the global economy and banking, a core practice area of Clifford Chance, meant fewer referrals into India from the U.K. firm.¹⁶⁹

163. Bhasin, *supra* note 44.

164. If a foreign law firm exhibits too much control over, or shares finances with, its Indian affiliate, then the Indian affiliate may come to be viewed as merely a shell of the foreign firm, and the foreign firm may be deemed to be practicing law in India in violation of the Act. This might be one reason why Linklaters stressed that its partners had severed all financial ties with the firm before joining its Indian affiliate. “There is no way that we can try and cross that line.” See *Two Linklaters Partners Defect to Indian Best Friend Takwar Thakore*, *supra* note 159.

165. See Interview, *supra* note 54; Interview, *supra* note 128; Interview, *supra* note 132.

166. See Bhasin, *supra* note 44.

167. See Ganz, *supra* note 148 (“I don’t think there is any single [international] firm out there which has the ability to sustain any firm like ours [in terms of referrals],” commented one AZB lawyer.” (alterations in original)).

168. *Id.*

169. *Id.*

C. Picking the Best Model of "Affiliation"

This note argues that the foreign firms that have affiliated with a single Indian law firm through the "best friends" model are in the best position to serve their clients in the Indian market, whether or not liberalization eventually occurs. It is also the most practical approach because the firms involved help each other adjust to the changes of an increasingly global legal market. The "best friends" firms will also be able to best demonstrate adherence to the Advocates Act if they are subjected to government scrutiny, as the foreign firm in a "best friends" relationship is not the entity that is practicing law in India.¹⁷⁰ Ultimately, by entering into a "best friend" affiliation, foreign firms are giving their clients "the next best thing" to actually opening an office in India.

As the Indian economy becomes more and more integrated with the global community, the number of major Indian projects tendered with a requirement for the participation of foreign lawyers is growing at a significant pace. This is happening despite the restrictions currently in place on foreign law firms practicing law in India.¹⁷¹ Accordingly, those firms that are forming "best friends" relationships seem to be a step ahead of the market. The continued march toward globalization of India's legal sector is inevitable whether India formally accepts it or not,¹⁷² and "best friends firms" will be best positioned to quickly merge with their Indian affiliates if the Indian market is eventually liberalized.

Many Indian and foreign firms have abandoned the ad hoc model in favor of a "best friends" affiliation. This is because those U.S.- and U.K.-based firms that do not formally affiliate with an Indian firm via a "best friends"-type relationship, yet continue ad hoc referral networks, can find it difficult to get a prominent Indian firm to take on the foreign firms' clients. Many of the Indian firms have developed closer affiliations with other foreign firms whose work often gets priority. One firm made the switch from an ad hoc referral relationship to a more formal "best friends" affiliation, according to one of its partners, because the ad hoc relationship "was not satisfactory to our clients who were struggling to get the quality and advice they wanted out of India."¹⁷³ One problem was "that the good [Indian] firms were intensely busy, and getting access for non-important transactions was difficult [I]t was hard to find someone to take on a client and have that someone be a good firm."¹⁷⁴ Once an Indian firm affiliates with a single foreign firm, it may lose referrals from other foreign firms, but it seems to be a risk firms are willing to take.

Foreign firms that have set up surrogate relationships with Indian firms have faced the most opposition from the BCI and Indian law firms against foreign firms'

170. *See supra* Part IV.B.3.

171. *See Neelakatan, supra* note 40.

172. *See id.* India is not only an "emerging market" and at the front of major financial deals, but the LPO industry in India has expanded to support some of the largest U.S. and U.K. corporate law departments and law firms. *See Cotts & Kufchock, supra* note 107.

173. Interview, *supra* note 128.

174. *Id.*

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entry into India. This type of affiliation is also least likely to pass muster under the Advocates Act because the foreign firm legally controls the Indian firm. In contrast, “best friends” affiliates work to structure their relationships as closely as legally possible without violating the Advocates Act. As one partner calls it, “Two firms, one team.”¹⁷⁵ The foreign firm and Indian firm remain two separate entities, but they benefit from common cultures and structures, from concentrating their nonfinancial efforts, and from sharing know-how.¹⁷⁶

Firms that choose “best friends” affiliations have also seen an increase in client satisfaction because they often engage in joint training.¹⁷⁷ While some joint training may exist for firms choosing other models of affiliation, training can be more organized and strategically targeted for firms engaged in a “best friends” affiliation. Partners of “best friends” firms often visit each other’s firms and give presentations about legal developments in their practice areas, akin to “practice area lunches” at U.S. firms. “Best friends” firms have also joined together to provide weekly lectures to their junior associates, and have made joint training videos on various subjects and for practice areas that need extra attention.¹⁷⁸ One U.K. firm even has plans to begin a more formal four to six week off-site training program.¹⁷⁹ These training techniques help ensure that the associates of “best friends” firms are learning what is happening internationally in their respective fields.

The “best friends” model also best serves client needs. One partner says that clients appreciate better access to the “too small a pool of commercial lawyers in India.”¹⁸⁰ Additionally, clients have expressed a preference for a single point of contact to manage the transaction between the main firm and affiliate, rather than juggling multiple firms depending on the transaction. “Clients who come to us believe in the value of an international firm rather than a series of national firms that coordinate their own output.”¹⁸¹

The “best friends” model is also preferable because it puts foreign firms in the best position to take advantage of eventual liberalization. But until that time, firms plan to continue to develop and strengthen their affiliations, and foreign firms hope to integrate their Indian affiliate with their clients in situations where they do not share a common client. They also plan to connect in other ways, by attempting to align the methods each firm uses to approach clients and continue to develop mutual practice areas. But, all in all, affiliations are done with an end game in mind: moving even closer together. Foreign firms would not be investing their time and efforts into relationships with Indian firms with no interest in a closer connection. While some

175. *Id.*

176. *See supra* notes 157–59 and accompanying text.

177. *See* Interview, *supra* note 54; Interview, *supra* note 128; Interview, *supra* note 132.

178. *See* Interview, *supra* note 128.

179. *Id.*

180. *Id.*

181. Interview, *supra* note 132.

affiliations may not continue forever, it is currently the best choice for foreign firms looking to enter the Indian legal market, and for Indian firms who can benefit from foreign firms' expertise.¹⁸²

V. CONCLUSION

Although Indian regulations, reinforced by the *Lawyers Collective* decision, appear to impose a strict ban on the foreign practice of law in India, they are not likely to frustrate the current presence of foreign law firms in India. The increasingly global legal market and complexity of cross-border transactions require foreign firms to have a presence in India whether the government relaxes its regulations on the foreign practice of law or not. Therefore, despite the highly regulated nature of the Indian legal market, both Indian and foreign law firms have found effective ways to work together and serve their clients through different models of affiliation. Furthermore, in *Lawyers Collective*, the Bombay High Court asked the Indian government to decide whether reforms to the country's legal regulatory regime are needed. This has placed the state of Indian regulatory reform in limbo. In turn, it has reinforced the need for foreign firms to solidify their affiliate relationships with local Indian law firms and has led to warnings of closer government scrutiny of foreign law firm activities in India.

Of the three law firm affiliation models currently used in India—ad hoc, surrogate, and best friends—foreign firms that have formed “best friends” affiliations are best positioned to succeed in penetrating the Indian legal market and effectively meeting their clients' demands in a globalized legal market while avoiding regulatory problems, whether liberalization of the legal sector occurs or not. By aligning with a firm “as closely as legally possible” under the Advocates Act, these “best friends” will thrive because they work together to build each other up through joint training and practice area development, by sharing know-how and through the resulting increased awareness of global developments. These synergistic features will also improve both firms' abilities to better serve their clientele, who need sophisticated representation in the global marketplace and often prefer to deal with one firm for a single matter. Additionally, if and when liberalization of India's legal sector does occur, those foreign firms that have established “best friends” relationships with Indian firms will be best positioned to take advantage of the newly opened market in a form that best suits the firms' needs.

182. Interview, *supra* note 128.